DECISION

Fair Work Act 2009
s.394—Unfair dismissal

David Paul Lonnie
v
WA Council on Addictions Incorporated
(U2023/565)

DEPUTY PRESIDENT BEAUMONT PERTH, 17 JULY 2023

Application for an unfair dismissal remedy

1 Issue and outcome

[1] Mr David Paul Lonnie (the **Applicant**) has applied under s 394 of the *Fair Work Act 2009* (Cth) (the **Act**) for an unfair dismissal remedy in relation to his dismissal from his employment as a General Manager of Residential Services with the WA Council on Addictions Incorporated (the **Respondent**). The Respondent is an organisation that states its mission as providing the highest quality services to make a positive and meaningful difference in the lives of people affected by alcohol and other drugs.[1] As the General Manager of Residential Services, the Applicant was responsible for overseeing and directing the operation and development of the Respondent's residential treatment services, which comprise of a mix of Therapeutic Communities and Low-Medical Withdrawal Units.[2]

[2] In a decision dated 20 April 2023, I determined that the Applicant was protected from unfair dismissal, having earned less than the high income threshold, and dismissed the Respondent's jurisdictional objection. The present decision concerns the merits of the Applicant's application as well as remedy. Briefly stated, the Applicant was dismissed as a result of his purported misconduct directed toward a co-worker (the **Person Impacted**). The letter of termination of 6 January 2023 referred to serious bullying and harassment. However, at hearing the Respondent clarified, and evidence was given, that the Applicant was dismissed for the following:

a) serious breaches of the Respondent's Code of Conduct by allegedly committing domestic violence against the Person Impacted; and
b) inappropriate use of the Respondent's resources, being the Applicant's phone and laptop, to subject the Person Impacted to emotional abuse.

[3] In light of the subject matter of the alleged misconduct, I provided a caution to the parties at the commencement of the hearing in respect to the privilege against self-incrimination. Further, both parties were granted permission to be legally represented with reasons detailed at the hearing. The Person Impacted was not called to give evidence for reasons

that will be detailed. Given the personal nature of certain disclosures and in light of that which was alleged, I considered it fair and reasonable to issue confidentiality orders supressing the name of the Person Impacted.[3]

[4] Section 396 of the Act requires that I decide four matters before considering the merits of the unfair dismissal application. I am satisfied of the following. Firstly, the application was made within the 21-day period required by s 394(2) of the Act. Secondly, the Applicant was a person protected from unfair dismissal, as he had served the minimum employment period and, as noted, earned less than the high income threshold. Thirdly, the dismissal was not a case of genuine redundancy. Fourthly, the Respondent is not a small business employer rendering the Small Business Fair Dismissal Code irrelevant to this matter.

[5] Briefly stated, I have dismissed the Applicant's unfair dismissal application. Whilst the Applicant was not notified of the valid reason and provided an opportunity to respond to the same, I have nevertheless concluded that his dismissal was not unfair for the following reasons.

2 Background

[6] The Applicant gave evidence on his behalf, calling no other witnesses. The Respondent called nine witnesses to give evidence in support of its case. Whilst the witnesses are listed below, it is noted that Mr Hopkins was not required for cross examination and therefore was not called:

a) Carol Jane Daws, Chief Executive Officer (**CEO**);
b) Deborah Claudine Hamm, Change Management Lead;
c) Thomas Andrew Patrick Hopkins, General Manager Justice and Women's Services;
d) Simon James Cameron Hunter, Chief Operating Officer;
e) Nicola Iannantuoni, General Manager of Non-Residential Services;
f) Therese Mahoney, Manager of the Nannup Withdrawal Unit and Nannup Therapeutic Community;
g) Michele Pilutkiewicz, Human Resources Generalist;
h) Stephen John Scarrott, Chief Financial Officer; and
i) Colette Wrynn, Chief Purpose Officer.

[7] The broader context and background to the matter is structured in accordance with the evidence of the witnesses. This material, however, should not be confused with my having made findings on such evidence. The Applicant levelled criticism at the Respondent for its reliance on hearsay or indirect evidence, noting that the Person Impacted was not called to give evidence. Ms Daws, on behalf of the Respondent, explained that she decided not to ask the Person Impacted to give evidence, but instead sought to rely upon the evidence of others to whom the Person Impacted had reported episodes of purported domestic violence. Ultimately, Ms Daws was a key person in this respect, the Person Impacted purportedly having shared much of what was going on for her with Ms Daws. It is for this reason that I have commenced with the evidence of Ms Daws. However, before embarking on the Respondent's evidence, I observe that it was uncontroversial that the Applicant's employment contract[4] required the Applicant to work in accordance with the Respondent's Code of Conduct and, in addition, placed responsibility upon him for personal health and safety within the workplace, extending to his

compliance with occupational safety and health policies and procedures.[5] The Code of Conduct provided that all of the Respondent's employees were to:

> [r]efrain from any activity where personal or professional conduct is likely to compromise the fulfilment of their professional responsibilities, denigrate the name of Cyrenian House, or negatively affect their responsibility to provide a positive role model. This includes gossip about consumers and fellow workers.[6]

2.1 Ms Daws

[8] Ms Daws commenced with the Respondent in 2002 as its CEO. She came to the position qualified as a registered clinical psychologist with a master's degree in clinical psychology.[7] Ms Daws explained that her work required her to have a good understanding of issues like domestic violence, including coercive control.[8] She said that she kept up to date with the new studies and writing about these issues, because they informed her work as CEO of the Respondent.[9]

[9] Ms Daws said she first met the Person Impacted when the Person Impacted started working for the Respondent around eight years ago. The Person Impacted was employed on a full-time basis as a personal assistant to Ms Daws, in addition to holding the position of Manager for Compliance, Quality and Communication.[10]

[10] Regarding the Applicant, Ms Daws acknowledged she first met the Applicant when he commenced work with the Respondent in November 2011.[11] Ms Daws explained that the Applicant had a background in psychology and completed most of his master's degree in organisational psychology.[12] Whilst he had initially been employed by an entity known as Serenity Lodge, the Respondent ultimately took over that service and in doing so, employed the Applicant.[13]

[11] The Applicant's responsibilities extended to oversight of the Rick Hammersley Centre Therapeutic Community, Serenity Lodge Therapeutic Community, Nannup Therapeutic Community and Midland Withdrawal and Intervention Centre.[14] The Applicant had been responsible for supporting managers of these services, which included site visits on a fortnightly basis to supervise the managers.[15]

[12] In June or July 2022, Ms Daws said she became aware that the Person Impacted had flights booked to go to Bali with the Applicant.[16] A phishing security system on the Respondent's computer system had detected an email from the Person Impacted's personal email to the work email of the Applicant.[17] Ms Daws confronted the Person Impacted who disclosed she was in a relationship with the Applicant. The Person Impacted later informed Ms Daws that the Applicant was upset that it was out in the open, as he felt it was no one's business.[18]

[13] Ms Daws said that prior to knowing that the Applicant and the Person Impacted were in a personal relationship, she had disclosed to the Person Impacted that she suspected the Applicant was under the influence of drugs.[19] However, when Ms Daws realised there was a relationship between the two on foot, she ceased informing the Person Impacted about this.

[14] In respect of the Applicant's purported drug use, Ms Daws gave evidence concerning an incident at the Rick Hammersley Centre where Mr Hunter had become involved. Ms Daws recalled that the Applicant had taken some drugs from a staff member who had located them in a bag search for a new resident and instead of adopting the usual process of flushing the drugs down the toilet with another person, the Applicant took them home and held them in his possession over a period of several days.[20] At a later point, the Applicant returned the drugs to Head Office and disposed of them down a toilet in the presence of a coordinator.[21] Mr Hunter issued the Applicant with a written warning in respect of the incident.[22]

[15] On 17 November 2022, the Person Impacted came to the office of Ms Daws and disclosed that the Applicant was physically violent and controlling towards her.[23] Ms Daws recalls her observations and the conversation in the following terms:

> She seemed very anxious and worried that David would lose his job. She said words to the effect of "Promise not to talk to David about it?'. I replied with words to the effect of "Does anyone else know about it." She replied with words to the effect of "Yes, Nicola and Michele." In my professional opinion, I thought she looked like she was having a PTSD reaction as she was physically shaking, her voice was uncontrollable and she seemed very scared and distressed.[24]

[16] Ms Daws said that whilst she informed the Person Impacted that she would speak to the Applicant, the Person Impacted informed her that if she did, she would quit her job, sell her house, and leave town, and that the Applicant was a scary man.[25]

[17] Ms Daws said at a later point, the Person Impacted disclosed to her an incident where the Applicant had thrown the Person Impacted's mobile phone at her, hitting her on her forehead.[26] According to Ms Daws, the incident was said to have occurred on 3 November 2022, after an annual general meeting (**AGM**) in the car park under the office.[27]

[18] On 26 November 2022, Ms Daws attended a Pride event with the Person Impacted, noting that later in the night, the Person Impacted informed her that she was going to meet the Applicant and left.[28] Ms Daws said she did not know where the Person Impacted was that night until the following day, when the Person Impacted spoke to her on the phone.[29] Ms Daws recalls the following exchange taking place between her and the Person Impacted on 27 November 2022:

> The Person Impacted said words to the effect of "He locked me in the bedroom, assaulted me and sexually assaulted me" and "I couldn't get out of the room as he had removed the doorknobs." I replied with words to the effect of "Where did he hit you?". She replied with words to the effect of "He always hits me where you can't see the bruising."[30]

[19] Ms Daws said that on 29 November 2022, Ms Iannantuoni asked Ms Daws if she could speak to her about the Person Impacted.[31] Ms Iannantuoni informed Ms Daws of an incident having taken place earlier in the day where something had happened in the Person Impacted's office with the Applicant, such that the Person Impacted was frightened. Ms Iannantuoni said that the Person Impacted hid in the toilet following the incident and called Ms Pilutkiewicz and Ms Pilutkiewicz had informed Ms Iannantuoni what had happened. Ms Daws recalls Ms Iannantuoni stating that the Person Impacted had told her that the Applicant had fronted up to her with his fists and then had attempted to lift the desk and spat at her.[32]

[20] Ms Daws reports that on 29 November 2022, the Person Impacted asked whether she could go home. Having observed that the Person Impacted was shaking, Ms Daws formed the view that the Person Impacted was traumatised and agreed that she should go home.[33]

[21] Ms Daws said that on 5 December 2022, she contacted the Chairperson of the Respondent and the Respondent's accountant, to inform them about the Person Impacted's situation.[34] Ms Daws disclosed to the Chairperson and accountant that on 3 November 2022, the Applicant had thrown a phone at the Person Impacted, and that the Respondent had a domestic violence organisation advising it about what to do.[35]

[22] On 8 December 2022, Ms Daws had a long discussion with the Person Impacted who was due to see a counsellor on 12 December 2022. The Person Impacted purportedly informed Ms Daws that things were escalating and that the Applicant had become 'brazen about it at work.' The Person Impacted advised Ms Daws that the Applicant had stood at her door using the door as a shield and threatened her verbally.[36]

[23] Ms Daws reports that on 12 December 2022, she had a long discussion with the Person Impacted about the Person Impacted having gone out on the Friday night and having had the Applicant wait for her when she arrived home. According to Ms Daws, the Person Impacted informed her that the Applicant told her to get into his car. Ms Daws then gave evidence that the Person Impacted said words to the effect:

> He was so intimidating. I got into the car with him and went to his house. I wasn't able to leave. He took my phone and car keys. He tied me up and physically and sexually assaulted me…I was sitting on the floor, sobbing, with the Labrador was comforting me. I was curled up in a ball on the floor. He held me captive most of the night.[37]

[24] Ms Daws gave evidence that the Person Impacted informed her that after the Applicant had finished the abovementioned episode, the Applicant had said to her words to the effect of '[y]ou may as well fuck off now.' Ms Daws said that the Person Impacted was very distraught and advised Ms Daws that she did not want this to happen again and that she was going to counselling.[38]

[25] Over the course of 15 December to 31 December 2022, Ms Daws was 'checking in' with the Person Impacted via mobile phone to see if she was okay.[39] Ms Daws explained that on 30 November 2022, she had contacted the CEO of Communicare and White Ribbon Australia to obtain guidance in respect of the situation with the Person Impacted. Part of the guidance received was to establish a safety plan, and Ms Daws became a point of contact for the Person Impacted (day or night).[40]

[26] Ms Daws' last contact with the Person Impacted was on 31 December 2022, when the Person Impacted informed her via text message, '[a]ll is ok'.[41]

[27] On 1 January 2023, Ms Daws received a call at 12:17 PM from the Applicant, who informed her that the Person Impacted had suffered a brain haemorrhage and that '[s]he isn't going to make it.'[42]

[28] On 3 January 2023, the Applicant presented for work but soon asked to go home, informing Mr Hopkins that he was upset about the Person Impacted.[43] Whilst the Applicant was permitted to go home and had annual leave the next day, Ms Daws instructed Mr Hopkins to call the Applicant in for a meeting the next day.

[29] Ms Daws gave evidence that she felt that the Applicant had contributed to the Person Impacted's condition albeit she could not prove anything.[44] Given issues with the Applicant's credit card, Ms Daws said the Respondent used this as an excuse to bring the Applicant into work.[45]

[30] The Applicant presented to the Respondent's office at 10.00 AM and Mr Scarrott, Ms Daws, and Mr Hunter met with him. Ms Daws' evidence was that she read out a prepared statement, stating:

> We are aware of matters that we have been advised by our board that we need to report to the police. Due to our obligations under the WHS Act for the psychosocial health of our employees, and because the use of Cyrenian House resources has been involved, this amounts to serious misconduct and we are terminating your employment immediately. You are required to hand back all Cyrenian House property including keys, laptop, credit card, vehicle etc. If you leave these premises with any of these items, it is also our intention to advise the police and look to a charge of stealing.[46]

[31] The Applicant asked what the serious misconduct was. Ms Daws said she told the Applicant words to the effect, 'domestic violence against [the Person Impacted], and harassment of her and her family.'[47]

[32] According to Ms Daws, the Applicant asked whether the Person Impacted told her this and she informed him that she was not going to discuss it with him. Ms Daws said the Applicant then informed her that 'Michelle's husband made a pass at [the Person Impacted] at the party the other night,' and '[d]o you know that she's been involved with multiple other guys.'[48]

[33] Ms Daws said that the Applicant did not attempt to disclose his side of the story and repeatedly asked whether the Person Impacted had informed Ms Daws. Ms Daws expressed the following:

> Because I had heard so many detailed reports from [the Person Impacted], and from other employees I trusted, I was confident that [the Person Impacted] was telling the truth. I had no doubt in my mind that the Applicant had perpetrated violence on [the Person Impacted]. I recognised [the Person Impacted]'s reaction during her disclosures to me as trauma responses. You cannot fake the strong emotions and physical shaking that were happening to her as she disclosed some of the horrendous incidents.[49]

[34] Ms Daws observed that during the meeting the Applicant was doing something to his mobile phone. She suspected that the Applicant was deleting evidence.[50] On the Applicant's departure from the building, Ms Daws checked the Applicant's phone to see that he had done a factory reset, therefore deleting any evidence, photographs, or mobile messages between him and the Person Impacted.[51]

[35] Ms Daws said following the Person Impacted's aneurysm she received the Person Impacted's laptop and mobile phone from her children. Both pieces of equipment were the

property of the Respondent. Ms Daws extracted from the laptop a number of screenshots of text messages that had passed between the Applicant and the Person Impacted. The Applicant concedes that he authored and sent the text messages to the Person Impacted. Extracts taken from the text messages[52] include the following:

Applicant	U don't know whaty.first thought was. I'm going now. I hope you are ok. I'll prob cancel the meeting. Have a good day
Person Impacted	Yes I'm ok thanks for asking Don't cancel the meeting U r more professional than that Either call in sick completely Or get suck it up and get on with your day! That's life!
Applicant	Great thanks [Person Impacted]. You can fuck off now
Person Impacted	Ok no problems Goodbye David Didn't know you could just throw my away so easily Guess I do now…
Applicant	I won't impact your employment status
Monday, 13 June, 8:37 PM	
Applicant	What were you doing till 8 o clock u dodgy slut? Cya in the office moping like a victim
Tuesday, 14 June, 7:04 PM	
Applicant	So you know, 45 mins ago I was going to ask you to come over… Please don't bother involving me in your efforts to convince yourself you aren't to blame. Take care Tiger. Let's put an end to this ugly chapter. I can maybe start believing I don't deserve to be treated like shit. Sad thing is I suspect I do deserve it and I find people who are willing to confirm it… but maybe that will change The physical abuse thing was pathetic BTW… but the victim thing is you all over
Person Impacted	I'm sorry it ended this way I did really love u
Applicant	Cool Just don't undermine me at work… and hope that I am not already on anyone's radar cos I'll blame u
Person Impacted	If ur it's because of your own behaviour Nothing to do with me

[36] The Applicant's laptop was also checked. On there Ms Daws discovered a court document about breaching a Family Violence Restraining Order (**FVRO**) relating to another woman dated 23 December 2021.[53] Ms Daws noted that the Applicant had not disclosed to the Respondent the FVRO or the spent conviction for a breach of the FVRO.[54]

2.2 Mr Hunter

[37] Mr Hunter's evidence predominately related to two aspects of the Applicant's employment. The first was the Applicant's purported underperformance and the second was an incident regarding the mishandling of drugs.

[38] Turning first to the purported underperformance, Mr Hunter, the Applicant's line manager, stated that the Applicant's performance in the 12 months leading to his dismissal was particularly poor, and he provided examples of the same.[55] Mr Hunter acknowledged that he did not act on the Applicant's poor performance as quickly as he might have in other instances due to several of the Applicant's life events, including a marital separation in 2020, health issues, and historical allegations of sexual abuse made against his father by another person.[56]

[39] However, the performance issues were not ignored and Mr Hunter said he initially held several informal supervision meetings,[57] which progressed to a written outline aimed at improving the Applicant's performance (the Informal Improvement Plan was provided to the Applicant on 20 June 2022).[58] Mr Hunter said he did not witness an improvement in the Applicant's performance whilst under the Informal Improvement Plan, and had verbally noted to the Applicant that his poor performance could, eventually, lead to a formal Performance Improvement Plan and ultimately dismissal if adequate performance was not achieved.[59]

[40] Mr Hunter said that the Applicant had a past history of drug use and in May 2021, an incident occurred that made him suspicious of the Applicant.

[41] Mr Hunter said that on 20 May 2021, the Applicant called him late in the afternoon and said that he thought he had done something stupid and wanted to let him know what had occurred.[60] Mr Hunter gave evidence that the Applicant disclosed that whilst at the Rick Hammersley Centre, a bag of powder had been discovered and that the Applicant had taken the bag of powder home with him in his car. According to Mr Hunter, the Applicant reported that the bag of powder was thought to be heroin.[61]

[42] Mr Hunter directed the Applicant to bring the bag of powder to work the next day and discard it down the toilet in the presence of another member of the Respondent's staff.[62] Mr Hunter said that the Applicant had acted contrary to the Respondent's clear procedure and that he was shocked that the Applicant had not contacted him or the CEO immediately to discuss what was the best course of action.[63] Mr Hunter said that he became aware, after the incident, that the Applicant did not call him on the day that he had taken the bag of powder, and had held onto it for just over 24 hours.[64] The Applicant received a written warning for his misconduct on this occasion.[65]

[43] With regard to the Person Impacted, Mr Hunter gave evidence that he had been informed by Ms Daws of the safety plan concerning the Person Impacted. His role, regarding the safety plan was to: (a) ensure he was in the office more when the Person Impacted was there; (b) observe the Applicant and the Person Impacted and if he saw any one-on-one interactions, make his presence known; and (c) if the Person Impacted was going to have to attend meetings that involved the Applicant, he would be asked to attend those meeting too, if possible.[66]

[44] Mr Hunter played a part in the disciplinary process, noting that he contacted the Applicant on 3 January 2023 in respect to an issue with the Applicant's credit card usage and reconciliation.[67] Mr Hunter said that he notified the Applicant he was to attend a meeting at 9:00 AM on Wednesday, 4 January 2023, about his credit card.[68]

[45] Mr Hunter said that prior to calling the Applicant, he had held multiple discussions with Ms Daws and Mr Scarrott on 2 and 3 January 2023. Mr Hunter said that given the Person

Impacted was in intensive care, they felt that she was a bit more protected from the Applicant than if she was at home, noting her safety had unfortunately become somewhat of a moot point given she was gravely unwell.[69] Mr Hunter said that he was aware that Ms Daws had been speaking to the police and that Ms Daws was worried about the Applicant destroying evidence.[70]

[46] Mr Hunter gave evidence that the Applicant presented on the morning of 4 January 2023 and whilst he initially met with him, not long after, Ms Daws and Mr Scarrott joined them.[71] Mr Hunter said that Ms Daws had a script prepared and she delivered the message to the Applicant in terms of his serious misconduct and dismissal.[72]

[47] Mr Hunter gave the following evidence of the meeting on 4 January 2023:

> Carol said words to the effect "we have become aware of matters that we have been advised by our board that we need to report to the police. Due to our obligations under the Work Health and Safety Act, for the psychosocial health and wellbeing of our employees and because we are aware that Cyrenian House resources have been utilised, this amounts to serious misconduct and we are terminating your employment effective immediately. You are required to hand back all Cyrenian House property, including keys, laptop, phone, credit card etc. If you leave the premises with any of these items, we intend to advise police and look to charging you with potential theft."
>
> David asked "what do you mean by serious misconduct?". Carol responded "domestic violence against [the Person Impacted], and harassment of her and her family". David then asked "how have I harassed the family?" Carol responded saying "you contacted them on several occasions". I understood this to mean David contacting [the Person Impacted]'s kids after she was admitted to hospital. They spoke a little more about whether or not David had called [the Person Impacted]'s kids.
>
> David said words to the effect "I may have been ugly, but I was never violent. You are wrong". I responded "we have multiple reports, from a number of sources".
>
> David then asked "Did [the Person Impacted] tell you this?". Carol said words to the effect "I'm not prepared to discuss that with you at this stage". David repeatedly asked whether it was [the Person Impacted] who had made the reports.
>
> David said "You know she has done this with seven other blokes?" and then "You do know I have a letter from [the Person Impacted] apologising for her behaviour?". Carol responded "Are you familiar with the term coercive control?" David said "Yes Carol, I am familiar with the term coercive control"…[73]

2.3 Mr Scarrott

[48] Mr Scarrott observed that in the later months of 2022, the Applicant's behaviour appeared to be unravelling.[74] Mr Scarrott said he suspected the Applicant was using drugs as he was non-contactable a lot of the time, especially in the mornings, before 9:30 AM–10:00 AM.[75]

[49] Mr Scarrott cited an incident in the carpark on 24 November 2022, where the Applicant had attended a manager's meeting and got his car stuck in the carpark, near a pillar.[76]

Mr Scarrott said that after this incident he began to suspect that the Applicant was using drugs as his pupils were noticeably dilated.[77]

[50] It was Mr Scarrott's team who had initially identified that the Applicant had been spending money on the Respondent's credit card.[78] Mr Scarrott said that an email had been sent to the Applicant giving him an opportunity to explain himself.[79] Mr Scarrott said that the Applicant acknowledged that the transactions were related to private expenditure, but Mr Hunter was said to have been reluctant to speak to the Applicant about the issue given the Applicant's Family Court proceedings and heart issues.[80]

[51] Mr Scarrott gave evidence that he was in attendance at the disciplinary meeting on 4 January 2023, with Ms Daws and Mr Hunter. Mr Scarrott reports that Mr Hunter was too scared to facilitate the meeting himself as he was worried about his physical safety.[81]

[52] Mr Scarrott recounted that Ms Daws read from a script that had been prepared prior to the meeting, and that the Applicant's response was to ask who had informed Ms Daws of the domestic violence, and to inform them that the Person Impacted had done this before with other men.[82] Mr Scarrott recalled that Ms Daws asked the Applicant whether he had heard of 'coercive control' and that the Respondent considered the circumstances serious enough to advise the police.[83]

[53] Mr Scarrott said that the Applicant was fiddling with his phone for the most part of the meeting. Mr Scarrott said he assumed that the Applicant was sorting out passwords for the phone as the Applicant expressed that he just had to get his passwords.[84] However, Mr Scarrott noted, having departed the meeting for a short period, that when he returned, he saw that the Applicant was resetting his phone.[85]

2.4 Ms Iannantuoni

[54] Ms Iannantuoni gave evidence that she had suspected that the Applicant and Person Impacted were in a relationship in or around 2021, and that they confirmed this in late 2022.

[55] On 23 November 2022, after the Person Impacted had travelled to Bali with the Applicant, the Person Impacted disclosed to Ms Iannantuoni that the Applicant had physically hurt her.[86] Ms Iannantuoni was unable to recall precisely whether it was in this discussion or a discussion on or around 30 November 2022, where the Person Impacted also disclosed to her that the Applicant used 'meth' and that 'no one else knows about this'.[87]

[56] Ms Iannantuoni gave evidence that she encouraged the Person Impacted to speak to Ms Daws about the issue, but the Person Impacted said to the effect, 'No, no, no, I can't tell her'. Notwithstanding, a few days after the discussion in November 2022, Ms Iannantuoni informed Ms Daws about the Applicant's purported abuse of the Person Impacted.[88]

[57] Ms Iannantuoni said that she had a meeting scheduled on 8 December 2022, where both the Applicant and the Person Impacted were supposed to be present.[89] However, before the meeting she had found the Person Impacted crying, and the Person Impacted expressed that she did not feel strong enough to go to the meeting. Ms Iannantuoni gave the following evidence:

> …I walked into [the Person Impacted]'s office. When I walked in, I saw [the Person Impacted] and she looked physically terrified. Her face was shocked and she was shaking and crying. I recall thinking to myself that his was the most scared I had ever seen someone look.
>
> I asked her what had happened and she said words to the effect that "David had just been in here and spat at me, and was standing over me and verbally abusing me and…" then she gestured to show that he had grabbed her desk to flip it over.[90]

[58] Ms Iannantuoni said that following the abovementioned incident, she discovered that the Person Impacted was telling inconsistent stories to people in the office about whether she was still spending time with the Applicant.[91] By way of example, Ms Iannantuoni drew upon circumstances where the Person Impacted had informed her of going to the cricket with the Applicant and him being nice until the point where he became aggressive and violent, whilst informing another person in the office, Michele (presumedly Michele Pilutkiewicz), that she had not gone to the cricket with the Applicant.[92]

2.5 Ms Pilutkiewicz

[59] Ms Pilutkiewicz stated that she was the Human Resources Generalist, albeit the Person Impacted had previously been her line manager when she occupied another role as the Human Resources Officer, and she had a friendship with the Person Impacted outside of work.[93]

[60] Like other witnesses, Ms Pilutkiewicz gave evidence that the Person Impacted had disclosed to her on multiple occasions that the Applicant was physically violent towards her.[94] Ms Pilutkiewicz recalls having seen a bruise on the Person Impacted's arm and asking how she got the bruise, to which the Person Impacted replied, 'David did it'.[95] On another occasion in November 2022, on the evening of the Respondent's AGM, Ms Pilutkiewicz observed that the Person Impacted had a bruise on her forehead. When she questioned the Person Impacted about the bruise, she replied, 'David threw a phone at me'.[96] On another occasion, on or around 12 December 2022, Ms Pilutkiewicz observed a bruise on the Person Impacted's cheek area which appeared to be fresh, and asked the Person Impacted what had caused the bruise.[97] The Person Impacted replied, 'David caused it'.[98]

[61] On the morning of 8 December 2022, at around 10:00 AM, the Person Impacted was said to have messaged Ms Pilutkiewicz. The following text message exchange was provided in evidence:

> Where r u?
> I'm hiding in the toilet
>
> Was in office
>
> My office?
>
> No own
>
> Ok thank coming now[99]

[62] Ms Pilutkiewicz explained in respect of the abovementioned text message, the Person Impacted had messaged her words to the effect that she was hiding in the toilets at work because

she was frightened of the Applicant.[100] Ms Pilutkiewicz said she immediately went to the bathroom to make sure the Person Impacted was alright, and passed the Applicant on the way. Ms Pilutkiewicz said that from the direction the Applicant was walking, it seemed he was coming from the Person Impacted's office.[101] Ms Pilutkiewicz found the Person Impacted physically shaking and it looked like she had been crying. Ms Pilutkiewicz said she tried to calm the Person Impacted down, and told her she should go home. However, the Person Impacted declined to do so.[102]

2.6 Mr Hopkins

[63] Mr Hopkins gave evidence that he had worked for the Respondent for 16 years and knew the Applicant when he worked for the Respondent.

[64] Mr Hopkins gave evidence that Mr Scarrott had presented him with a document that purported to be the transfer of a speeding fine and the associated demerit points from the Applicant to the Person Impacted.[103] The document listed Mr Hopkins as a witness and was purportedly signed by him.[104] Mr Hopkins said that he had never seen the document before having been shown it by Mr Scarrott, and that the signature on the document was not his.[105]

2.7 Ms Wrynn, Ms Hamm and Ms Mahoney

[65] Ms Wrynn gave evidence of the Person Impacted having reported to her in the lead up to Christmas 2022 that the Applicant had demanded that she go to his house and then he had tied her up.[106] Ms Wrynn gave further evidence of the Person Impacted reporting to her in November 2022 that the Applicant threatened her and that she was frightened of him.[107] It is not apparent that Ms Wrynn reported her concerns regarding the Person Impacted to the Respondent's management.

[66] Ms Hamm worked for the Respondent between 2018 and January 2020, and whilst having departed the Respondent to work elsewhere, she maintained a friendship with the Person Impacted. Similarly to Ms Wrynn, Ms Hamm reported that the Person Impacted had disclosed to her episodes of verbal abuse, controlling behaviour and physical violence, by the Applicant.[108] Again, it is not apparent that Ms Hamm reported this to the Respondent – particularly given she was no longer an employee of the Respondent at the time such disclosures were made.

[67] Ms Mahoney, whilst Manager of the Nannup Withdrawal Unit and Nannup Therapeutic Community, became friends with the Person Impacted in 2021.[109] Ms Mahoney explained that the Person Impacted would travel regularly to Nannup during 2022 to assist with compliance and that they would, at times, talk about their personal lives whilst at work.[110]

[68] Ms Mahoney gave evidence of the Person Impacted having informed her in or around October 2022 that things between her and the Applicant were not good and that he had started to hurt her.[111] Ms Mahoney said that they spoke about the trip to Bali and she asked the Person Impacted why she was going, to which the Person Impacted advised her that the Applicant would be angry with her if she did not go, and that he grabbed and pushed her.[112] Ms Mahoney said that she advised the Person Impacted to talk to someone about it.

[69] Ms Mahoney said that she met with the Person Impacted on 16 November 2022 to do some shopping for a Pride event.[113] Ms Mahoney's evidence was that the Person Impacted told her that the Applicant assaulted her whilst she was in Bali, and she also observed on that same day that the Person Impacted had a bruise under her right eye. Ms Mahoney said that when she questioned the Person Impacted about the bruise, the Person Impacted informed her that the Applicant had caused the bruise when he had abused her one night for the whole night.[114]

[70] Ms Mahoney reported that in late-November and mid-December 2022, the Person Impacted continued to inform her that the Applicant was abusing her, this time over the phone.[115]

[71] On 12 December 2022, Ms Mahoney met up with the Person Impacted for lunch. At that meeting, the Person Impacted told Ms Mahoney that on a recent occasion the Applicant had abused her physically at work, coming into her office and banging her head on her desk.[116] During the course of the conversation, Ms Mahoney disclosed that the Person Impacted had, in addition, advised her that she had been sexually assaulted by the Applicant, having been locked in a room with the door handles removed.[117]

[72] Ms Mahoney said that as she was working in Perth on 19 December 2022, she intended to tell Ms Daws what the Person Impacted had disclosed to her. However, when she arrived at the Respondent's head office and went to see the Person Impacted, Ms Daws was already present in the Person Impacted's office, and they were talking about 'it'.[118]

2.8 The Applicant's evidence

[73] The Applicant gave evidence that he commenced employment with the Respondent in November 2011 and by May 2021, had been appointed to the position of General Manager of Residential Services.[119]

[74] The Applicant said he entered into a romantic relationship with the Person Impacted in late 2021.[120] The Applicant described the Person Impacted as dishonest, actively deceptive, verbally abusive, unable to apologise, extremely crazy-making and hurtful.[121]

[75] The Applicant acknowledged that while he had made some very ugly comments in response to the continual cycle of dishonesty and betrayal from the Person Impacted, he had not been abusive toward the Person Impacted.[122] The Applicant said that it was clear to him that he was on the receiving end of continual emotional abuse, betrayal and gas-lighting behaviour that he struggled to walk away from.[123]

[76] The Applicant said that at one point in October 2022, he indicated to the Person Impacted that he had become very concerned about the potential damage that she could do to his reputation when she was in her 'abusive cycles' and saying things that she normally would not.[124] Having half joked to the Person Impacted that he considered her dangerous enough to get the truth from her documented in writing to protect himself when she was not behaving rationally, several days later the Person Impacted provided him with a letter hand delivered to his office, acknowledging that he was not violent.[125]

[77] In response to the multiple witness statements filed by the Respondent that contained, in the Applicant's view, indirect allegations that he had committed acts of domestic violence toward the Person Impacted, the Applicant gave evidence that:

a) he admitted that he had sent some unsavoury text messages to the Person Impacted but otherwise denied engaging in acts of domestic violence towards her;
b) both he and the Person Impacted abused each other, with the Person Impacted abusing him as much, if not more, than he did she;
c) he had not physically abused the Person Impacted; and
d) sexual acts such as being really aggressive and choking the Person Impacted until she passed out, were consensual.[126]

[78] The Applicant gave evidence that the Person Impacted came to his place late on New Year's Eve, and having been 'intimate', the Person Impacted was 'normal other than having a headache'.[127] According to the Applicant, the following morning, on New Year's Day, the Person Impacted's headache intensified, she vomited and then lost consciousness. The Applicant said he called an ambulance and the Person Impacted was transferred to one hospital and then to another. He was advised that there was a very good chance that she may not survive having suffered a serious brain bleed.[128] The Applicant said the Person Impacted was operated on.

[79] Although the Applicant presented for work on 3 January 2023, he said he was struggling to concentrate properly as he was upset and preoccupied by the Person Impacted's medical condition.[129] The Applicant said he spoke to management and arranged to go on leave at the end of the day, with an expectation of being off work for an undetermined period commencing once he left the office on 3 January 2023.[130] However, he was called by Mr Hunter and asked to attend the office the next day to discuss an issue with his company credit card, notwithstanding that he was on leave.[131]

[80] The Applicant said he presented for the meeting the next day, on 4 January 2023. Whilst he saw Mr Hunter on arrival, he was told that there was something else to be talked about and Mr Hunter left the room to return with Ms Daws and Mr Scarrott. The Applicant said that Ms Daws opened the meeting by informing him that 'we've taken it to the board and the board wants me to terminate your employment'.[132]

[81] Having been instructed that he was to handover the keys to the company car, and to leave the company mobile phone and laptop, the Applicant said that Ms Daws advised him that he would be facing another criminal charge if he did not leave those items behind. When the Applicant asked what other criminal charges she was talking about, Ms Daws informed him 'domestic violence – you've got a problem'.[133]

[82] The Applicant said that he asked whether the information they were relying upon came from the Person Impacted, and Ms Daws and Mr Scarrott refused to answer.[134] The Applicant said that he indicated to Ms Daws and Mr Scarrott that the Person Impacted's dishonesty had been an ongoing issue with their relationship and that he would be able to demonstrate that this was true.[135] However, the Applicant said that they were not interested in examining this evidence.[136]

[83] The Applicant said that at the end of the meeting Ms Daws advised him that the matter would be referred to the police.[137]

3 Consideration

[84] Turning to the merits of the matter, the first consideration is whether there was a valid reason for the Applicant's dismissal. For the following reasons, I have concluded that there was.

3.1 Valid reason

[85] In considering whether a dismissal is unfair, the Commission must consider the matters specified in s 387, including whether there was a valid reason for dismissal and any other matters the Commission considers relevant. Section 387 of the Act contemplates that an overall assessment as to the nature of the dismissal will be undertaken and in so doing, the criteria in s 387 must, where relevant, be weighed up in totality.

[86] In respect of whether there was a valid reason, 'valid' in this context generally refers to whether there was a sound, defensible or well-founded reason for the dismissal.[138] Such a reason is one that is valid in the sense that it was both sound and substantiated. For example, a failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a 'valid reason' for dismissal.[139]

[87] Essentially there appears to have been two reasons relied upon for the Applicant's dismissal. The first, alleged domestic violence against the Person Impacted, which constituted a serious breach of the Code of Conduct. The second, inappropriate use of the Respondent's resources to subject the Person Impacted to emotional abuse. It is the alleged domestic violence that I address first.

[88] When one reviews the evidence, it can be seen that the majority of the purported domestic violence occurred at a time outside of the working hours of the Applicant and the Person Impacted. The exceptions to this are perhaps the reported mobile phone to the head incident in the carpark of the Respondent's offices and the reported incident in December 2022 where the Person Impacted is said to have informed others that she was confronted by the Applicant in her office fronting up to her with his fists, lifting a desk and then spitting at her.[140] There are, of course, the text messages of in or around June 2022, referred to in the evidence of Ms Daws, that also warrant consideration.

[89] This Commission has, as have other jurisdictions, referred to conduct occurring outside of the premises of the workplace as 'out of hours conduct'. In cases involving out of hours conduct, it is often contended that the necessary relationship between the conduct and the employment is established on the basis of an assertion that the conduct will in some way affect the employer's reputation or compromise the employee's capacity to perform his or her duties. However, there needs to be evidentiary material upon which a firm finding may be made that there is or will be the necessary effect; it is not sufficient merely to assert its potentiality.[141]

[90] In cases such as this, which involve allegations of serious misconduct, the Commission must make a finding on the evidence provided as to whether, on the balance of probabilities, the conduct occurred.[142] The Respondent has referred to the Applicant *allegedly* committing domestic violence against the Person Impacted which has given rise to serious breaches of the Code of Conduct. However, it will not be sufficient for the Respondent to establish that it had a reasonable belief that the Applicant's termination was for a valid reason.[143]

[91] In *Gelagotis v Esso Australia Pty Ltd* (**Gelagotis**), Deputy President Colman provided a useful synopsis of what is referred to the '*Briginshaw* standard', a standard that was referred to by the Applicant on multiple occasions during the hearing.[144] In *Gelagotis*, it was stated:

> [69] Where allegations of misconduct are made, the standard of proof in relation to whether the alleged conduct occurred is the balance of probabilities. However, as the High Court noted in *Briginshaw*,[145] the nature of the relevant issue necessarily affects the 'process by which reasonable satisfaction is attained'[146] and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences'[147] or 'circumstances pointing with a wavering finger to an affirmative conclusion'.[148] The application of the *Briginshaw* standard means that the Commission should not lightly make a finding that an employee engaged in the misconduct alleged.[149]
>
> [70] The rule in *Briginshaw* has elsewhere been described as reflecting a conventional presumption that members of society do not ordinarily engage in fraudulent or criminal behaviour.[150] In *Greyhound Racing Authority*, Santow JA noted:
>
> > '... The notion of "inexact proof, and indefinite testimony or indirect inferences" needs to be translated to a comfortable level of satisfaction, fairly and properly arrived at, commensurate with the gravity of the charge, achieved in accordance with fair processes appropriate to and adopted by [a Tribunal]'.[151]
>
> [71] The 'level of comfort' referred to means that the finder of fact must 'feel an actual persuasion of the occurrence or existence of the fact in issue'; the 'mere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact.[152]

[92] It was held in *Greyhound Racing Authority (NSW) v Bragg* that the *Briginshaw* standard requires inferences to be reached upon a comfortable level of persuasion, commensurate with the gravity of what is alleged.[153]

[93] In the area of law concerning out of hours conduct, each case is likely to turn very much on its own facts, but within a framework of consistent principles developed over time by the cases. The seminal case that broached the type of circumstance where an employee's out of hours conduct may constitute a valid reason for dismissal was *Rose v Telstra Corporation Ltd* (**Rose v Telstra**), where it was stated:

> It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited,:
>
> - the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
> - the conduct damages the employer's interests; or
> - the conduct is incompatible with the employee's duty as an employee.

> In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.
>
> Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct.[154]

[94] *Rose v Telstra* involved a fight between the dismissed employee and another employee, in circumstances where the dismissed employee was on a work trip in a country town but was off duty at the time the altercation occurred. Evidence led did not give rise to a finding that the employer's reputation had been tarnished, and ultimately it was not accepted that the dismissed employee's conduct, objectively viewed, was such as to be likely to cause serious damage to his relationship with his employer.

[95] In *Keenan v Leighton Boral Amey NSW Pty Ltd* (**Keenan**),[155] the dismissed employee, a Team Leader within the respondent organisation, was dismissed as a result of his conduct at a Christmas function organised and paid for by the Respondent, and for his conduct after the function (in the upstairs bar). The behaviour complained of was repeated undesired romantic and sexual propositions and the sudden kissing of a colleague in an unsolicited and unprovoked manner. Having found that the factual basis of each allegation had been established on the evidence, the question remained as to whether the dismissed employee's conduct constituted a valid reason for dismissal.

[96] The argument was made that Mr Keenan's conduct toward one of his female work colleagues constituted sexual harassment as defined in s 28A of the *Sex Discrimination Act 1984* (Cth) (**SD Act**), for which the employer would be vicariously liable. The respondent pressed that employee conduct for which the employer could be vicariously liable, was conduct which legitimately fell within the scope of employer supervision and could constitute a valid reason for dismissal as it had a significant potential to damage the employer's interests.

[97] In *Keenan*, it was accepted that where an employer is vicariously liable for the conduct of an employee outside of working hours, that creates a sufficiently significant connection between the conduct and the employment such as to bring the conduct within the legitimate employer supervision.[156] The question was whether Mr Keenan's conduct at the upstairs bar constituted unlawful sexual harassment.

[98] The Vice President, as he was then, found that Mr Keenan's conduct in the upstairs bar fell within the definition of sexual harassment in s 28A of the SD Act, as it was unwelcome conduct of a sexual nature. However, the now-President did not agree with the proposition that simply sharing the same employer regardless of the circumstances in which the harassment occurred was sufficient for s 28B(2) of the SD Act to be applicable.[157] That section provides that it is unlawful for an employee to sexually harass a fellow employee.

[99] In support of such reasoning, reference was had to the Federal Court judgment in *Leslie v Graham*,[158] where Branson J considered whether sexual harassment between two co-workers which had occurred in the early hours of the morning in a shared apartment sourced for the purpose of attending a work-related conference was unlawful under s 28B(2) of the SD Act. Her Honour concluded that it did, observing that at the time of the incident the relationship between the co-workers as fellow employees was a continuing relationship as they were sharing the apartment in the course of their common employment.[159] The indicia of a continuing

relationship included that the employer had provided the accommodation for the purpose of them attending a work related conference, and as such it could not be suggested that their common employment was unrelated or merely incidental to the incident.[160]

[100] In *South Pacific Resort Hotels Pty Ltd v Trainor* (**Trainor**),[161] what was said in *Leslie v Graham* was met with approval. The Court observed that her Honour had concluded that the employer was vicariously liable, pursuant to s 106(1) of the SD Act, for the acts engaged in by the employee, having seemingly based her conclusion on observations she had made on the question of whether the harassment was to be characterised, for the purpose of s 28B(2) of the SD Act, as harassment by an employee of a fellow employee.

[101] It was said in *Trainor* that the expression 'in connection with' in its context of s 106(1) of the SD Act is a broad one of practical application and, as in *Leslie v Graham*, the facts in *Trainor* pointed to the conclusion that the conduct of a Mr Anderson in the employer-provided staff accommodation, was 'in connection with' his employment within the meaning of s 106(1) of the SD Act.[162] Mr Anderson had, on two occasions, entered the room of Ms Trainor in the staff accommodation, when not invited to do so. The first occasion he awoke her and made sexual advances, and on the second, she found him laying in her bed. The staff accommodation formed part of the hotel complex in which they both worked. It was found that the connection between the employment and the acts in question was even closer since the prohibition on staff having visitors in the staff accommodation meant that, absent any special arrangements by the employer, only staff were permitted there. It was only by virtue of them being staff that Mr Anderson and Ms Trainor were in the 'Staffies' premises where the acts of sexual harassment occurred.[163]

[102] In *Keenan*, it was expressed that there was no clear test as to what is sufficient to establish the necessary connection, as referred to in the SD Act. However, reference was made to the judgment of Kiefel J in *Trainor*, who whilst agreeing with Black CJ and Tamberlin J had added some observations concerning s 106, formulating a test in the following terms:

> [70] In my view no narrow approach to the operation of s 106(1) is warranted. It is consonant with its purpose to read the words '*in connection with the employment of the employee'* as requiring that the unlawful acts in question be in some way related to or associated with the employment. Once this is established it is for the employer to show that all reasonable steps were taken to prevent the conduct occurring, if they are to escape liability under s 106(2). In this way the aim of the SDA, to eliminate sexual harassment in the workplace, might be achieved.

[103] Justice Kiefel added a further observation concerning s 106 that is perhaps of relevance to the case before me now. Her Honour expressed that it would 'seem logical to say' that out of work conduct which could be seen to adversely affect the working environment would be sufficient to establish the necessary connection.[164] However, as observed in *Keenan*, her Honour's statement did not form part of the *ratio decidendi* of the Full Court's decision and did not reflect the approach taken by the other members of the Court. In *Keenan*, it was observed that the statement was best regarded as *obiter* for the purposes of s 106.[165]

[104] Returning to *Keenan*, it was observed that the criterion of 'in connection with the employment of the employee' is different to that of 'in the course of employment', a turn of phrase used in the context of workers' compensation liability.[166] The President continued that in the context of an issue concerning workers' compensation liability where the relevant test

for liability was whether the injury occurred in 'the course of employment', the High Court in *Comcare v PVYW*[167] held that where an injury occurred outside of work as a result of attendance at a particular place or engagement in a particular activity, the injury would only be in the course of employment if the employee attended the place or engaged in the activity because of encouragement or inducement by the employer.[168]

[105] The 'but for' test was also considered by the President in *Keenan*, the following analysis of the test by the New Zealand Court of Appeal in *Smith v Christchurch Press Company Ltd* (**Smith**)[169] having been favoured:

> [17] It was not argued that the appellant's conduct, if it was sufficiently related to his employment, did not amount to serious misconduct justifying dismissal... The argument for the employee was directed to the link between the conduct and the employment necessary to trigger the right of dismissal. As already mentioned, the Judge adopted the test of "but for" the employment relationship, conduct would not have occurred though she had qualified this by reference to "in the employment setting". She used this to ascertain whether the appellant was acting "in the course of his employment". Her conclusion was that the fact that the incident took place away from the work premises during the lunch time "does not remove the nexus between employment and the sexual harassment".
>
> [18] The "but for" test is not unfamiliar, though in other fields it no longer is accepted as a sufficient test of causation giving rise to legal liability. It was applied in the High Court in a case of sexual harassment in employment under the Human Rights Commission Act 1977 in *Ellis v Proceedings Commissioner* [1997] 1 ERNZ 325, 329. The test was adopted in that case from earlier employment cases, though again it seems to have been complemented with a finding that the conduct "arose out of the employer – employee relationship". Those earlier employment cases are *NZ Labourers, etc IUOW v Fletcher Challenge Ltd* (1989) 3 NZILR 129, 197 and *Z v A* [1993] 2 ERNZ 469, 483. The "but for" test for causative link in those cases appears to be traced back to *McMahon v Post & Telegraph Department* [1958] NZLR 717, 718, but matters have moved on somewhat since then: see *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 681; *Price Waterhouse v Kwan* [1999] NZCA 311; [2000] 3 NZLR 39, 46.
>
> [19] Without more the "but for" test could not provide a test for all circumstances. As Mr Couch pointed out, at the extreme it could extend to all conduct, whenever occurring, involving persons who first met in an employment situation. Plainly that would permit employers to intrude too far into the private lives of employees."[170]

[106] The President stated that:

> Whilst the above analysis concerned whether particular conduct occurred in the course of employment, I consider it equally applicable to the question, in the context of ss.28B and 106 of the SD Act, whether conduct occurred in connection with the employment. In particular, the underlined part of the above passage would apply with equal force so that any sexually harassing conduct by one person against another, where both persons have the same employer and first met as a result of their common employment, could be said to be in connection with that employment regardless of the contextual circumstances. That is an approach I reject. It was certainly not the approach taken in *South Pacific Resort* or *Leslie*.[171]

[107] For the most part the focus in *Keenan* was on the operation of the SD Act. However, leaving aside the SD Act, the President expressed that private conduct by one person towards a

second person with the same employer may damage the employer's interests (and thus meet the *Rose v Telstra* criteria) if the capacity of the second person to perform his or her duties for the employer is affected by that conduct.[172]

[108] In the context of the case before me this proposition deserves further attention, it echoing what was said by Kiefel J in *Trainor*. The President's proposition appears to have been drawn from the Federal Court judgment of *McManus v Scott-Charlton* (**McManus**) where the impetus of the dispute was the question of whether a direction to an employee to cease private sexually harassing behaviour towards a co-employee was lawful and reasonable.[173]

[109] In *McManus*, the misconduct that had preceded the direction for Mr McManus, the applicant, to refrain from contacting Ms Penny Bond, an officer of AusAID, outside the requirements of his official duties, was a number of unwelcomed advances made to Ms Bond (and also to other women officers in AusAID), which, after complaint, resulted in both the counselling of, and the giving of other directions to, the applicant.

[110] Whilst the context of *McManus* was against the backdrop of the *Public Service Act 1922* (Cth) and Mr McManus had not been dismissed, this does not detract from some of the observations made by Finn J in respect of the common law obligation of an employee to obey a lawful and reasonable direction. Reference was made to the oft cited passage in *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (**Darling Island Stevedoring**):

> If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable.[174]

[111] However, Finn J observed that the limiting formula in *Darling Island Stevedoring* may not, with its current focus on the 'subject matter of the employment' and the 'scope of the contract of service', satisfactorily capture what properly may be the subject matter of directions, in this instance, to public servants. One of the reasons relied upon by Finn J was that legislation, increasingly, is making the workplace a forum in which human rights are being accorded some level of protection both from the actions of employers and co-workers. As a result, workplace behaviour and its consequence are being made matters of legitimate interest or concern to employers and employees alike.[175]

[112] Whilst ultimately the Court in *McManus* determined that the SD Act could not provide a lawful basis in respect of private sexual harassment, Finn J went on to say that the direction would be lawful where 'the harassment has had and continues to have substantial and adverse effects on workplace relations, workplace performance and/or the "efficient equitable and proper conduct"… of the employer's business because of the proximity of the harasser and the harassed person in the workplace'.[176] In *McManus*, the necessary substantial and adverse effects were identifiable in the evidence in that affected employees were 'emotionally disturbed'[177] by the harasser's actions to the extent that they were using work time to discuss their concerns with other more senior employees and were paying reduced attention to their duties to the detriment of their work 'because their concern about the [harasser] was preying on their minds'.[178]

[113] The Court's conclusion in *McManus* was that it was lawful for an employer to give an employee a direction to prevent the repetition of privately engaged in sexual harassment of a co-employee where:

> a) that harassment can reasonably be said to be a consequence of the relationship of the parties as co-employees (ie it is employment related); and
> b) the harassment has had and continues to have substantial and adverse effects on workplace relations, workplace performance and/or the "efficient equitable and proper conduct"…of the employer's business because of the proximity of the harasser and the harassed person…[179]

[114] However, the Court added that in light of objections raised by counsel for the applicant against allowing any employer direction against the privately engaged in sexual harassment of a co-employee, the Court cautioned that the test of lawfulness as set out above would not, for example, be likely to justify a direction given against an employee privately harassing a co-employee with whom he or she cohabited or was married, but from who he or she was later estranged.[180] The Court stated that such a direction would, because of the prior relationship of the parties, be unlikely to satisfy the first of the two conditions noted above.[181]

[115] At this juncture, the Full Bench decision of *Streeter v Telstra Corporation Ltd* (**Streeter**)[182] warrants examination as does the viewpoint of the President in *Keenan*, in respect of the *Streeter* decision.

[116] In *Streeter*, the basis of Ms Streeter's dismissal was that she had engaged in sexual harassment for which her employer was vicariously liable under the SD Act and she had lied about her conduct (including the sexual activity she had engaged in) when interviewed by her employer. The sexual harassment in question had occurred in a hotel room that had been booked by four co-workers to stay following a Christmas function. Whilst Ms Streeter was not one of the workers who had booked the room, she engaged in behaviour that included having sex with the 'fourth employee' within the view and/or earshot of the 'first employee', 'second employee' and 'third employee'.[183]

[117] At first instance, it was found that Ms Streeter's conduct either did not amount to sexual harassment or, alternatively, was sexual harassment of the most indirect kind. Further, as to the lying, the Commission found that although Ms Streeter had lied, it was lying about conduct that was 'of an inherently personal nature', which occurred well away from the workplace booked and paid for privately. As there was no valid reason for her dismissal, Ms Streeter was reinstated. The decision was appealed, and on appeal, whilst the Full Bench found no error in respect of sexual harassment conclusion, error was found in respect to Ms Streeter having lied about what occurred in the course of her employer's investigation. Ultimately, the dismissal was found not to be unfair.

[118] In *Keenan*, the President expressed the following:

> I must say, with respect, that I strongly disagree with the conclusion of the majority in *Streeter*. I do not accept the validity of the proposition that an employer has a right to ask questions of an employee about private consensual sexual activity and to expect any answers, let alone truthful ones. The further proposition that a failure to answer such questions honestly can lead to a breakdown in the relationship of trust and confidence and constitute a valid reason for dismissal

> is equally unacceptable. There is no support for either proposition in any of the relevant authorities. An employer does not have the legal right to intrude so far into the private lives of employees.[184]

[119] The cases considered to this point have not traversed out of hours conduct which has given rise to charges, a plea having been entered (such as a guilty plea), or a conviction. In *Public Employment Office Department of Attorney General and Justice (Corrective Services NSW) v Silling* (**Silling**),[185] however, this was not the case.

[120] The Full Bench of the NSW Industrial Relations Commission in *Silling* considered an appeal from a decision at first instance in which the Commissioner had considered the dismissal of Mr Silling harsh, unjust and unreasonable, in part because there was no acceptable evidence that the performance of Mr Silling's duties would be compromised by his recent out of hours criminal history. Mr Silling had assaulted his wife twice and his 24-year-old daughter once. At first instance, the Commissioner applied the test in *Rose v Telstra* and concluded that the necessary connection was not established because she did not consider on the evidence before her that Mr Silling's conduct, whilst abhorrent, was of sufficient seriousness, or gravity, to fall within the limited circumstances identified by Vice President Ross, as he was then, in *Rose v Telstra*. The Full Bench considered no error was made in this respect.

[121] The Full Bench in *Silling* further considered whether the Commissioner had wrongly applied the test in *Rose v Telstra*, noting that the test does not require any evidence of actual damage to the employer:[186]

> [i]n any event, a reading of Commissioner Bishop's decision on this issue demonstrates that what Commissioner Bishop in fact said (at [154] of the Decision) was that there was no evidence of any concern on the part of CSNSW that Mr Silling's conduct, "... did, or was likely to damage CSNSW's interests in any way ...". The reference to a likelihood of damage is entirely consistent with the principles formulated in *Rose v Telstra*. Moreover, those principles make clear that any conduct "likely to cause serious damage" to the employment relationship, must be viewed objectively, that is, the subjective views of a dismissed public officer (relevantly, here, Mr Silling's admissions and apology for tarnishing the reputation and integrity of his office), in the absence of evidence, or sufficient evidence from the employer, carry little, or no, weight.[187]

[122] It was uncontroversial that the Respondent is responsible for providing drug rehabilitation services to vulnerable members of the Western Australian community. As General Manager of Residential Services, the Applicant oversaw the women and children's program, in addition to other programs. In the Respondent's program referred to as 'Wandoo', 99% of people are said to have had family and domestic violence in their background.[188] Mr Hunter gave evidence that the Respondent's 'Saranna' program is a program exclusively for women with young children who require residential treatment and that the Applicant was responsible for the program. The Applicant gave evidence that:

> I wouldn't want a perpetrator of domestic violence around those women or in – doing my job. So if that's where we're leading to. No. If I've done that stuff I should be sacked.[189]

[123] It is evident however that the Respondent did not dismiss the Applicant because he had committed domestic violence against the Person Impacted, albeit Ms Daws was forthright in her evidence that she believed the account of the Person Impacted. The reason relied upon by the Respondent was that the Applicant had engaged in *alleged* domestic violence.

[124] One can perceive an immediate difficulty for a respondent employer faced with circumstances where one of its employees alleges that another of its employees is subjecting her or him to domestic violence that is occurring predominately out of hours, and that employee requests that no steps are taken regarding the disclosure. The limitations on an employer's right to regulate, investigate and discipline an employee in respect of out of hours sexual harassment, or for that matter domestic violence, is clearly illustrated by the various cases referred to in this decision. In *Commissioner for Railways (NSW) v O'Donnell*, the High Court held that the fact that an employee had been arrested and charged with an offence did not of itself constitute misconduct warranting termination of employment.[190] Nor is the conviction of a criminal offence, of itself, sufficient to warrant termination. The misconduct in question must have a relevant connection to the employment.[191] In this case, however, there is no evidence that the Applicant had been charged of an offence in respect of the out of hours conduct – such were the circumstance in *Silling*.

3.2 Alleged domestic violence outside of the workplace

[125] To justify there being a valid reason for the Applicant's dismissal, the Respondent has, in part, relied upon purported domestic violence inflicted by the Applicant upon the Person Impacted, out of hours. The Respondent referred to the following disclosures made by the Person Impacted to various members of its staff over the latter part of 2022:

a) Ms Mahoney gave evidence of the Person Impacted having informed her in or around October 2022 that things between her and the Applicant were not good and that he had started to hurt her.[192] Reference was made by Ms Mahoney to the Person Impacted having informed her that the Applicant had grabbed and pushed her;[193]
b) on 16 November 2022, Ms Mahoney said the Person Impacted told her that the Applicant assaulted her whilst she was in Bali on holiday with him;
c) on 16 November 2022, Ms Mahoney questioned the Person Impacted about a bruise under her eye and the Person Impacted informed her that the Applicant had caused the bruise;[194]
d) on 17 November 2022, the Person Impacted came to the office of Ms Daws and disclosed that the Applicant was physically violent and controlling towards her;[195]
e) on 23 November 2022, after the Person Impacted had travelled to Bali with the Applicant, the Person Impacted disclosed to Ms Iannantuoni that the Applicant had physically hurt her;[196]
f) on 27 November 2022, the Person Impacted advised Ms Daws that she had been locked in a bedroom (doorknobs removed off the doors), assaulted and sexually assaulted by the Applicant;
g) on 12 December 2022, the Person Impacted advised Ms Daws that on a Friday night the Person Impacted had accompanied the Applicant to his house in circumstances where he had been intimidating, and at his house he tied the Applicant up and physically and sexually assaulted her, and she was held captive most of the night;[197]
h) on 12 December 2022, the Person Impacted informed Ms Mahoney that she had been sexually assaulted by the Applicant, having been locked in a room with the door handles removed;
i) on or around 12 December 2022, Ms Pilutkiewicz asked the Person Impacted about a bruise on her cheek[198] and the Person Impacted replied, 'David caused it';[199]

j) Ms Wrynn gave evidence of the Person Impacted having reported to her in the lead up to Christmas 2022 that the Applicant had demanded that she go to his house and then he had tied her up.[200] Mr Wrynn gave further evidence of the Person Impacted reporting to her in November 2022 that the Applicant threatened her and that she was frightened of him;[201]
k) in late-November and mid-December 2022, the Person Impacted continued to inform Ms Mahoney that the Applicant was abusing her, this time over the phone;[202]
l) Ms Pilutkiewicz gave evidence that the Person Impacted had disclosed to her on multiple occasions that the Applicant was physically violent towards her;[203] and
m) Ms Pilutkiewicz recalls having seen a bruise on the Person Impacted's arm and asking how she got the bruise, to which the Person Impacted replied, 'David did it'.[204]

[126] For the following reasons, I have found that the alleged out of hours conduct relied upon by the Respondent at paragraph [125] of this decision, does not constitute a valid reason for dismissal.

[127] Firstly, the facts before me do not disclose a charge or conviction as was the case in *Silling* or for that matter *Wakim v Blue Star Global Logistics*,[205] and they are dissimilar to the factual circumstances traversed in cases such as *Rose v Telstra*, *Keenan*, *Leslie v Graham*, and *Trainor*. The out of hours conduct under consideration did not take place in employer-provided accommodation, or accommodation subsidised by the employer. Further, the conduct does not appear to be connected to a work-sponsored event. The purported events referred to by the Respondent unfolded independent of the workplace. By this I mean that the purported domestic violence occurred independent of a work event or in circumstances where there had been a work event where the Person Impacted had been in attendance but not the Applicant, such as the incident following the Pride festival on 27 November 2022. The situation in which the Applicant and the Person Impacted were placed, which provided the opportunity for the conduct, did not, in my view, arise in connection with work-related activities.

[128] That is not, however, to say that the purported domestic violence was not impacting the Respondent organisation. Several staff members were aware of certain alleged incidents between the Applicant and the Person Impacted. Ms Daws was directly aware of the Person Impacted's allegations, having heard them from the Person Impacted herself. Ms Iannantuoni also informed Ms Daws about the Applicant's purported abuse of the Person Impacted,[206] as did Ms Pilutkiewicz.[207] It is not apparent that Ms Mahoney or Ms Wrynn took that step. Ms Hamm was no longer an employee of the Respondent at the relevant time.

[129] Given the seriousness of the allegations and the position held by the Applicant within the Respondent organisation, on 5 December 2022, Ms Daws informed the Chairperson of the Respondent's Board of the events unfolding, noting that support had been garnered from a domestic violence organisation and the priority was the Person Impacted's safety. Ms Daws informed the Chairperson that the Applicant had not been spoken to at that stage.[208]

[130] It is evident that during the course of November and December 2022, several people within the Respondent organisation had become aware of the purported domestic violence, and some were involved in the management of the situation. Mr Hunter gave evidence that he had been drawn into the safety plan for the Person Impacted by Ms Daws.[209] The safety plan

required that the Person Impacted never be alone with the Applicant in the office.[210] Mr Scarrott said that whilst he did not play a part in the safety plan, he was nevertheless told what days the Person Impacted would be in the office, and that either he or Mr Hunter would always be present.[211]

[131] By December 2022, the ramifications of the purported domestic violence between the Applicant and the Person Impacted were not confined to their relationship. The Chairperson of the Respondent had been briefed. A third party had been consulted for advice. Ms Daws had become a point of contact for the Person Impacted under a safety plan. Some staff members of the Respondent organisation were now part of a safety plan and there was a requirement that the Applicant and the Person Impacted were to never work together alone. Several staff members had inadvertently become enmeshed in the situation having had the Person Impacted disclose the Applicant's purported violence to them. Mr Hunter stated that he attended at least one meeting he would not usually attend, just to ensure that the Applicant and the Person Impacted were not left alone. Notwithstanding the seeming disruption to the organisation, by the end of December 2022, no one within the organisation appeared to have addressed the Applicant in respect of multiple allegations of domestic violence and the resultant disruption that this was giving rise to in the workplace.

[132] In *Keenan*, it was accepted that where an employer is vicariously liable for the conduct of an employee outside of working hours, that creates a sufficiently significant connection between the conduct and the employment such as to bring the conduct within the legitimate employer supervision.[212] It is noted, however, that neither party made any suggestion that the Respondent would be so liable, and neither party relied on the operation of the SD Act.

[133] Whilst it is true that the operation of the SD Act has not formed part of the argument advanced by the parties, it is worthwhile returning to the observation made by Kiefel J in *Trainor* concerning the phrase 'in connection with the employment of the employee' within the SD Act. Regarding that phrase, her Honour opined that it required that the unlawful acts in question be in some way related to or associated with the employment, and once established, it was for the employer to show that all reasonable steps were taken to prevent the conduct occurring, if they are to escape liability under s 106(2).[213] Her Honour expressed that it would 'seem logical to say' that out of work conduct which could be seen to adversely affect the working environment would be sufficient to establish the necessary connection.[214] It is that point which warrants further examination, and the judgment in *McManus* does just that.

[134] In *McManus*, it was said, in relation to private sexual harassment, a direction to an employee to cease private sexually harassing behaviour towards a co-employee could be lawful where: (a) the harassment can reasonably be said to be a consequence of the relationship of the parties as co-employees (i.e. it is employment-related); and (b) the harassment has had and continues to have substantial and adverse effects on workplace relations, workplace performance and/or the efficient equitable and proper conduct of the employer's business because of the proximity of the harasser and the harassed person.[215] Essentially, the lawfulness of the direction given by the employer in *McManus* was dependent on the fact that the employee's out of work conduct had a demonstrated, substantial and adverse effect on the employer's business.

[135] The necessary substantial and adverse effects referred to in *McManus* were affected employees having become 'emotionally disturbed'[216] by the harasser's actions to the extent that they were using work time to discuss their concerns with other more senior employees and were paying reduced attention to their duties to the detriment of their work 'because their concern about the [harasser] was preying on their minds'.[217]

[136] Whilst the evidence before me makes for a solid case that the purported out of hours conduct of the Applicant was adversely impacting upon the Respondent's work environment, there are other factors to consider.

[137] First, I am not persuaded that the purported domestic violence can be said to be a consequence of the relationship of the parties as co-employees. I am of the view that to arrive at that finding would require the application of the 'but for' test, as described by the President in *Keenan*[218] (see *Smith*[219] and paragraph [105] of this decision). The use of that test in circumstances such as those disclosed in this case has been rejected by this Commission.

[138] Second, at no point during November or December 2022 was the Applicant alerted to the allegations arising from his purported out of hours conduct and there was definitely no direction that the Applicant desist from engaging in the alleged domestic violence. Ms Daws gave evidence of having prioritised the Person Impacted's safety, noting to the Chairperson that the Applicant was uninformed of the allegations made.

[139] Third, whilst the judgment of *McManus* suggests that in relation to private sexual harassment, that a direction to an employee to cease private sexually harassing behaviour towards a co-employee could be lawful, the Court provided an important caution. Namely, the test of lawfulness in respect of such a direction would not, for example, be likely to justify a direction given against an employee privately harassing a co-employee with whom he or she cohabited or was married, but from who he or she was later estranged.[220] As noted, the Court stated that such a direction would, because of the prior relationship of the parties, be unlikely to satisfy the first of the two conditions noted above (the harassment can reasonably be said to be a consequence of the relationship of the parties as co-employees (i.e. it is employment-related)).[221] I will comment further on this point at a later part of this decision.

[140] Nevertheless, it could also be argued that the Applicant's contractual obligations required him not to engage in certain conduct that would likely compromise his fulfilment of his professional responsibilities. The Applicant's employment contract[222] required the Applicant to work in accordance with the Respondent's Code of Conduct, which obliged all the Respondent's employees to:

> [r]efrain from any activity where *personal* or professional *conduct* is likely to compromise the fulfilment of their professional responsibilities, denigrate the name of Cyrenian House, or negatively affect their responsibility to provide a positive role model. This includes gossip about consumers and fellow workers.[223] (italics my emphasis)

[141] Whilst an employee's out of hours conduct may cause serious damage to the relationship between employer and employee, and for example, fall, depending on what the employee has done, foul of the requirement as set out in the Code of Conduct, the Respondent in this case has acted upon *allegations* of domestic violence. That is, the Respondent has, appropriately in my view, not advanced that the evidence shows that more likely than not that the Applicant engaged

in domestic violence against the Person Impacted, but instead relies upon *alleged* domestic violence.

[142] When considering whether conduct is incompatible with the fulfilment of an employee's duties, it is insufficient, in my view, to base a finding on *alleged* conduct. It is the case that the conduct itself must be found to have occurred and had involved the incompatibility. It has previously been said that an actual repugnance between the acts and the employment relationship must be found, it not being enough that grounds for uneasiness as to future conduct arises.[224] Whilst spoken of in the context of the duty of fidelity and good faith, the proposition appears apt here. In *Blyth Chemicals Ltd v Bushnells*,[225] their Honours Starke and Evatt JJ noted:

> The mere apprehension that an employee will act in a manner incompatible with the due and faithful performance of his duty affords no ground for dismissing him; he must be guilty of some conduct in itself incompatible with his duty and the confidential relation between himself and his employer.

[143] A further difficulty that arises in respect of the Respondent's reliance on the purported domestic violence is that the Respondent has based its case largely on the evidence of those to whom the Person Impacted reported the domestic violence. The absence of the Person Impacted at hearing means that the credibility of her accounts were unable to be tested. Ms Daws explained that the Respondent had deliberately decided not to call the Person Impacted to give evidence, as far back as March 2023. This was at that time that the Person Impacted had indicated that she was not going to press charges against the Applicant in respect of the alleged domestic violence. Ms Daws said that the Respondent did not feel it was in the Person Impacted's best interests to have her appear at hearing of this matter, because at that stage she was still recovering from a very serious brain injury.[226]

[144] The Applicant submitted that had the Person Impacted been called as a witness, her evidence would not have assisted the Respondent. The Applicant goes as far to say that a completely different story would have been told to what the Respondent's witnesses have heard, second-hand, along the way.

[145] The approach taken by Ms Daws is, in my opinion, understandable given in early January 2023, the Person Impacted faced death and in the subsequent months had been rehabilitating from a brain haemorrhage. In such circumstances, I consider it reasonable that a respondent employer would prefer not to place such a person through the associated stress and trauma of not only having to give evidence in legal proceedings, but to also have to arguably confront and be forensically questioned about purported incidents, which by all accounts, if accurate, were traumatic. However, the consequence of that decision is that the Commission is unable to hear firsthand the experiences of the Person Impacted, as she had detailed them to others.

[146] In closing submissions, the Applicant invited the Commission to draw an inference against the Respondent for its failure to call the Person Impacted to give evidence. Essentially, the Applicant contended that the Commission must draw an adverse *Jones v Dunkel*[227] inference.

[147] The rule in *Jones v Dunkel* has been described as a 'rule of common sense and fairness in relation to the fact finding process'.[228] In *Hyde v Serco Australia Pty Ltd*,[229] the Full Bench observed that the rule in *Jones v Dunkel* had been considered extensively in *Tamayo v Alsco Linen Service Pty Ltd* (**Tamayo**)[230] and outlined the observations made in that case. Observing that the Commission was not bound by the rules of evidence, that it could inform itself in relation to a manner as it considers appropriate and that the Commission must perform its functions and exercise its powers in a manner that is 'fair and just', the Full Bench adopted the *Tamayo* observations. It continued that as the 'rule' in *Jones v Dunkel* is fundamentally concerned with issues of fairness, the Commission will consider its application in an appropriate case. It is of course accepted that when exercising discretion concerning the rule in *Jones v Dunkel*, the discretion is to be exercised in accordance with the dictates of common sense and fairness.[231]

[148] A *Jones v Dunkel* inference can be drawn where there is a conflict in the evidence on particular issues and there is an unexplained failure to call someone to explain that conflict. There has not, in this case, been an unexplained failure to call the Person Impacted, and in such circumstances, I am not minded to draw the inference sought. In any event, I am unconvinced that the *alleged* domestic violence, as described in this part of the decision, proves to be a valid reason for dismissal for the aforementioned reasons.

3.3 Alleged domestic violence in connection with the Applicant's employment

[149] Further allegations of domestic violence were raised by the Respondent against the Applicant, which were, in my view, more proximal to the employment relationship, such that they had the necessary connection with the Applicant's employment. Notably:

a) **Mobile phone incident**: Ms Pilutkiewicz and Ms Daws gave evidence that on the evening of the Respondent's AGM (on or around 3 November 2022), the Person Impacted reported that the Applicant had thrown a mobile phone at her in the car park under the Respondent's office. Ms Pilutkiewicz observed that the Person Impacted had a bruise on her forehead, and when questioned about it, the Person Impacted informed her 'David threw a phone at me'.[232] Ms Daws said at a later point in time, the Person Impacted disclosed to her an incident where the Applicant had thrown the Person Impacted's mobile phone at her, hitting her on her forehead.[233] It is further observed that a text message that Ms Mahoney received from the Person Impacted on 4 November 2022 referred to the Applicant throwing a phone at the Person Impacted's head.[234]

b) **Desk incident**: on 29 November 2022, Ms Iannantuoni informed Ms Daws of an incident having taken place earlier in the day where something had happened between the Person Impacted and the Applicant in her office such that the Person Impacted was frightened. Ms Iannantuoni said that the Person Impacted hid in the toilet following the incident and called Ms Pilutkiewicz and Ms Pilutkiewicz had informed Ms Iannantuoni what had happened. Ms Daws recalls Ms Iannantuoni stating that the Person Impacted had told her that the Applicant had fronted up to her with his fists and then had attempted to lift the desk and spat at her.[235] Such report had also been provided by the Person Impacted to Ms Mahoney who purports

that the Person Impacted said that the Applicant had come into her office and banged her head on a desk. [236]

c) **Brazen behaviours**: on 8 December 2022, Ms Daws had a long discussion with the Person Impacted to encourage her to see a counsellor on 12 December 2022. The Person Impacted purportedly informed Ms Daws that things were escalating and that the Applicant had become 'brazen about it at work.' The Person Impacted advised Ms Daws that the Applicant had stood at her door, used the door as a shield, and threatened her verbally.[237]

[150] Starting with the so called 'Brazen behaviours'. I am absent a clear understanding of what these particular behaviours involved, with the exception of the one example given, that is, the door being used as a shield whilst the Applicant purportedly verbally threatened the Person Impacted. In my view, there is insufficient evidence for me to find that on balance such purported conduct occurred.

[151] Concerning the Mobile phone incident, the Applicant gave evidence that he attended the AGM, having arrived, and later departed, with the Person Impacted.[238] The Applicant further confirmed that he thought he had spent the night with the Person Impacted after the AGM. However, the Applicant denied having thrown a mobile phone at the Person Impacted on the evening of 3 November 2022 or early in the morning on 4 November 2022, adding that he considered it noteworthy that the incident purportedly occurred in the basement carpark at the Respondent's offices, and he had not returned to the Respondent's office at all.[239] The Applicant suggested that if the incident occurred at that location, as reported, there would be footage of the incident.[240]

[152] In respect of the Mobile phone incident, there is simply insufficient evidence before me to reach a finding that on balance the more probable inference is that the Applicant threw a mobile phone at the Person Impacted following the AGM on 3 November 2022. Whilst Ms Iannantuoni, Ms Daws and Ms Mahoney all received reports from the Person Impacted that this had in fact occurred, absent the direct evidence of the Person Impacted and in light of the Applicant's denial of its occurrence in addition to his evidence regarding having not returned to the Respondent's offices, I do not consider it reasonable in the circumstances to draw an inference that is unfavourable to the Applicant. In reaching this conclusion I have deferred to the principles as expounded in *DesignInc (Sydney) Pty Ltd v Xu*.[241] Further, given my finding in this respect, I have considered it unnecessary to expand upon why I consider that the purported behaviour had the requisite connection to the Applicant's employment.

[153] However, in respect of the Desk incident, I make the following observations. First, the Applicant admits that there was some kind of altercation with the Person Impacted in her office at work that morning.[242] The requisite connection to his employment is therefore established. In response to the question of whether there was some kind of altercation with the Person Impacted in her office at work, the Applicant stated:

> Yes, so that morning there was some words, an argument, and I was sort of indicating that I was going to be done, again. Then I did see the person impacted go into the toilets not long after and then I saw Michelle [sic] go into the toilet not long after than [sic] and I thought, I wonder if she's doing her thing, where she makes stuff up. So, yes.[243]

[154] While the Applicant denies spitting at the Person Impacted on that day, I find that the Applicant engaged in an argument with the Person Impacted about personal matters pertaining to their intimate relationship. I further find that such interaction significantly affected the Person Impacted rendering her unable to work for a period.

[155] To traverse such subject matter in the work environment or otherwise entertain it by participating in the discussion, such that it escalates to the point where one participant is rendered incapable of working due to emotional upset, albeit temporarily, is not only unprofessional for a person at that level of seniority within an organisation, but also constitutes misconduct. If the Applicant had, in fact, decided that he no longer wished to engage intimately with the Person Impacted in a personal relationship, the work environment was not the place to convey such message or to hold such discussion. It was poor judgment on his behalf to have engaged in the subject matter. The Applicant was not being paid by the Respondent to manage his personal relationship within the workplace; he was being paid to manage the Respondent's residential services. I will return to this point when concluding my consideration of whether there was a valid reason for the Applicant's dismissal.

3.4 Inappropriate use of the Respondent's resources, being the Applicant's phone and laptop, to subject the Person Impacted to emotional abuse

[156] In the background part of this decision, I included an extract of the screenshots of text messages that had passed between the Applicant and the Person Impacted. One will recall that these had been obtained by Ms Daws from the laptop of the Person Impacted after the employment of the Applicant had ended. The text messages had been sent during the course of the Applicant's and the Person Impacted's on and off again relationship, whilst both were employed by the Respondent. It is uncontroversial that the Applicant used the Respondent's mobile phone which had been allocated to him for business and personal use, including to send the text messages to the Person Impacted.

[157] Regarding the use of evidence obtained post-dismissal, in *Chalk v Ventia Australia Pty Ltd*, the Full Bench stated:

> …Facts justifying dismissal, which existed at the time of the dismissal, should be considered even if the employer was unaware of those facts and did not rely on them at the time of the dismissal. Ultimately, the Commission is bound to determine, whether, on the evidence provided, facts existed at the time of termination that justified the dismissal.[244]

[158] At hearing, the Applicant conceded that he had authored the text messages to the Person Impacted and acknowledged that the messages included threats of physical violence:

> So the first message here, from the - on the left side of the screen so showing that it's been received by this phone and noting that up the top it says, David:
>
> *You should be ashamed of yourself, person impacted, I want to kick the shit out of you for what you did tow(?) by coming back still a liar and to attack me for catching you out. If you don't come back and say sorry, like a human, at 10 tonight, I swear I will turn your life inside out, test me.*
>
> Did you send that text message?---Yes.

> Yes? And is that a threat of physical violence, or two threats?---It does sound like a threat to physical violence, yes.
>
> Okay. So next page - - - ?---It's cringeworthy.
>
> - - - 123, at the bottom, so the second grey message on the screen, again from David:
>
> *You are a liar. You could take a screenshot showing the date easy as. I'll smash you if you lie again, cunt.*
>
> ?---Yes.
>
> Is this a message from you?---Yes.
>
> Is that a threat of physical violence, to say, 'I'll smash you if you lie again'?---It is.[245]

[159] The Applicant was questioned further in cross examination about the text messages that has passed from him to the Person Impacted, including:

> *Honestly, keep coming at me with attitude and I'll knock you out, cunt.*
>
> Did you send that message - - -?---Yes, I did.
>
> - - - to the person impacted?---Yes, I did.
>
> Is that a threat of physical violence?---It is.
>
> Later, in the same screenshot, you say, 'I was joking about violence, of course -', laughing face emoji. You sent that message, correct?---Yes.
>
> Yes? And you've alleged that the person impacted was lying to people about you abusing her and that that concerned you significantly?---Yes.
>
> So if you are very concerned about incorrect assertions of violence, you here make a joke about violence and you jokingly, apparently, reference 'knocking you out, cunt'?---M'mm.
>
> That seems quite inconsistent with being very concerned about her lying, doesn't it?---It doesn't to me, actually, because my concerns with the person impacted is actually making up things that destroy my life, as opposed to me saying something a bit ugly that she knows is never going to happen.[246]

[160] The Applicant acknowledged that the text messages were sent to the Person Impacted on his work phone and that they disgusted him and were ill-advised.[247] The Applicant further noted that they were ill-advised, 'because we're sitting here talking about it.'[248]

[161] At this juncture, the evidence of the disciplinary meeting on 4 January 2023 warrants further consideration. This was a meeting where the Applicant, by his own admission under cross-examination, albeit not volunteered in his two witness statements, stated that he had conducted a factory reset of the Respondent's mobile phone in the disciplinary meeting,[249] a mobile phone which had been allocated to him for his business and personal use. The Applicant's explanation was to the effect that such conduct was acceptable, as anybody handing

their phone to people who are going to take their phone forever would do the same. The Applicant added that he was concerned for his own privacy in general and that it was not to hide evidence.[250]

[162] The evidence relied upon by the Respondent, as detailed at paragraph [35] of this decision, would not have been available had not the Person Impacted taken screenshots of the text messages and saved them on her work laptop computer. By resetting the Respondent's mobile phone, the Applicant deleted all the Respondent's information and data, absent its consent. Hence the Applicant rendered the Respondent unable to review the contents of the Applicant's mobile phone for any future purpose. In my view, it is reasonable to infer that the Applicant's conduct in this respect was not undertaken for the purpose of protecting his privacy generally (because he did not want Ms Daws to see text messages to his mum and everything else)[251] but was instead actioned to avoid the disclosure of information which was damaging to his position in respect of his employment or former employment with the Respondent.

[163] The Applicant was questioned about one particular text message in which he had said, '[k]eep coming at me with attitude and I'll knock you out. I want to kick the shit out of you…'.[252] In response to being questioned about the text message, he stated:

> Yes, well I did write those messages, yes. They are a selection of about 10,000 messages. They're the worst of them and she kept them, yes.[253]

[164] At hearing, I informed the Applicant that he had mentioned having had 10,000 text messages on his phone and on other occasions having mentioned that there were text messages on his phone. I then asked the Applicant whether he still had access to those 10,000 text messages because he had referred to them being on the bar table. The Applicant replied:

> ---I've got – I've got back-ups of texts going back quite a while. Not all of it. But certainly I've kept the texts for – that might be relevant to this – this thing.[254]

[165] The Respondent of course did not have knowledge of those some 10,000 text messages which had previously existed on its property, the organisation's mobile phone. This was because the Applicant conducted a factory reset of the mobile phone in the disciplinary meeting absent authority to do so. The Applicant had effectively removed evidence from the mobile phone that may have proved relevant to his dismissal and this application. In engaging in this conduct, he prejudiced the position of the Respondent in respect of responding to applications such as the one on foot.

[166] Turning to the text messages provided by the Applicant, for the most part the content concerns apologies from the Person Impacted to the Applicant for her behaviour and her professing her love for him.[255] However, at some point, presumedly the Person Impacted has sent the Applicant the following text messages on 'Monday, 6 June 16:42':

> U piece of shit
> Now it's game on David
>
> Let's play
>
> I don't care about her

> After seeing those boys the other night u don't compare
> Anyone can fuck with toys!
>
> What a same [sic] Dave given all of your really aggressive threatening voice messages I have and for threatening text icon today I am fairly concerned and may need to consider getting a Viero…[256]

[167] It is apparent that the messages formed part of a chain but the message following reference to the 'Viero' is unable to be seen. The Applicant has described the text messages as evidence of the Person Impacted threatening a violence restraining order as part of a 'game'.

[168] I am mindful that this Commission has received certain curated text messages that passed between the Applicant and the Person Impacted. Notwithstanding, the evidence shows that the Applicant and Person Impacted engaged, at times, in a style of communication style that sought to disparage the other. Whilst some of the text messages are surfeit with disparaging comments, there are however others where the text messages evince the Applicant making threats of violence against the Person Impacted (as referred to at paragraphs [158] to [159] of this decision). On any objective level, it is reasonable to infer that they were sent for the purpose of intimidating the Person Impacted. Whilst the Person Impacted in one text message expressed concern and referred to the potential of applying for a form of protection offered under the law (presumedly a violence restraining order), this markedly differs to the Applicant communicating 'I'll knock you out cunt', or 'I'll smash you if you lie again, cunt', or 'I want to kick the shit out of you' (**offending text messages**).

[169] While it is likely that the conduct of sending the offending text messages essentially occurred out of hours given the times and dates when some of the text messages were sent (albeit some times and dates were difficult to discern), I consider it to be conduct which is in breach of the Applicant's contractual obligations for the following reasons.

[170] The Applicant's employment contract stipulated that his duties and responsibilities included working in accordance with Code of Conduct and that he was to:

> …be responsible for personal health and safety in the workplace and for complying with all Cyrenian House occupational safety and health policies and procedures, promoting and maintaining a safe and secure environment (**Safety Instruction**).

[171] The Code of Conduct by which the Applicant was similarly bound, provided that the Applicant was required to '…[r]efrain from any activity where personal or professional conduct is likely to compromise the fulfilment of [his] professional responsibilities'.[257]

[172] The question that arises is whether the aforementioned instruction in the Code of Conduct and the Safety Instruction constituted lawful and reasonable instructions, such that the Applicant was obliged to comply with them. Complicating matters is the indefatigable fact that at least some of the offending text messages appear to have been sent outside of working hours and the Applicant sent the offending text messages to a co-worker with whom he was embroiled in an intimate relationship with.

[173] The starting point is the fact that at all material times the Applicant and the Person Impacted shared the same employer. Because of that and the positions they occupied, the

Applicant and the Person Impacted were required to work in the same physical work location. At all relevant times, the Applicant was aware of this fact. He was further aware that notwithstanding having sent the offending text messages to the Person Impacted, text messages that referenced the threat of violence and on any objective level were intimidating, the Person Impacted was obliged under her employment contract to present to work – whether that be the next day or the following day, depending on when the offending text message was sent. Therefore, the Applicant had, by his own conduct in sending the text messages threatening violence, knowingly established a work environment which now, on any objective level, would prove unsafe for the Person Impacted to work within.

[174] From an objective standpoint, it would be unreasonable for an employer to insist that an employee present to work in circumstances where his or her co-worker had threatened that same employee with violence (the conduct in this case extending beyond conduct that could be characterised as a 'bit ugly', a characterisation of the offending text messages that was advanced by the Applicant). Attendance at the workplace would inevitably expose that same employee to a potential hazard or harm in the form of the co-worker who had engaged in the offending conduct. On an objective level, it is open to find that such conduct would result in substantial and adverse effects on workplace relations and workplace productivity, hence the direct interests of the Respondent would therefore be put at stake as a consequence of the actions of the employee, who in this case was the Applicant.

[175] Before expanding upon this point further, the context of this matter demands further examination. It should be said that the Applicant perhaps sought to somehow sanitise his conduct, or minimise it, by drawing upon the context in which the offending text messages were sent – namely an intimate relationship where he asserts both he and the Person Impacted were abusive toward each other.[258] Whilst the intimidation and threat of violence may have been made 'out of hours' toward the Person Impacted as an intimate partner (not a co-worker), the intimidation and/or threat did not somehow extinguish when the Person Impacted entered the workplace. It continued to exist. That the conduct occurred away from the workplace did not alter this aspect of its character. There is simply no evidence to support a finding that the threat of violence or the intimidation arising from the offending text messages was confined to the parameters of the intimate relationship that existed outside of work and therefore had no bearing on the relationship of the Applicant and Person Impacted as co-workers within the same work environment. In my view, to adopt a standpoint to the contrary would be to impose an artificial construct that simply cannot be sustained.

[176] In *McManus*, the Court considered whether a direction to cease private sexually harassing behaviour would be lawful and concluded it would where 'the harassment has had and continues to have substantial and adverse effects on workplace relations, workplace performance and/or the "efficient equitable and proper conduct"... of the employer's business because of the proximity of the harasser and the harassed person in the workplace.'[259] However, the Court in that case cautioned that such direction could not be said to be lawful unless the harassment could reasonably be said to be a consequence of the relationship of the parties as co-employees (i.e. it is employment-related). The Court continued that an employer's direction against the privately engaged in sexual harassment of a co-employee, would not, for example, be likely to justify a direction given against an employee privately harassing a co-employee with whom he or she cohabited or was married, but from who he or she was later estranged. The Court considered that such a direction would, because of the prior relationship of the

parties, be unlikely to satisfy the first of the two conditions that the harassment could reasonably be said to be as a consequence of the relationship of the parties as co-employees.

[177] The Court in *McManus* addressed circumstances of sexual harassment where Mr McManus had been directed from contacting a Ms Penny Bond outside of the requirements of his official duties. The issue in contention was whether the direction was lawful. There was no indication that Mr McManus and Ms Bond were in a prior relationship and the case was not one that concerned dismissal. It follows that the proposition in *McManus* regarding an employee's private harassment of a co-employee with whom the employee had previously co-habited or was married, is a statement that is best regarded as obiter in this respect, and is a proposition by which I am not bound.

[178] The Applicant's conduct of sending the offending text messages arose from circumstances of a personal relationship with the Person Impacted, a relationship which admittedly appeared to vacillate between being coupled and not. Whilst sent out of hours, they can still properly be said to have a direct relationship to the Applicant's employment for the aforementioned reasons and those that follow.

[179] The offending text messages were sent against a backdrop of text dialogue where the Applicant informed the Person Impacted, 'I won't impact your employment status,' and 'What were you doing till 8 o clock u dodgy slut? Cya in the office moping like a victim' and 'Just don't undermine me at work… and hope that I am not already on anyone's radar cos I'll blame u' (**the Employment text messages**).

[180] With reference to the first text message, the Applicant informs the Person Impacted he will not impact the 'employment status' of the Person Impacted, it being reasonable to infer that he has the capability or authority to do just that – otherwise, why provide the reassurance. Evidently, the Applicant has utilised his position of authority within the Respondent organisation against the Person Impacted drawing upon the potential fragility of her employment. In doing so, there is a direct linkage between his conduct and the co-employee status of both him and the Person Impacted.

[181] The second text message sees the Applicant refer to the Person Impacted, not by name, but instead by the nomenclature of 'dodgy slut' in circumstances where he appears to be keeping her to account for her whereabouts, and then informs her that he will see her in the office. That is, the office of the Respondent. Of course, the text message concludes with the disparaging comment that the Person Impacted will be 'moping like a victim.' Again, the boundaries of the relationship extend from the personal sphere to that of the workplace milieu – the Applicant pointedly remarking that he will see the Person Impacted in her workplace.

[182] In the third text message, the Applicant provides a not-so-subtle warning to the Person Impacted not to 'undermine him at work'. Essentially, it is reasonable to infer that the Applicant is fettering the Person Impacted's voice to complain about his conduct within the workplace.

[183] Private conduct by one person towards a second person with the same employer may damage the employer's interests (and thus meet the *Rose v Telstra* criteria) if the capacity of the second person to perform his or her duties for the employer is affected by that conduct. This proposition is drawn from the President's consideration of *McManus* in his decision of *Keenan*.

In *Keenan*, it is not apparent that the President attended to the Court's observations in respect to sexual harassment in circumstances where the co-employees were in a personal relationship of cohabitation or marriage but were later estranged. This is understandable given there was no requirement for the President to do so given the factual circumstances with which he was presented. Notwithstanding, I consider the proposition sound and equally relevant here.

3.5 My conclusion regarding valid reason

[184] While the Applicant's conduct of sending the offending text messages and the Employment text messages may have been engaged in out of hours, it can still properly be said to have a relationship to his employment. The Code of Conduct obliged the Applicant '…[r]efrain from any activity where personal or professional conduct is likely to compromise the fulfilment of [his] professional responsibilities'.[260] In my view, the subject matter of such direction to the Applicant was appropriate given his position in the Respondent organisation and the duties and responsibility of his role, in addition to the services that the Respondent provided to the community at large. This included the provision of residential care to vulnerable persons in society. It therefore constituted a lawful and reasonable direction, notwithstanding its regulation of the Applicant's personal activities.

[185] The Applicant was further required to take responsibility for personal health and safety in the workplace. He was obliged to comply with all of the Respondent's occupational safety and health policies, and his duties and responsibilities extended to promoting and maintaining a safe and secure environment. I consider it uncontroversial that the Safety Direction would constitute a lawful and reasonable direction in light of state legislation regulating safety and health within the workplace – it being a legitimate subject matter over which the Respondent and Applicant have specific duties.

[186] As already observed at paragraph [86] of this decision, a failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer.[261] In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a 'valid reason' for dismissal.[262]

[187] By engaging in the conduct that he did, namely, the sending of the offending text messages and the Employment text messages, the Applicant evinced a substantial and wilful breach of the Code of Conduct and the Safety Instruction. Accordingly, for the reasons stated, I conclude that the Applicant's conduct constituted a valid reason for his dismissal.

[188] At this point, I consider it relevant to observe that the Applicant had utilised the Respondent's mobile phone (resource) to send both the offending text messages and the Employment text messages. At hearing, the Applicant was asked whether he had ever been spoken to by anybody at the Respondent about the inappropriate use of his mobile phone or laptop, and he responded 'no'.[263] The Code of Conduct obliged the Applicant to '[r]espect the property, funds and facilities of Cyrenian House, and ensure that all use of all resources [were] for authorised purposes only'. In the present case, I find that the Applicant contravened this obligation having used the Respondent's mobile phone in the manner so described. In the circumstances, it is irrelevant whether the Respondent spoke to the Applicant regarding the inappropriate use of the mobile phone assigned to him – for it was not until after the Applicant's

dismissal that the Respondent became aware of the offending text messages and the Employment text messages. Notwithstanding, it is not unreasonable to expect that a person holding the position of General Manager within an organisation, such as the Respondent, would understand that the mobile phone provided by his employer was not to be used for the purposes of advising a co-worker, for example, of 'I'll smash you if you lie again, cunt'. Whilst having already concluded that there was a valid reason for the Applicant's dismissal, inevitably the Applicant's contravention of the Code of Conduct in this respect would also prove to be a valid reason.

[189] At paragraph [155] of this decision, I referred to the Applicant's misconduct in respect of traversing with the Person Impacted their personal relationship and his viewpoint that he no longer wished to have a personal relationship with the Person Impacted. Such discussion gave rise to an altercation, and I highlighted that the work environment was not the place to convey such message or to hold such discussion. Whilst in and of itself, I do not consider that the Applicant's misconduct in this respect warranted censure in the form of dismissal, in my opinion it can be considered as supporting the conclusion that there was a valid reason for the Applicant's dismissal. Albeit that conclusion is not dependent on this particular finding.

[190] The Respondent submitted that there had been further significant misconduct on behalf of the Applicant discovered after the dismissal.

[191] First, the Respondent submitted that a syringe was found in the office of the Applicant. In its evidential case, the Respondent relied upon the evidence of Mr Scarrott who expressed that he suspected that the Applicant was using drugs, given the Applicant was non-contactable 'a lot of the time'.[264] Ms Daws also gave evidence that she suspected that the Applicant was using drugs from around 2019 to 2022, observing that the Applicant looked like he was '…out of it, pinpoint pupils, under the influence of drugs'.[265]

[192] The Respondent further relied upon the Applicant's misconduct which had warranted the issuance of a warning to the Applicant, after he failed to correctly dispose of drugs located in the possession of a client. Mr Hunter is stated to have held 'suspicions' about the Applicant following the incident in May 2021. In respect of the incident, Mr Hunter gave evidence that in May 2021, the Applicant telephoned him and advised that he had taken a bag of white power (suspected to be heroin) home with him and it was in his car.[266] The accepted procedure being to dispose of the drugs when and where they have been located, in the presence of another staff member. The correct disposal procedure did not occur and as a consequence the Applicant was issued a written warning given his lack of judgment. It should be noted that at the time, the Applicant confirmed with Mr Hunter when the drugs had been disposed of. Whilst Mr Hunter became suspicious of the Applicant after the incident, it is not evident that the Respondent took steps to address such concerns.

[193] Whilst a syringe may have been located in the office of the Applicant subsequent to his dismissal and several witnesses of the Respondent held suspicions that the Applicant was using drugs, I consider it unreasonable to infer that the detection of such syringe in light of the other evidence leads to a finding that the Applicant contravened an alcohol and other drug policy within the Respondent organisation. The Respondent presents no evidence that at any time the Applicant was subjected to drug testing. This is despite the Applicant occupying a position with an organisation which provides withdrawal and intervention services.

[194] On receipt of the Applicant's laptop, a laptop that was the property of the Respondent, a document was located which was said to be a transfer of a speeding fine and associated demerit points from the Applicant to the Person Impacted. The document listed Mr Hopkins as the witness and had been purportedly signed by him. Mr Hopkins gave evidence that he had never seen the document before it was presented to him by Mr Scarrott, that the signature was not his and he did not recall the Applicant ever having asked him to sign it.[267] The Applicant gave evidence that there had been fines on his fridge and that the Person Impacted went and paid the fines, albeit that none of the fines concerned the 'transferring thing'. The Applicant denies knowing that the document went anywhere and asserts that he did not know that Mr Hopkins was going to sign it.[268] On balance, the evidence is insufficient for the Commission to find that the Applicant falsified the document in question.

[195] Ms Daws gave evidence that on the return of the Applicant's laptop she found a court to document dated 23 December 2021, about the Applicant having breached a FVRO relating to another woman.[269] Ms Daws said that the Applicant had not disclosed to the Respondent the FVRO. The following explanation was provided by the Applicant at hearing regarding the FVRO, the breach of the FVRO and such breach resulting in a spent conviction:

> Okay. There has been a bit of discussion about a family violence restraining order. Were final orders ever made in relation to that matter?---No. It was never – it was well-known that it was never going to go anywhere because it just wasn't. And it got dropped and turned into a mutual undertaking.
>
> Okay?---At my request.
>
> So was there ever a final hearing?---No.
>
> Okay. And was an interim order made in relation to that matter?---Yes. An interim order was made. And then it was dropped before it became a final.
>
> Were you present when that interim order was made?---Not when it was created but no, I think that happened between – so it was done in – so the order was made in your absence?---Yes.
>
> Okay. And in your statement you have mentioned that you intended to send a text message to a family member?---Yes.
>
> And you inadvertently sent that message to the wrong - - -?---I said 'I love you' to somebody who I did not love. And so – and then I rang the police straight away and said, 'I have just done this. Technically, I've just breached this. Could you let her know? In case she's freaking out or wants to turn it into something.' Yes. That's what's happened.
>
> And you ended up being charged as a result of that?---Yes. I got charged anyway.
>
> And did you receive a spent conviction order as a result of that?---Yes.[270]

[196] Ms Daws stated that the Respondent had previously terminated the employment of a supervisor at Serenity Lodge Withdrawal Unit who had a violence restraining order in place against him.[271]

[197] Returning to the Code of Conduct, it requires that an employee is to refrain from any activity that negatively affects their responsibility to provide a positive role model. In my view, the Applicant exercised poor judgment when he was not transparent with the Respondent about having been issued an interim violence restraining order, a breach of the same, the charge, and the issuance of a spent conviction. He was required to refrain from activities that would otherwise negatively affect his responsibility to provide a positive role model. In circumstances where a violence restraining order had been issued, it was, in my view, incumbent upon him to inform the Respondent of the same given the community members with whom he worked. The Applicant's failure to do so in such circumstances, constituted, in my view, a valid reason for his dismissal, albeit it has been unnecessary to call upon this conduct to support the conclusion already drawn.

3.6 Notification of the reason and an opportunity to respond

[198] At a general level, the case law makes it plain that when it comes providing an opportunity to respond, the process does not require any degree of formality, and that the requirement is to be applied in a practical way in order to ensure that the employee is treated fairly.[272] It is accepted that where an employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of the sub-section.[273]

[199] It is evident from Ms Daws' account and that of Mr Hunter that the decision to terminate the Applicant's employment was made prior to the disciplinary meeting on 4 January 2023. Simply put, the Applicant was not notified for the reasons for his dismissal prior to him being dismissed and he was therefore not provided with an opportunity to respond to those reasons.

3.7 Support person

[200] There were no discussions relating to the Applicant's dismissal prior to him being dismissed. Accordingly, the issue of him being allowed a support person does not arise for consideration.

3.8 Warnings about unsatisfactory performance

[201] As will be evident from the background material, it was not the case that the Respondent sought to rely upon unsatisfactory performance to justify dismissing the Applicant.

3.9 Size of the Respondent's enterprise and dedicated human resource specialists

[202] The Respondent business is of a reasonable size, employing or engaging more than a couple of hundred workers. It appears to have its own internal human resources expertise. However, it is apparent that such expertise was not drawn upon to obtain advice regarding the disciplinary process. It is clear that this affected the procedures it adopted in dismissing the Applicant. Given the Respondent's size, in my view, it could and should have obtained advice from its internal human resources advisor or an external provider, as to how to afford procedural fairness before deciding to summarily dismiss the Applicant.

3.10 Any other matters considered relevant

[203] There are certain matters that I consider are relevant and do not favour a conclusion that the Applicant's dismissal was unfair.

[204] First, in the disciplinary meeting on 4 January 2023, the Applicant undertook a factory reset of the Respondent's mobile phone. He did so in the course of a disciplinary meeting where he had been notified that his employment would be terminated due to allegations of domestic violence. As observed, in engaging in this unauthorised conduct the Applicant effectively removed from the mobile phone evidence that may have proved relevant to his dismissal and to this application.

[205] Second, had not the Person Impacted taken screenshots of the offending text messages and the Employment text messages and saved them on the Respondent's laptop, its response to this application would have been prejudiced by the actions of the Applicant. This is evident given the findings that have led to the conclusion that there was a valid reason for the Applicant's dismissal.

[206] Third, in his evidence the Applicant acknowledged that the offending text messages disgusted him and were ill-advised,[274] were very ugly[275] and then, they were 'a bit ugly' and 'unsavoury'[276]. In his witness statement the Applicant stated:

> Whilst I have made some very ugly comments in response to the continual cycle of dishonesty and betrayal from [the Person Impacted], I was not abusive towards her. On the contrary, it is clear to me that I was on the receiving end of continual emotional abuse, betrayal and gas lighting behaviour that I have struggled to walk away from.[277]

[207] At hearing, the Applicant gave further evidence in response to questions about having sent the offending text message of '[h]onestly, keep coming at me with attitude and I'll knock you out, cunt'.[278] Following what the Applicant admits was a threat of physical violence,[279] the Applicant sends a text stating 'I was joking about violence, of course', laughing face emoji. When it was stated to the Applicant that he was concerned about incorrect assertions of violence and yet he had made a 'joke' about violence, and that appeared quite inconsistent with being concerned about the Person Impacted lying, the Applicant responded:

> It doesn't to me, actually, because my concerns with the person impacted is actually making up things that destroy my life, as opposed to me saying something *a bit ugly* that she knows is never going to happen.[280] (italics my emphasis)

[208] The Applicant's inconsistent characterisation of the offending text messages, notwithstanding his admission that they were threats of violence, demonstrates an acute misapprehension of the gravity of his misconduct. Whilst the Applicant in this instance characterises the offending text messages as 'a bit ugly' or 'unsavoury', those same text messages constitute the gravamen of the Applicant's misconduct. It is concerning that a person in the position previously held by the Applicant has sought to minimise threats of violence towards a co-worker, in the context of which they were made and in the manner that he has.

[209] Fourth, at paragraph [44] of his witness statement the Applicant states, in respect of the Person Impacted, 'I was not abusive towards her'. At paragraph [5] of his supplementary witness statement, the Applicant states that both he and the Person Impacted abused each other,

and that the Person Impacted abused him more than he her. There is a distinct inconsistency in the Applicant's first witness statement and that of his supplementary statement that again gives rise to consternation that he may not have appreciated the gravity of his misconduct. Whilst the Applicant may have considered the Person Impacted subjected him to abuse, it does not assist in minimising the gravity of his misconduct regarding the Employment text messages or the offending text messages.

[210] I have found that the Applicant's conduct, as detailed under my consideration of 'valid reason', constituted serious misconduct. Whilst the Applicant had worked for the Respondent over an extended period, it was not the case that he had an unblemished employment record given the warning he had received in or around May 2021. Further, it is to be appreciated that the Applicant's dismissal was said to have had a significant economic impact upon the Applicant, with him having to forego the construction of a house. However, the dismissal of the Applicant was not harsh. It was a proportionate response to the valid reason for the Applicant's dismissal.

[211] However, the procedural errors in this case were matters of significance such that the Applicant was not notified of the valid reason and provided with an opportunity to respond. The Respondent was entitled to act swiftly when confronted with the allegations it had before it. However, the Respondent then hastily moved to convene a disciplinary meeting with the Applicant without first clearly articulating the issues under examination and allowing the Applicant to provide a response to the same. The evidence establishes that the Respondent had already pre-determined its decision to dismiss the Applicant conveyed verbally during the meeting held on 4 January 2023. The dismissal of the Applicant was clearly undertaken with the adoption of defective procedure.

[212] Consequently, whilst the Applicant was dismissed for valid reason involving his serious misconduct, the significant procedural defects evident in respect of the determination and implementation of the dismissal of the Applicant call into question whether the dismissal was unreasonable or unjust.

[213] The type of conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained by the High Court of Australia in *Byrne v Australian Airlines Ltd*.[281] Justices McHugh and Gummow explained as follows:

> It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.[282]

[214] In my opinion, the dismissal was not unjust or unreasonable because there was a valid reason for the Applicant's dismissal, and there was no tenable basis upon which his employment could have continued in light of that valid reason. Had the Applicant been notified of the valid reason and provided with an opportunity to respond, I do not consider that there is any reasonable possibility that he could have advanced any response which might have altered the

outcome. The Applicant admitted to sending the offending text messages and the Employment text messages. Further, it was uncontroversial that he had utilised the Respondent's resource to do so. The Applicant admitted that the content of the offending text messages constituted threats of violence. Those threats of violence were towards his co-worker, the Person Impacted, and whilst conveyed against the backdrop of a personal relationship, for reasons already disclosed, they constituted a breach of the Applicant's contractual obligations. Once the offending text messages and Employment text messages came to light, the consequence for his employment was unavoidable. It is not the case that the Applicant was not 'guilty' of the misconduct traversed in these reasons, and it is not the case that the dismissal was unreasonable, because of the admitted facts.

4 Conclusion

[215] It is therefore the case that the Applicant's dismissal was not unfair. The Applicant's application for an unfair dismissal remedy is therefore dismissed and an Order[283] issues concurrently with this decision.

[216] However, if I am wrong on this point and the Applicant's dismissal was unfair because of the procedural deficiencies, I am of the view that reinstatement would not be an appropriate remedy and that an amount of compensation would not be forthcoming for the following reasons.

5 Remedy

[217] The Commission must be satisfied that reinstatement is inappropriate and that an order for payment of compensation is appropriate in all the circumstances.[284] In relation to reinstatement, it would be inappropriate in this case. It is evident that the Applicant has demonstrated a lack of insight into his misconduct in light of his characterisation of the offending text messages and I consider his action in conducting a factory reset of his mobile phone during the disciplinary meeting was an unauthorised action for which a plausible explanation was not provided. I am satisfied that the relationship between the Applicant and the Respondent has broken down such that there is a loss of trust and confidence in the Applicant that would not be able to be re-established. It is therefore necessary to consider whether an award of compensation would be appropriate in this case.

[218] In assessing compensation, it is necessary to take into account all the circumstances of the case, including the specific matters identified in ss 392(2)(a)–(g), and to consider the other relevant requirements of s 392.

[219] The well-established approach to the assessment of compensation under s 392 is to apply the '*Sprigg* Formula', derived from the decision of the Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket* (**Sprigg**).[285] This approach was articulated in the context of the current legislative framework in *Bowden v Ottrey Homes – Cobram & District Retirement Villages Inc* (**Bowden**),[286] and I have applied this methodology in reaching my decision.

[220] Under that approach, the first step to be taken in assessing compensation is to consider s 392(2)(c), that is, to determine what the Applicant would have received, or would have been

likely to receive, if the Applicant had not been dismissed (the **anticipated period of employment**). In *Bowden*, this was described in the following way:

> [33] The first step in this process - the assessment of remuneration lost - is a necessary element in determining an amount to be ordered in lieu of reinstatement. Such an assessment is often difficult, but it must be done. As the Full Bench observed in *Sprigg*:
>
> > '... we acknowledge that there is a speculative element involved in all such assessments. We believe it is a necessary step by virtue of the requirement of s.170CH(7)(c). We accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law.'
>
> [34] Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. We refer to this period as the 'anticipated period of employment'...[287]

[221] Once the first step of determining the anticipated period of employment has been undertaken, various adjustments are made in accordance with s 392 and the formula for matters including monies earned since dismissal, contingencies, any reduction on account of the employee's misconduct, and the application of the cap of six months' pay. This approach is, however, subject to the overarching requirement to ensure that the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case.

[222] The Applicant's rate of pay was $153,527.19 (gross) per annum exclusive of superannuation. This amounted to a gross weekly remuneration of $2,952.45.

[223] The evidence suggests that the Applicant's performance prior to dismissal was under scrutiny. Mr Hunter gave evidence that he had observed poor performance and had issued a document titled 'Issues raised for development' to the Applicant on 20 June 2022. That same document detailed, amongst other feedback, the following performance issues:

> 2. Project management
>
> - Lacks structure, planning, effective management and communication and follow-through
> - Sense that project completion rarely seems to occur properly
> - Lack of appropriate written record on some key projects. This compromised the sustainability and fidelity of the work undertaken.
> - Examples:
>   - Medication management / training / competency
>   - Saranna review
>   - Establishment project
>   - Models of Care – including Low Medical Withdrawal
>
> 3. Operational management
>
> - Sometimes does not clearly demonstrate that he is 'across his brief'. David and [sic] be vague and appear hesitant and unsure, when precision and detail is required to instill necessary confidence.
> - Perception of not in the office enough, and can be late for meetings, and can appear unprepared at times. These issues appear more significant than they probably are.

> Perception not helped in context of loose approach to project work, and inconsistent and sometimes inadequate communication up the line to COO and other members of Exec.
> - Example: Recently gave impression of having 'eyes off the ball', after an excellent period of focus and work on issue of occupancy in our TCs.[288]

[224] According to Mr Hunter, he had verbally noted to the Applicant that his poor performance could, eventually, lead to a formal Performance Improvement Plan and ultimately dismissal if adequate performance was not achieved.[289] Mr Hunter said that he had not seen an improvement in the Applicant's performance notwithstanding the identification of the issues for development.[290]

[225] The Applicant acknowledged that he had been informed that there were issues with his performance.[291] However, when it was suggested to the Applicant that in his first witness statement no one had ever suggested that he had poor performance, the Applicant replied:

> I don't know that it was suggested that I've got poor performance, to be honest. It was suggested that there's things I could improve on, but that's part of the supervision process, yes.[292]

[226] In short, having considered all the evidence, but for the Applicant's dismissal, I am satisfied that the Applicant would have proceeded to work for the Respondent for a period that extended to eight weeks. It is evident that the Applicant's performance was substandard given the expectations of his role. Whilst Mr Hunter's feedback in the 'Issues raised for development' included some positive observations, overall, I am unconvinced that the anticipated period of employment would have extended past eight weeks, a timeframe in which the Applicant would have been performance managed. Therefore, had the Applicant not been dismissed, he would have earned $23,619.60 (gross).

[227] However, s 392(3) of the Act requires that if I consider that misconduct on the part of the Applicant contributed to the dismissal, I must reduce the amount of compensation that would otherwise be awarded. I have concluded that the Applicant's actions in relation to the incident that led to his dismissal warranted censure, but that the Respondent failed to notify the Applicant of the valid reason and provide him with the opportunity to respond. Further, with respect to there being substantiated misconduct, I also refer to the Applicant's failure to disclose the FVRO to the Respondent. The seriousness of the Applicant's misconduct reduces the amount of compensation, and in such circumstances, I would reduce any such (notional) amount to nil given gravity of the Applicant's misconduct. It therefore proves unnecessary to consider the remaining aspects of s 392(2) of the Act.

DEPUTY PRESIDENT

Appearances:

E Rennie for the Applicant.
C Lewin for the Respondent.

Hearing details:

2023.
Perth:
19 & 20 June.

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[1] Digital Hearing Book Part 2, 113 (**DHB Part 2**).

[2] Ibid.

[3] PR763167.

[4] Witness Statement of Carol Daws, attachment CD-2A (**Daws Statement**).

[5] Ibid attachment CD-2B.

[6] Ibid attachment CD-3.

[7] Ibid [5].

[8] Ibid [6].

[9] Ibid.

[10] Ibid [8].

[11] Ibid [11].

[12] Ibid [12].

[13] Ibid.

[14] Ibid [13].

[15] Ibid.

[16] Ibid [17].

[17] Ibid.

[18] Ibid [18].

[19] Ibid [21].

[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Ibid [28].

[24] Ibid.

[25] Ibid [29].

[26] Ibid [34].

[27] Ibid.

[28] Ibid [38].

[29] Ibid [39].
[30] Ibid [40].
[31] Ibid [41].
[32] Ibid.
[33] Ibid [42].
[34] Ibid [48].
[35] Ibid [49].
[36] Ibid [51].
[37] Ibid [54].
[38] Ibid.
[39] Ibid [64]–[72].
[40] Ibid [44]–[45].
[41] Ibid [72].
[42] Ibid [73].
[43] Ibid [74].
[44] Ibid [75].
[45] Ibid [77].
[46] Ibid [81].
[47] Ibid [82].
[48] Ibid [83].
[49] Ibid [85].
[50] Ibid [86].
[51] Ibid [87].
[52] DHB Part 2 (n 1) 124–6.
[53] Daws Statement (n 4) [90], annexure CD-4.
[54] Ibid [91].
[55] Witness Statement of Simon James Cameron Hunter, [17] (**Hunter Statement**).
[56] Ibid [19].
[57] Ibid [22].
[58] Ibid.
[59] Ibid [24].
[60] Ibid [33].
[61] Ibid [34].
[62] Ibid [37].
[63] Ibid [38].
[64] Ibid [41].
[65] Ibid [44].
[66] Ibid [57].
[67] Ibid [69].
[68] Ibid [70]
[69] Ibid [64].
[70] Ibid [67].
[71] Ibid [74].
[72] Ibid [76].

[73] Ibid [77]–[81].

[74] Witness Statement of Stephen John Scarrott, [13] (**Scarrott Statement**).

[75] Ibid [14].

[76] Ibid [16].

[77] Ibid.

[78] Ibid [23].

[79] Ibid [23].

[80] Ibid [24].

[81] Ibid [31].

[82] Ibid [37].

[83]Ibid.

[84] Ibid [41]

[85] Ibid.

[86] Witness Statement of Nicola Iannantuoni, [14] (**Iannantuoni Statement**).

[87] Ibid [19].

[88] Ibid [26].

[89] Ibid 'Other Conversations' [1].

[90] Ibid [27]–[28].

[91] Ibid 'Other Conversations' [2].

[92] Ibid 'Other Conversations' [4].

[93] Witness Statement of Michele Pilutkiewicz, [5]–[6] (**Pilutkiewicz Statement**).

[94] Ibid [10].

[95] Ibid [16].

[96] Ibid [20].

[97] Ibid [25].

[98] Ibid.

[99] Ibid attachment MP-1.

[100] Ibid [21].

[101] Ibid [22].

[102] Ibid [23].

[103] Witness Statement of Thomas Andrew Patrick Hopkins, [3] (**Hopkins Statement**).

[104] Ibid [4].

[105] Ibid [5].

[106] Witness Statement of Colette Wrynn, [13] (**Wrynn Statement)**.

[107] Ibid [15].

[108] Witness Statement of Deborah Hamm, [13].

[109] Witness Statement of Therese Mahoney, [4] (**Mahoney Statement**).

[110] Ibid.

[111] Ibid [10].

[112] Ibid [11].

[113] Ibid [15].

[114] Ibid [19].

[115] Ibid [24]–[26], attachments TM-2 and TM-3.

[116] Ibid [27].

[117] Ibid [28].

[118] Ibid [35].

[119] Witness Statement of David Lonnie, [4] (**Lonnie Statement**).

[120] Ibid [33].

[121] Ibid [36].

[122] Ibid [44].

[123] Ibid.

[124] Ibid [42].

[125] Ibid [43].

[126] Supplementary witness statement of David Paul Lonnie, [3]–[6], [38] (**Supplementary Lonnie Statement**).

[127] Lonnie Statement (n 119) [47].

[128] Ibid [50]–[51].

[129] Ibid [57].

[130] Ibid [56].

[131] Ibid [59].

[132] Ibid [63].

[133] Ibid [67].

[134] Ibid [70].

[135] Ibid [71].

[136] Ibid.

[137] Ibid [73].

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

[139] *B v Australian Postal Corporation* (2013) 238 IR 1, 14 [34]–[36].

[140] Daws Statement (n 4) [41].

[141] See *Public Employment Office, Department of Attorney General and Justice (Corrective Services NSW) v Silling* [2012] NSWIRComm 118 (**Silling**).

[142] *Edwards v Giudice* (1999) 94 FCR 561, 564; *King v Freshmore (Vic) Pty Ltd* (Australian Industrial Relations Commission, Ross VP, Williams SDP and Hingley C, 17 March 2000) [24].

[143] Ibid.

[144] [2018] FWC 2398.

[145] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[146] Ibid 363 (Dixon J).

[147] Ibid 362 (Dixon J).

[148] Ibid 350 (Rich J).

[149] *Sodeman v The King* (1936) 55 CLR 192, 216 (Dixon J).

[150] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50.

[151] *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388, [35] (**Bragg**), approved in *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176, 189 [35]–[37].

[152] *NOM v Director of Public Prosecutions* (2012) 38 VR 618, 655–6 [124].

[153] *Bragg* (n 151) [35], [75].

[154] [1998] AIRC 1592 (**Rose v Telstra**).

[155] [2015] FWC 3156 (**Keenan**).

[156] Ibid [81].

[157] Ibid [84].

[158] [2002] FCA 32.

[159] Ibid [71].

[160] Ibid.

[161] (2005) 144 FCR 402, 409 [35]–[36] (**Trainor**).

[162] Ibid 409–10 [41].

[163] Ibid 409 [40].

[164] Ibid 416 [73].

[165] *Keenan* (n 155) [96].

[166] Ibid [91]–[92].

[167] (2013) 250 CLR 246.

[168] *Kennan* (n 155) [91].

[169] [2001] NZLR 407 (**Smith**).

[170] *Keenan* (n 155) [97].

[171] Ibid [98].

[172] Ibid [94].

[173] (1996) 70 FCR 16 (**McManus**).

[174] (1938) 60 CLR 601, 621–2

[175] *McManus* (n 173) 23.

[176] Ibid 29.

[177] Ibid 31.

[178] Ibid.

[179] Ibid 29.

[180] Ibid.

[181] Ibid.

[182] (2008) 170 IR 1.

[183] Ibid 4 [4(14)].

[184] *Keenan* (n 155) [110].

[185] *Silling* (n 141).

[186] *Kolodjashnij v J Boag & Son Brewing Pty Ltd* (2010) 195 IR 279.

[187] *Silling* (n 141) [50].

[188] Transcript of Proceedings, *Lonnie v WA Council on Addictions Incorporated* (Fair Work Commission, U2023/565, Beaumont DP, 19 June 2023) [PN417] (**Day One Transcript**).

[189] Ibid.

[190] (1938) 60 CLR 681, 689 (Rich J), 691–2 (Dixon J), 698 (McTiernan J).

[191] *Rose v Telstra* (n 154).

[192] Mahoney Statement (n 109) [10].

[193] Ibid [11].

[194] Ibid [19].

[195] Daws Statement (n 4) [28].

[196] Iannantuoni Statement (n 86) [14].

[197] Daws Statement (n 4) [54].

[198] Pilutkiewicz Statement (n 93) [25].

[199] Ibid.

[200] Wrynn Statement (n 106) [13].

[201] Ibid [15].

[202] Mahoney Statement (n 109) [24]–[26], attachments TM-2 and TM-3.

[203] Pilutkiewicz Statement (n 93) [10].

[204] Ibid [16].

[205] [2016] FWC 6992.

[206] Iannantuoni Statement (n 86) [26].

[207] Daws Statement (n 4) [35].

[208] Ibid [49].

[209] Hunter Statement (n 55) [57]–[58].

[210] Ibid.

[211] Scarrott Statement (n 74) [18].

[212] *Keenan* (n 155) [81].

[213] *Trainor* (n 161) 415 [70].

[214] Ibid 416 [73].

[215] *McManus* (n 173) 29.

[216] Ibid 31.

[217] Ibid.

[218] *Keenan* (n 155) [97].

[219] *Smith* (n 169).

[220] *McManus* (n 173) 29.

[221] Ibid.

[222] Daws Statement (n 4) attachment CD-2A.

[223] Ibid attachment CD-3.

[224] *Blyth Chemicals Ltd v Bushnells* (1933) 49 CLR 66, 81–2.

[225] Ibid 74.

[226] Day One Transcript (n 188) [PN653].

[227] (1959) 101 CLR 298.

[228] *Hyde v Serco Australia Pty Ltd* [2018] FWCFB 3989, [102] (**Hyde**).

[229] Hyde (n 228).

[230] (Australian Industrial Relations Commission, Ross VP, Drake DP and Commissioner Cargill, 4 November 1997).

[231] *Hyde* (n 228) [103].

[232] Pilutkiewicz Statement (n 93) [20].

[233] Daws Statement (n 4) [34].

[234] Transcript Day One (n 188) [PN273]; DHB Part 2 (n 1) 184.

[235] Daws Statement (n 4) [41].

[236] Mahoney Statement (n 109) [27].

[237] Daws Statement (n 4) [51].

[238] Day One Transcript (n 188) [PN270]–[PN271].

[239] Ibid [PN274].

[240] Ibid.

[241] (2012) 219 IR 367, 371–2 [14]–[15]. See also *Smith v Moore Paragon Australia Ltd* (Australian Industrial Relations Commission, Ross VP, Lacy SDP and Simmonds C, 21 March 2002).

[242] Day One Transcript (n 188) [PN230].

[243] Ibid [PN277].

[244] [2023] FWCFB 79, [37], citing *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359, 373, 377–8; *Lane v Arrowcrest* (1990) 27 FCR 427, 456, cited with approval in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 467–8 (McHugh and Gummow JJ) (**Byrne**).

[245] Day One Transcript (n 188) [PN286]–[PN295].

[246] Ibid [PN299]–[PN305].

[247] Ibid [PN307].

[248] Ibid [PN307].

[249] Ibid [PN461].

[250] Ibid [PN463].

[251] Ibid.

[252] Ibid [PN361].

[253] Ibid [PN362].

[254] Ibid [PN608].

[255] DHB Part 2 (n 1) 59–63.

[256] Ibid 64.

[257] DHB Part 2 (n 1) 114.

[258] Supplementary Lonnie Statement (n 126) [5].

[259] *McManus* (n 173) 29.

[260] DHB Part 2 (n 1) 114.

[261] *B v Australian Postal Corporation* (n 139) 14 [36].

[262] Ibid.

[263] Day One Transcript (n 188) [PN 501].

[264] Scarrott Statement (n 74) [14].

[265] Daws Statement (n 4) [20].

[266] Hunter Statement (n 55) [34].

[267] Hopkins Statement (n 103) [5].

[268] Day One Transcript (n 188) [PN493].

[269] Daws Statement (n 4) [90].

[270] Day One Transcript (n 188) [PN503]–[PN511].

[271] Ibid [PN639].

[272] *Royal Melbourne Institute of Technology v Asher* (2010) 194 IR 1, 14–15 [26].

[273] Ibid; *Osman v Toyota Motor Corporation Australia Ltd* (Australian Industrial Relations Commission, Ross VP, Lacy SDP and Commissioner O'Connor, 17 October 2001); *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1; *Selvachandran* (n 138).

[274] Day One Transcript (n 188) [PN307].

[275] Lonnie Statement (n 119) [44].

[276] Supplementary Lonnie Statement (n 126) [4].

[277] Lonnie Statement (n 119) [44].

[278] Day One Transcript (n 188) [PN299].

[279] Ibid [PN302].

[280] Ibid [PN305].

[281] *Byrne* (n 244).

[282] Ibid 465.

[283] PR764125.

[284] *Fair Work Act 2009* (Cth) ss 390(3)(a)–(b).

[285] (1998) 88 IR 21.

[286] (2013) 229 IR 6.

[287] Ibid 19 [24], quoting *Ellawala v Australian Postal Corporation* [2000] AIRC 1151.

[288] DHB Part 2 (n 1) 158.

[289] Hunter Statement (n 55) [24].

[290] Ibid [23].

[291] Day One Transcript (n 188) [PN218].

[292] Ibid [PN219].