



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Robert Crook

v

CITIC Pacific Mining Management Pty Ltd
(U2023/3578)

DEPUTY PRESIDENT O'KEEFFE

PERTH, 22 SEPTEMBER 2023

Application for relief from unfair dismissal. Applicant unfairly dismissed. Reinstatement, continuity of employment and service, and restoration of lost pay ordered.

[1] On 27 April 2023, Mr Robert Crook (the Applicant) made an application to the Fair Work Commission (the FWC) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with CITIC Pacific Mining Management Pty Ltd (the Respondent). The Applicant sought reinstatement, restoration of lost pay and maintenance of his continuity of service.

Background

[2] The Applicant was employed by the Respondent from 20 August 2020 until 6 April 2023 as a Dump Truck Operator at the Cape Preston mine site.

[3] On 25 March 2023 a fellow employee, Ms Sarah Kimber (Ms Kimber), made a complaint to the Respondent about the Applicant's behaviour. Specifically, she claimed that the Applicant had, in late December 2022 or early January of 2023 during an end of shift bus ride, instigated a sexually explicit conversation with several other employees that took place around the seat in which she was sitting. During this conversation, the complainant claimed that the Applicant passed a mobile phone showing explicit images between herself and the passenger beside her in a manner such that they were able to clearly see the contents. Ms Kimber further complained that in early March 2023 at a light vehicle park-up area, the Applicant stared at her in a lewd manner and remarked to fellow employees "Coore look at that".

[4] As a result of this complaint, the Applicant was called to a meeting with his supervisor Mr Greg Peillon and Mr Quinton Dowler on 25 March 2023 and asked to make an immediate written response to the allegations made by Ms Kimber. Having made this response, he was then stood down pending further investigation.

[5] On 27 March 2023 the Applicant was called to a further meeting with Mr Jason Woolaston (Mr Woolaston), Area Manager for Load and Haul at Cape Preston and Mr Steven

Reynolds, Manager of Employee Relations to discuss the allegations against him. At this meeting the Applicant was represented by Mr Andy Duffy, Organiser for the Australian Workers' Union (AWU). The result of that meeting was that the Respondent undertook to investigate the matter further. The Applicant remained on stand-down but was flown home to Perth.

[6] On 6 April 2023 a third meeting was held in the offices of the Respondent in Perth. Present were the Applicant, his wife, Mr Michael Reynolds, the Mining Manager for the Cape Preston Mine and Mr Peter Stillman, Manager of Industrial Relations for the Respondent. AWU Official Mr Duffy attended the meeting via telephone. The outcome of this meeting was that the Respondent terminated the Applicant's employment.

The hearing

[7] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[8] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing for the matter (s.399 of the FW Act).

Permission to appear

[9] The Applicant was represented by the AWU. As set out in s596(4)(b)(i) of the FW Act, the Applicant did not need permission to be represented by the AWU.

[10] The Respondent sought to be represented by counsel. The Applicant did not object to the Respondent being represented. In addressing s596(2)(a) the Respondent noted, in its submissions on representation, the significant factual disagreements between the parties and the issues that would inevitably arise from that disagreement, such as the need for careful and appropriate cross examination. The Respondent also made relevant submissions with respect to s596(2)(b) and (c). It is clear that the FWC only needs to find one of the circumstances in s596(2) to be applicable and in this instance, I was persuaded that the complexity of the matter was such that the efficient conduct of the hearing would be best served by the Respondent being granted permission to be represented.

Witnesses

[11] The Applicant gave evidence on his own behalf and the following witnesses also gave evidence on his behalf:

- Mr Cooper Flowers (Mr Flowers), co-worker with the Applicant
- Mr Jay Manu (Mr Manu), co-worker with the Applicant
- Ms Kim Paterson (Ms Paterson), co-worker with the Applicant
- (Name Redacted), co-worker with the Applicant
- Mr Piotr Rogala (Mr Rogala), co-worker with the Applicant
- Mr Gavin Pearmine (Mr Pearmine), co-worker with the Applicant

[12] The following witnesses gave evidence on behalf of the Respondent:

- Mr Michael Reynolds, Mine Manager at the Cape Preston mine site
- Ms Sarah Kimber, co-worker with the Applicant
- Mr Jason Woolaston, Area Manager – Load and Haul at the Cape Preston mine site
- Mr Brynn Boyd (Mr Boyd), Superintendent of Mine Production at the Cape Preston mine site
- Ms Tamara Klimova (Ms Klimova), co-worker with the Applicant
- Mr Steven Reynolds, Employee Relations Manager at the Cape Preston mine site

Has the Applicant been dismissed?

[13] A threshold issue to determine is whether the Applicant has been dismissed from their employment. In this matter the relevant consideration is as per s386(1)(a) of the FW Act, which provides that an Applicant has been dismissed if the Applicant's employment with the Respondent has been terminated on the Respondent's initiative.

[14] There was no dispute and I find that the Applicant's employment with the Respondent was terminated at the initiative of the Respondent. I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[15] Under section 396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.

Was the application made within the period required?

[16] Section 394(2) requires an application to be made within 21 days after the dismissal took effect. It is not disputed and I find that the Applicant was dismissed from his employment on 6 April 2023 and made the application on 27 April 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was the Applicant protected from unfair dismissal at the time of dismissal?

[17] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

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

(b) one or more of the following apply:

- (i) a modern award covers the person;
- (ii) an enterprise agreement applies to the person in relation to the employment;
- (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

Minimum employment period

[18] It was not in dispute and I find that the Applicant was an employee who commenced his employment with the Respondent on 20 August 2020 and was dismissed on 6 April 2023, a period in excess of 6 months. It was not in dispute and I find that the Respondent is not a small business employer within the meaning of s23 of the FW Act. I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

Application of an enterprise agreement

[19] It was not in dispute and I find that, at the time of dismissal, the *CITIC Pacific Mining Operations Agreement 2018* applied to the Applicant's employment. I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[20] As set out above, I find that the Respondent was not a small business employer. I am therefore satisfied that the Small Business Fair Dismissal Code does not apply.

Was the dismissal a case of genuine redundancy?

[21] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

- (a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[22] It was not in dispute and I find that the Applicant's dismissal was not a case of genuine redundancy.

[23] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Was the dismissal harsh, unjust or unreasonable?

[24] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

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

[25] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.¹

[26] I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant’s capacity or conduct?

[27] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”² and should not be “capricious, fanciful, spiteful or prejudiced.”³ However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.⁴

[28] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.⁵ “The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.”⁶

Submissions

[29] The Applicant submitted that there was no valid reason for the dismissal related to his capacity or conduct because in the first instance, the Applicant was not guilty of the accusations made against him. Additionally, it was submitted that the Respondent's investigations were not conducted with sufficient diligence, resulting in the allegations against the Applicant being somewhat vague to the point where it was difficult for him to make a proper response. The Applicant also submitted that some of the explanations provided by him to the Respondent were not properly investigated, and as such could not have been properly considered in the process of making a decision regarding his guilt.

[30] Further, the Applicant submitted that the Respondent erred by seeking to place the onus on him to prove that he did not engage in the alleged activities, rather than discharging its own onus to prove to a reasonable standard that he did. In summary, the Applicant submitted that the investigative process was flawed, the Applicant was not given a fair chance to answer the allegations against him and it was not open to the Respondent, based on the investigations it conducted, to find that he was guilty. In support of these submissions, the Applicant drew my attention to a number of cases.

[31] I was referred to the decision of a Full Bench of what was then the Australian Industrial Relations Commission (AIRC) in *Department of Social Security v Uink (Uink)* which cited the following remarks of Heerey J in *Schaale v Hoechst Australia*:

*"It would be harsh, unjust and unreasonable for an employer to dismiss an employee summarily in the ground of serious misconduct without taking reasonable steps to investigate those allegations and give the employee a fair chance of answering them..."*⁷

[32] I was further invited by the Applicant to consider the finding of another Full Bench of the AIRC in *Rode v Burwood Mitsubishi*, where it was held that:

*"... the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason."*⁸

[33] Finally, the Applicant cited the principles from *Briginshaw v Briginshaw* as set out in *Barber v Commonwealth* as follows:

*"The standard of proof remains the balance of probabilities, but the nature of the issue necessarily affects the process by which reasonable satisfaction is attained and such satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences or by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion."*⁹

Given the serious nature of the allegations against the Applicant, it was submitted that a high standard of evidence was required to make a guilty finding.

[34] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant's capacity or conduct because he was, based on its investigations, guilty of the

misconduct allegations against him. Given the nature of that misconduct, it was the Respondent's submission that it provided a valid reason for termination.

[35] The Respondent further submitted that while there were some slight variations in the particulars of the allegations against the Applicant to be found over the course of the investigative process, these were not material to the central issues. It further submitted that the FWC could, as per the principles from *Uink* as set out in *Hijazi v Calvary Health Care ACT Ltd*¹⁰, give some weight to the findings of the Respondent's own investigations. However, the Respondent conceded, citing *Sydney Trains v Cahill*¹¹, that the FWC needs to satisfy itself based on the evidence before it that the misconduct actually occurred.

[36] Finally, the Respondent submitted that given the irreconcilable differences in the accounts of the various witnesses, the FWC would be likely to form a view that some witnesses may be untruthful. In that vein, it was submitted that I should:

- (a) pay particular attention to inconsistencies and contradictions in the various accounts given by the witnesses; and
- (b) have particular regard to the objective evidence and contemporaneous documents, where they exist; and
- (c) consider the motivations of those who give evidence and the reasons they might have for giving false or incomplete evidence.

Evidence

[37] Whether or not the Applicant actually engaged in the alleged misconduct is clearly the single most relevant matter to be considered. Nevertheless, I have also considered the standard of procedural fairness accorded to the Applicant as it may have some bearing on the overall fairness of the termination.

[38] I will deal with the two allegations that gave rise to the Applicant's termination in turn. The first allegation relates to conduct on the bus which travels between the worksite and the workers' accommodation at some time during the period 28 December 2022 and 2 January 2023 inclusive. The evidence which is relevant to that issue is set out below.

The bus incident

The evidence of Ms Sarah Kimber

[39] Ms Kimber gave a witness statement, to which was appended the Incident Witness Statement she submitted to the Respondent in March 2023 to make her complaint about the Applicant. She described how, as a trainee on A crew shift, she was working with the employees from B crew shift, which included the Applicant, for a short time but would be returning to work with her regular shift within a week.

[40] In her witness statement she described how she came to know who the Applicant was and referred to him by his nickname "Crooky". It was her evidence that the Applicant and a number of other male employees who sat with him at the back of the bus would regularly behave in an inappropriate manner. When questioned on the nature of this behaviour, Ms Kimber gave

evidence that it involved the displaying of inappropriate imagery, such as genitalia and pornography, albeit that it was established under cross-examination that Ms Kimber used “indecent” and “pornographic” in a somewhat interchangeable fashion. Nevertheless, it was her evidence that the material was not appropriate for the workplace.

[41] In particular, she described an incident during the middle of the week comprised of the days Tuesday 27 December 2022 to Monday 2 January 2023, when she was sitting towards the back of the bus next to another employee, Ms Tamara Klimova. Ms Kimber alleged that the Applicant had instigated a conversation about objects being inserted into women’s vaginas and transgender people whose sex reassignment surgery had suffered complications. She further alleged that the conversation was accompanied by images of such things on mobile phones being passed around. Ms Kimber’s evidence was that as part of this, the Applicant reached across her, brushing her shoulder in doing so, to pass a phone showing such an image to a person in front of her. In the act of doing this, Ms Kimber says she was exposed to the image. She stated that this action of passing a phone showing an explicit image was repeated by the Applicant shortly afterwards and she was again exposed to the explicit image.

[42] Ms Kimber’s evidence was that being exposed to the conversations and the images made her feel unsafe, embarrassed, humiliated and belittled in front of other employees. However, as she had only been working for the Respondent for a few days, she did not feel confident in making a complaint and thought that given she was due to return to her own shift the following week, she should just “put up with it”.

The evidence of the Applicant

[43] The Applicant submitted two witness statements. He denied the allegation about his behaviour in the bus. His evidence was that he had never had explicit images on his phone at work and had never shown such images to anyone. He denied ever engaging in sexually explicit discussions at work. He denied having handed his phone around on the bus and said that he did not believe that anyone else had done so for the purpose of sharing explicit images. It was the Applicant’s evidence that he had no interest in the sort of material alleged to have been passed around and that he and the people in his crew did not and would not engage in the alleged conversations.

[44] In further evidence, he submitted a seating plan of the bus, based on the places where he believed people had sat on 1 January 2023, which was the day he calculated that Ms Kimber and Ms Klimova had been sitting together on the bus, based on the swipe card records which were appended to the witness statement of Mr Brynn Boyd. He claimed that, given employees were required to wear seatbelts on the bus, it would have been very difficult for him to have leaned over and passed anything to a person seated two rows in front of him and at an angle. Further, as that day was Perth Cup Day, he would have been focused on betting on horse races.

Witness evidence of Mr Cooper Flowers

[45] Mr Flowers’ evidence was that he had been asked by the Respondent to provide a statement about the alleged bus incident. While he did provide a statement, a copy of it was not provided to him.

[46] In terms of the alleged incident on the bus, Mr Flowers' evidence was that he usually sat either next to the Applicant or in the row in front of him. He claimed that he had never witnessed the Applicant display any lewd behaviour or disrespect towards female co-workers and that he had never seen him pass around pornographic material on his phone. Mr Flowers claimed that the Applicant did not usually show anyone anything from his phone and that he usually only used his phone for betting.

[47] He claimed to recall a day when Ms Kimber and Ms Klimova were seated "two to three" rows in front of himself and the Applicant. His evidence was that there may have been some sharing of images on his own phone but nothing explicit or inappropriate. Further, his evidence was that he had never been shown explicit images by anyone at work.

[48] In his witness statement in reply, Mr Flowers denied ever having heard any conversations about the specific material complained about by Ms Kimber and had never seen images of such material at work at any time. His evidence was that the particular allegations were quite specific such that he would have remembered if he had seen such images. He also gave evidence that he did not recall Mr Crook passing his phone to anyone.

[49] Under cross-examination, Mr Flowers rejected the notion, advanced the Respondent, that the Applicant was an informal leader of the group of employees who sat together at the back of the bus. He did recall an occasion when Ms Kimber and Ms Klimova were on the bus within two or three rows of himself and the Applicant, and confirmed the Applicant had been sitting in the back row. On further questioning by the Respondent he stated that he was unsure if Ms Kimber and Ms Klimova had been in the row in front of the Applicant. Mr Flowers rejected the notion that he and the other male employees had been discussing or showing inappropriate material. Under questioning by the Respondent Mr Flowers maintained that if the incident had happened he would have been aware of it and further, denied that he was confirming the Applicant's story out of "loyalty to a mate" and a desire not to own up to his own misconduct.

Witness evidence of Mr Jay Manu

[50] It was Mr Manu's evidence that he was not asked by the Respondent to provide a statement about the alleged bus incident. He stated that he had been on the bus with the Applicant during the days when the alleged incident took place. Mr Manu did not recall any conversations about transgender pornography or videos of such material.

[51] Mr Manu recalled Ms Kimber and Ms Klimova being on the bus with himself and the Applicant, but his evidence was that there were no phones passed around on that occasion and no inappropriate conversation.

[52] In his witness statement in response, Mr Manu denied ever having heard any conversations about the specific material complained about by Ms Kimber and had never seen images of such material at work. His evidence was that the particular allegations were quite specific such that he would have remembered if he had seen such images or heard such talk.

[53] Under cross-examination, Mr Manu did not accept the notion, advanced by the Respondent, that the younger men in the group who sat together at the back of the bus would follow the lead of the Applicant. He confirmed that the Applicant usually sat at the back of the bus.

[54] Under questioning by the Respondent, Mr Manu only recalled one day when Ms Kimber and Ms Klimova had been on the bus. It was his evidence in his first statement, and initially under cross-examination, that on this occasion they had been sitting five to six rows in front of the Applicant. The Respondent explored with Mr Manu his second statement, which suggested that Ms Kimber and Ms Klimova had been two rows in front of the Applicant. Mr Manu's response was that his second statement had been, essentially, addressing the issue of whether he was aware of Ms Kimber and Ms Klimova sitting directly in front of the Applicant and his recollection was that they would have been at least two or three rows in front. Although Mr Manu did not recall the Applicant speaking with Ms Kimber and Ms Klimova, he conceded that as he may have been wearing his noise-cancelling headphones, he may have missed any such conversation.

Witness evidence of Ms Kim Paterson

[55] It was Ms Paterson's evidence that she was not asked to make a statement about the alleged bus incident. In her statement, she said that she did not recall any commotion or anything remarkable taking place on the bus in the period between 28 December 2022 and 3 January 2023, albeit that she usually sat at the front of the bus so could not see or hear everything that went on.

[56] However, Ms Paterson stated that she had never heard the Applicant say anything inappropriate in the time she had worked with him and that she did not believe that the Applicant would have been involved with looking at explicit images as it was "not his way". She described the Applicant as a reserved person and said that the allegations against him were totally out of character. She described his attitude towards female employees as being one of an "absolute gentleman".

[57] In her witness statement in response, Ms Paterson denied ever having heard any conversations about the specific material complained about by Ms Kimber and had never seen images of such material at work. She also stated that she knew the particular material complained about was not the Applicant's "cup of tea" as she had known him for long enough to judge. Ms Paterson also said that she believed she would have remembered the incident given the nature of the particulars of the complaint.

[58] Ms Paterson's further evidence was that the Applicant would have had difficulty in passing a phone between seats if he had been sitting in the middle of the back row of seats on the bus, which was where she stated he normally sat.

[59] Under cross-examination, Ms Paterson agreed the Applicant usually sat in the back row of the bus and confirmed that there would be some difficulty in passing something between seats. She was asked if she could recall Ms Kimber and Ms Klimova being on the bus and her evidence was that she could not. When questioned about the behaviour of the men at the back of the bus Ms Paterson acknowledged that one or two could be loud and she confirmed that

(Name Redacted) was one such person. She also stated that given her experience of the Applicant she was shocked to hear of the allegations.

Witness Evidence of Mr Piotr Rogala

[60] It was Mr Rogala's evidence that that he was not asked to make a statement about the alleged bus incident. He stated that the Applicant was "not the type" to say anything bad about women and that the Applicant had never and would never show pornography to people at work. Mr Rogala did not recall the Applicant or anyone else passing a phone around the bus in the period between 28 December 2022 and 3 January 2023 and further stated that the Applicant did not usually pass his phone around.

[61] Mr Rogala further stated that he did not recall sexually explicit videos or anything pornographic being passed around on the bus at any time. In his witness statement in response, Mr Rogala denied ever having heard any conversations about the specific material complained about by Ms Kimber and had never seen images of such material at work. It was Mr Rogala's evidence that he did not think the Applicant would be involved in the activities which were the subject of the complaint as he had never heard the Applicant speak about or show anything vulgar or sexually explicit at work.

[62] Under cross-examination, Mr Rogala accepted the notion that the Applicant was someone that other employees looked up to and someone whose lead could be followed. His evidence was that he could vaguely recall Ms Klimova being on the bus once or twice but could not recall where she was sitting or if there was another woman with her. He confirmed that the Applicant would normally sit at the back of the bus. When questioned about whether he had heard any conversations between the Applicant and Ms Kimber and Ms Klimova, Mr Rogala's evidence was that he had not, and could not recall a time when Ms Kimber and Ms Klimova had been sitting near the Applicant. Mr Rogala rejected the Respondent's suggestion that he was covering up for the Applicant because he would also be in trouble.

Witness evidence of (Name Redacted)

[63] It was the witness's evidence that that he was not asked to make a statement about the alleged bus incident. The witness did not recall seeing the complainant Ms Kimber on the bus during the period in question. However, his evidence was that he regularly sat next to the Applicant on the bus and there had never been any pornography shown, or sexual harassment towards co-workers.

[64] In his witness statement in response, the witness denied ever having heard any conversations about the specific material complained about by Ms Kimber and had never seen images of such material at work. Additionally, he had never seen the Applicant pass his phone around on the bus.

[65] In cross-examination, it was put to the witness that he had been absent on sick leave during the period 28 December 2022 to 2 January 2023 inclusive, being the period during which the bus incident had allegedly taken place. The witness denied that he had been on sick leave

during this period despite being shown evidence to the contrary. The witness did not agree to the suggestion put by the Respondent that the Applicant was a leader of the group of employees who congregated at the back of the bus. He conceded that he was often loud but that it was in the context of banter with workmates. He did not concede that the behaviour of the group was offensive.

Witness evidence of Mr Gavin Pearmine

[66] It was the evidence of Mr Pearmine that he had been approached by the Respondent to provide a statement about the alleged bus incident. While he did provide a statement, a copy of it was not provided to him.

[67] Mr Pearmine did not recall anything out of the ordinary occurring on the bus during the period in question. His evidence was that he usually sat very close to the Applicant but could not remember the Applicant showing anyone anything on his mobile phone. Mr Pearmine stated that at no time had he seen a phone with any porn or explicit images being passed around the work bus. His evidence was that while there was banter and occasional coarse language on the bus, it was never dirty or degrading.

[68] In his witness statement in response, Mr Pearmine denied ever having heard any conversations about the specific material complained about by Ms Kimber and had never seen images of such material at work. He clarified the comment he had made in his Incident Witness Statement about a phone being passed around by saying it was not the Applicant unless it was to do with betting.

Witness evidence of Ms Tamara Klimova

[69] Ms Klimova recalled the period where she and Ms Kimber had shared the bus with the Applicant and a number of other employees. She stated that the Applicant and the other men seated around him would have loud conversations but she generally tried to stay disengaged and so was not able to make any comment about the topics discussed.

[70] Ms Klimova's evidence was that she had seen pictures of women in their underwear shown on phones but could not recall who the phones belonged to. She did recall an incident where she was sitting next to Ms Kimber and someone behind her passed a phone between them to someone in front of them. However, she stated that she did not see what was on the phone or who passed it, as she believed that people were trying to make her uncomfortable and so she was using her headphones and trying to stay disengaged. When I questioned her as to why her evidence was that she thought what was passed was pornography, she explained that her thinking was based on what she described as stupid jokes and unprofessional behaviour displayed by the men at the back of the bus at the time. It was her further evidence that this kind of behaviour, including the showing of inappropriate images, was very common and occurred both during the time she was traveling on the bus with the Applicant and also later when she was traveling with her own crew.

[71] Ms Klimova said that when she attended a meeting called by the Respondent to discuss the alleged incident, she told the Respondent that she believed that inappropriate pictures were being passed around based on the behaviour she observed at the time. However, she had not

provided an Incident Witness Statement because she had not wanted to get involved. I asked Ms Klimova directly as to why she did not want to get involved and her answer was that she did not want to be hated by the crew.

Witness evidence of Mr Michael Reynolds

[72] It was Mr Reynolds' evidence that while he had not conducted the investigation himself, he was provided with the relevant documentation gathered by the investigators for the purpose of making a decision. Those documents were appended to Mr Reynolds' witness statement.

[73] In his evidence, Mr Reynolds gave a summary of his thinking pertaining to the decision to dismiss the Applicant. It was his view that the allegations against the Applicant had been substantiated, as the complainant had a witness who confirmed some of the behaviour and the statements from other witnesses had been "non-committal and seemed to be from (the Applicant's) work buddies." Mr Reynolds did not think it significant that there had been a delay in Ms Kimber making her complaint as he regarded delays in making such complaints as not unusual.

[74] Mr Reynolds stated that his first interaction with the Applicant was at a show cause meeting held in Perth on 6 April 2023. Present at that meeting had been himself, Mr Peter Stillman from the Respondent's HR department, the Applicant and his wife, and Mr Duffy of the AWU who attended via telephone.

[75] At that meeting, Mr Reynolds' evidence was that the Applicant had tried to defend himself against the allegations but had been told by Mr Stillman that the meeting was not about re-visiting the investigation. Mr Reynolds described the meeting as then becoming "boisterous" such that he called a recess to confer with Mr Stillman. Mr Reynolds stated that he had not heard anything from the Applicant in the meeting that had changed his mind and he decided to proceed with termination because of CITIC's responsibility to keep employees safe and that it was "important to take a strong stance against this kind of inappropriate behaviour."

[76] Under cross-examination, Mr Michael Reynolds confirmed that he, along with Mr Peter Stillman and Mr Steven Reynolds had jointly made the decision to terminate the Applicant. He conceded that he had taken into account the report that Ms Klimova had seen pornography but had not sought to clarify what she meant by pornography. He conceded that the termination recommendation from Mr Steven Reynolds stated that there were two witnesses who saw pornography on the bus but that he did not seek to clarify or confirm this. He further conceded that the witness statements that he dismissed as being from the Applicant's "work buddies" were from people whose relationship with the Applicant was unknown to him.

Witness evidence of Mr Steven Reynolds

[77] Mr Reynolds' evidence was that he had been involved in the second investigation meeting with the Applicant and his contemporaneous notes of that meeting formed part of his witness statement.

[78] Mr Reynolds' explained that in that meeting he had asked the Applicant about the complaints made by Ms Kimber and provided him with an opportunity to make a response. Mr

Reynolds' witness statement and accompanying notes both showed that the Applicant denied the allegations against him. However, it was Mr Reynolds' evidence that he did not believe that the Applicant had been truthful regarding the allegations and that he had formed the view that termination of employment was warranted. I questioned Mr Reynolds regarding the basis for his view that the Applicant had not been truthful. He explained that he had been concerned that the Applicant had changed his story after first making an emphatic denial. This suggested to Mr Reynolds that the Applicant had perhaps not been truthful in the first instance. Mr Reynolds also indicated that he was mindful of the demeanour of the complainant, the implication being that her level of discomfort was difficult to reconcile with a falsified allegation.

[79] At the hearing, Mr Steven Reynolds tendered into evidence records from the Respondent's payroll system that showed the attendances for the Applicant, Ms Kimber and (Name Redacted). These records showed that (Name Redacted) was absent on sick leave during the period 28 December 2022 to 2 January 2023 inclusive.

Witness evidence of Mr Brynn Boyd

[80] Mr Boyd's evidence was primarily about procedure. His part in the overall process had been as the first point of contact for Ms Kimber's complaint and he had also been present at the interview with Ms Kimber and Ms Klimova conducted by Mr Steven Reynolds. His evidence was that during that meeting Mr Steven Reynolds had questioned Ms Kimber about the specifics of her complaint and then spoke "...briefly with Tamara at the end." Mr Boyd also gave evidence about the operation of the swipe card system in use by the Respondent and appended to his witness statement were records of swipe card times for various witnesses who gave evidence to the FWC in this matter. Mr Boyd's statement also had appended to it the details of rosters for Ms Kimber and the Applicant for the periods of time under consideration by the FWC.

[81] Under cross-examination, Mr Boyd conceded that the Respondent had not checked the swipe card records at the time of the termination of the Applicant, even though he agreed that they would have been useful and could be used as an indicator of where people were sitting on the bus. He also conceded that the process of interviewing Ms Kimber and Ms Klimova together when taking their statements could have potentially reduced the integrity of the evidence given by Ms Klimova.

Witness evidence of Mr Jason Woolaston

[82] As with Mr Boyd, Mr Woolaston's evidence was primarily about procedure. He had attended the meeting held with the Applicant, his AWU Representative and Mr Steven Reynolds, but had been a largely passive participant as Mr Steven Reynolds had run the meeting. His evidence included some information about the operation of the swipe card system used by the Respondent.

[83] Under cross-examination Mr Woolaston conceded that the swipe card records were of some value in determining where people were sitting on the bus.

Consideration

[84] The reason for termination given by the Respondent in the letter terminating the Applicant's employment was "inappropriate conduct of a sexual nature towards new female trainees." In the course of the matter being heard by the FWC, it emerged that when considering the bus incident, the precise conduct was alleged to have been initiating conversations about objects being inserted into women's vaginas and failed gender reassignment surgeries and procuring and sharing images of those things on a mobile phone.

[85] When examining the statements of the various witnesses and reviewing their cross examination on this issue, I have found it necessary to be mindful that they are being asked to recall incidents some eight months prior, and that for many, the first time they were aware of the need to recall such incidents was at least five months after they occurred. As such, some level of confusion and uncertainty is to be expected.

[86] I requested from the Respondent the swipe card records for all of its employees and have taken the time to review those swipe card records in some detail. Although it was suggested by Ms Kimber under cross-examination that it was not possible to determine where someone was sitting based on the swipe records, I do not agree with her assessment. It is also the case that Mr Boyd and Mr Woolaston conceded that the swipe records were a useful tool in determining approximate locations on the bus and if the person was on the first or second bus. While they are not foolproof, they do allow a reader to draw some conclusions with reasonable certainty. For example, if two employees are swiped within one second of each other, it is reasonable to conclude that they are seated in very close proximity rather than on different buses or at different ends of the bus. I accept that there may be some occasions where, due to faulty cards or issues with the swipe reader the assumptions made may be flawed. However, the witnesses who gave evidence on the swipe card process generally supported the proposition that the guard with the swipe reader would move from the front of the bus to the back each time and that swiping, absent any issues, usually took about a second. From this and given a review of all the card data I am confident that, on balance of probability, I can make a reasonable assessment of where relevant people were sitting, if only in a relative sense.

[87] I found this to be necessary as it is probable that, in making their recollections of that week, the various witnesses were in some cases likely to have been recalling different days. This unreliable recall impacted the evidence of witnesses for both the Applicant and the Respondent. For example, (Name Redacted) was adamant that he had been on site during the relevant period, whereas the roster records and swipe card records make it clear that he was not. Ms Kimber recalled that she and Ms Klimova shared a bus with the Applicant on each of the days in the period 28 December 2022 to 2 January 2023 inclusive. The swipe card records indicate that this is not the case, as on two of the days it is clear from those records that both Ms Kimber and Ms Klimova were on a different bus to the Applicant.

[88] It is apparent that the complaint which resulted in the Applicant's termination related to incidents that occurred on one particular day, when Ms Kimber and Ms Klimova were seated in close proximity to the Applicant. Based on all of the evidence I find that the only day when this could have occurred is 1 January 2023. On that day, the swipe card records suggest that Ms Kimber and Ms Klimova were seated directly in front of the Applicant and as such if the incidents such as the passing of the phone did occur, it would appear that this day was the only

potential day when they could have done so. For completeness, I set out my analysis of the swipe card times for each of the relevant days.

28 December 2022

First swipe entry: 18:05:40

Regular swipe entries approximately every second until 18:06:25, including Ms Kimber at 18:06:00 and Ms Klimova at 18:06:24.

58 second period with no swipe entries.

Next swipe entry 18:07:23 (Kim Paterson) followed by regular swipe entries approximately every second until 18:07:44, including the Applicant at 18:07:42, then a gap of 1 minute and 7 seconds and then some further swipe entries.

Finding: Ms Paterson's evidence was that she regularly sat at the front of the second bus. As such, I find that Ms Kimber and Ms Klimova were on the first bus, and the Applicant was on the second bus. I note there is 1 minute and 42 seconds, encompassing the 58 second period, plus 28 swipe entries between Ms Kimber and the Applicant.

29 December 2022

First swipe entry: 18:05:44

Regular swipe entries approximately every second until 18:06:30, including Ms Klimova at 18:05:56 and Ms Kimber at 18:06:21.

44 second period with no swipe entries.

Next swipe entry 18:07:14 followed by Kim Paterson at 18:07:16 followed by regular swipe entries approximately every second until 18:07:43, including the Applicant at 18:07:42, then a gap of 37 seconds and one further swipe entry.

Finding: Again, I find that Ms Paterson was sitting at the front of the second bus and Ms Kimber and Ms Klimova were on the first bus. The Applicant was on the second bus. I note there is 1 minute and 21 seconds, encompassing the 44 second period, plus 29 swipe entries between Ms Kimber and the Applicant.

30 December 2022

First swipe entry: 18:05:50

Regular swipe entries approximately every second until 18:06:27.

44 second period with no swipe entries.

Next swipe entry 18:07:11 followed by Kim Paterson at 18:07:12 followed by regular swipe entries approximately every second until 18:07:37, including Ms Kimber at 18:07:23, Ms Klimova at 18:07:30 and the Applicant at 18:07:35, then a gap of 1 minute and 55 seconds and one further swipe entry.

Finding: Again, I find that Ms Paterson was sitting at the front of the second bus, but Ms Kimber and Ms Klimova were also on the second bus. However, there is a gap of 7 seconds and 6 swipe entries between Ms Kimber and Ms Klimova, suggesting they were not sitting together. The gap between Ms Kimber and the Applicant is 12 seconds and 11 swipe entries, suggesting they were not seated in close proximity.

31 December 2022

There is no swipe out recorded for Ms Kimber on this day but there is a gap of only 5 seconds and 5 swipe entries between Ms Klimova and the Applicant, suggesting they were in close proximity. However, given that there were five swipe entries in the 5 seconds between the swipe entries for Ms Klimova and the Applicant, I think it unlikely that Ms Kimber could have been closer to the Applicant than Ms Klimova if indeed she was on the bus at all.

1 January 2023

First swipe entry: 18:05:51

Regular swipe entries approximately every second until 18:06:37.

37 second period with no swipe entries.

Next swipe entry 18:07:11 followed by regular swipe entries approximately every second until 18:07:48, including Ms Klimova at 18:07:44, Ms Kimber at 18:07:45 and the Applicant at 18:07:47, then a gap of 39 seconds and then some further swipe entries.

Finding: I find that on this day both Ms Kimber and Ms Klimova are seated in very close proximity to the Applicant and in all likelihood in the row in front of him.

2 January 2023

First swipe entry: 17:38:38

Second swipe entry: 18:04:15

Third swipe entry: 18:04:16

Fourth swipe entry: 18:05:34

Regular swipe entries approximately every second until 18:06:19, including Ms Klimova at 18:06:15.

33 second period with no swipe entries.

Next two swipe entries at 18:06:52 followed Ms Paterson at 18:07:09 and then by regular swipe entries approximately every second until 18:07:38, including Ms Kimber at 18:07:23 and the Applicant at 18:07:35, then a gap of 34 seconds and two further swipe entries.

Finding: I find that on this day Ms Klimova was on the first bus and Ms Kimber and the Applicant were on the second bus. As there is a gap of 12 seconds and 11 swipe entries between Ms Kimber and the Applicant, and there are a number of other people swiped within 3 seconds of the Applicant, I find that Ms Kimber was not in close proximity to the Applicant.

[89] In reviewing in some detail the evidence given by the various witnesses, and cross-referencing that evidence with the evidence of other witnesses, including the swipe records for the buses, I formed the following views:

Witnesses for the Applicant

The Applicant. The Applicant was a credible witness who, in the main, gave clear answers to questions put to him under cross-examination and was not evasive about the main points in his evidence. The Applicant made concessions about inconsistencies between his statements regarding various issues, but these concessions were in the main freely given and I was not persuaded that these points were such that they undermined the Applicant's evidence overall. There was one occasion where there was some delay in the Applicant conceding the point however, on reviewing his testimony I believe that this was more likely to be a case of the Applicant not fully understanding the nuance of the question¹² - see transcript PN329 to PN382. I am also mindful that while the Applicant's answers did vary over the course of the investigation, the submission of statements to the FWC and the hearing, he was being asked to recall, with no prompts in most cases, events from several months prior. Further, the information from the Respondent also changed over the duration of the matter and so it is unsurprising that the Applicant's answers changed in response.

Mr Cooper Flowers. Mr Flowers gave his evidence with a calm demeanour and his answers to the questions put to him in cross-examination were, in the main, straightforward. From the swipe card records he appears to be seated in very close proximity to the Applicant on all of the days in question save for 31 December 2022, where he was still reasonably close by. As such, I find his evidence of his recollections of Ms Kimber and Ms Klimova are on balance of probabilities from 1 January 2023, notwithstanding the slight variation in his assessment of where they were sitting. His witness statement and comments are broadly consistent with the written statement that he gave to the Respondent when requested to do so as part of its investigation in March 2023. Although the Respondent suggested that Mr Flowers was perhaps partially motivated by protecting himself in making his statement and giving his evidence, it may be noted that he has not been employed by the Respondent for several months and as such would not appear to be at any risk of repercussions. I have placed some weight on Mr Flowers' evidence.

Mr Jay Manu. Mr Manu gave his evidence in a straightforward manner. He was not evasive and did not attempt to avoid questions. The swipe card records show that he was in very close proximity to the Applicant on all of the days in question save for 1 January 2023, where he was still reasonably close by. However, his recollection of the one day where Ms Kimber and Ms Klimova were on the bus was a day when they were not seated directly in front of the Applicant and thus not likely to have been 1 January

2023. Further, while he claimed that he had not seen any of the alleged images or heard any of the alleged conversations, he also conceded that he often wore noise-cancelling headphones and so may have been unaware of what was going on in any case. I have not placed any weight on Mr Manu's evidence.

Ms Kim Paterson. Ms Paterson was a credible witness who answered all of the questions put to her without evasion. However, her evidence was, in the main, in the nature of a character reference for the Applicant. I do not regard Ms Paterson's testimony as capable of shedding light in relation to the alleged behaviour giving rise to the termination. The swipe card records show, consistent with her own evidence, that Ms Paterson usually sat some distance away from the Applicant on the bus.

Mr Piotr Rogala. Mr Rogala answered the questions put to him in a calm and considered manner and did not appear to be evasive. The swipe card records show him sitting in very close proximity to the Applicant on the days in question save for 30 December 2022 where there was no record of Mr Rogala's swipe time. However, Mr Rogala's recollection of Ms Kimber and Ms Klimova, as stated under cross examination, was very vague. He recalled possibly seeing Ms Klimova "once or twice", could not recall where she sat and did not recall if there was another woman sitting next to her. As such, I have not placed any weight on his evidence as regards what may or may not have been said or displayed on 1 January 2023.

(Name Redacted). I accept the evidence tendered by Mr Steven Reynolds that indicates that this witness was not on site during the period in question. Indeed, this is consistent with his own evidence where he states he cannot recall Ms Kimber ever being on the bus with him. As a consequence, I have not given any weight to the evidence of this witness.

Mr Gavin Pearmine. Mr Pearmine was a somewhat erratic witness whose recall of events varied between quite precise and nonexistent. I am not persuaded by the Respondent's suggestion that Mr Pearmine was attempting to cover up what had occurred through his testimony. Having reviewed Mr Pearmine's evidence, I consider that his recall was genuinely poor, and have concluded he was clearly unused to giving evidence in a formal setting. As such, I have not placed any weight on his evidence.

I should note that it was the case that all of the above witnesses provided some degree of what were essentially character references for the Applicant. As with Ms Paterson, I have not given any weight to those parts of their evidence.

Witnesses for the Respondent

Ms Sarah Kimber. Ms Kimber was a reasonably credible witness who generally gave direct answers to the questions put to her. However, there were two issues where I have difficulty in accepting her recollection, notwithstanding she was adamant it was accurate. Firstly, there is her evidence in cross-examination regarding the initial interview she had with Mr Steven Reynolds and Mr Boyd. Ms Kimber's recollection of the sequence of that meeting was Ms Klimova being interviewed first, followed by herself. She would not accept the proposition that she had been interviewed first while

Ms Klimova was in attendance. In justifying her recall, Ms Kimber went as far as explaining that she had previously worked at the Department of Justice and as such was aware of the need for integrity of evidence and would not have allowed Ms Klimova to witness her interview prior to giving her own evidence.

However, it was very clear from the written record of interview and verbal evidence of Mr Steven Reynolds and the verbal evidence of Mr Brynn Boyd that in fact, Ms Kimber had been interviewed with Ms Klimova present and Ms Klimova was then simply asked to confirm what Ms Kimber had said at the end of the meeting. Indeed, Ms Ong for the Applicant pursued Mr Steven Reynolds at some length over this very issue during cross-examination to make the point that, procedurally, he had erred significantly by allowing such a process.

Secondly, Ms Kimber insisted that she had sat next to the Applicant on the bus on one of the afternoon journeys when the swipe card evidence indicates quite clearly that this did not happen. There were other instances where Ms Kimber's recollection was incorrect. She insisted that she rode the bus every day with the Applicant, when the evidence clearly indicated that she did not. Ms Kimber also insisted that the Applicant always rode the first bus, when the evidence is clear that he always rode the second bus. I do not categorise these instances as being as significant as the two outlined above but they contribute to my hesitation about the accuracy of Ms Kimber's evidence. While I certainly do not regard Ms Kimber as having been untruthful, I find that her recollection, although recounted in an emphatic manner, was not entirely reliable. I outline this not to be critical of Ms Kimber because I am mindful that it was her first week at work and having been exposed to a large number of new faces and new procedures it may be expected that her recall of persons and procedures may not be completely accurate.

Ms Tamara Klimova. Ms Klimova gave clear answers despite not wanting to be involved in the matter due to her apprehension regarding how her involvement would be perceived by the crew. Ms Klimova gave her evidence in a measured and credible fashion and was frank when asked if she was appearing as a witness to support Ms Kimber. In answering, Ms Klimova stated that she was not there to support Ms Kimber or the Applicant, but rather simply to provide her recollections of what went on. While I have concerns regarding the conduct of the meeting between Ms Kimber, Ms Klimova, Mr Steven Reynolds and Mr Boyd because I consider the procedure adopted had the potential to taint Ms Klimova's evidence, I have noted that Ms Klimova did not confirm all of Ms Kimber's allegations. I am satisfied that Ms Klimova gave honest answers based on her genuine recall.

Mr Michael Reynolds. Mr Michael Reynolds' evidence was chiefly about the process followed by the Respondent in terminating the Applicant. He was a forthright witness who generally answered the questions put to him without any apparent evasion, even when those answers may have contributed to a concern about the validity of the process followed by the Respondent and the conclusions it had drawn. I have no reason to doubt what Mr Michael Reynolds said in his evidence but even though he was one of the decision makers, I have noted he had no direct evidence to give about the actual alleged events themselves.

Mr Steven Reynolds. Mr Steven Reynolds was generally a credible witness. He answered questions in cross-examination that called the reliability of his investigation into question in a straightforward manner, even when that answer may have not reflected well upon him. However, in the main his evidence was about the process of the investigation rather than the facts. As such, it does not particularly assist in determining whether the alleged misconduct occurred. Mr Steven Reynolds was undoubtedly convinced the Applicant was untruthful, but the logic underpinning this conclusion was not persuasive. In Mr Steven Reynolds' assessment, the fact that the Applicant had, when first confronted with the allegations, been somewhat vague and had changed parts of his story suggested he was untruthful. Given the vagueness of the allegations themselves and the time that had elapsed since the alleged bus incident, I do not accept this assessment. Mr Steven Reynolds' other rationale for regarding the Applicant as untruthful amounted to a conviction that Ms Kimber would not raise a complaint if it were not true.

Mr Jason Woolaston. Mr Woolaston had no direct evidence regarding the alleged behaviours of the Applicant and was only peripherally involved in the investigation process. Many of the questions put to him were about matters over which he either had no involvement or no control. On other matters he had no recall but I accept that his lack of recall was genuine given the time that had elapsed and the somewhat minor details about which has was questioned. I do not find that there is anything in Mr Woolaston's evidence that assists me.

Mr Bryn Boyd. Mr Boyd was a credible witness but again, his evidence was only about process. As with Mr Woolaston, his involvement was peripheral and such evidence as he gave was mainly about what occurred in the meeting with himself, Mr Steven Reynolds, Ms Klimova and Ms Kimber, which was a meeting essentially run by Mr Steven Reynolds. There is nothing in Mr Boyd's evidence that assists me.

[90] Were this decision to be only about whether or not an appropriate process was followed, it would have presented far less difficulty. In my view the process used by the Respondent was deeply flawed and lacked rigour. As admitted by Mr Steven Reynolds, his recommendation to terminate was only based on his joint interview with Ms Kimber and Ms Klimova, and his one interview with the Applicant. While Ms Kimber's evidence was broadly supported by Ms Klimova, I consider that Mr Steven Reynolds ought to have been more circumspect regarding Ms Klimova's evidence, as it was in the form of general agreement with Ms Kimber's allegations which had been made in front of her. He also clearly did not know that when Ms Klimova referred to pornography in that discussion, she was not referring to the kinds of images alleged to have been shown but rather to photos of women in underwear and bikinis. This evidence emerged later and as a result of Ms Klimova being asked to provide a witness statement for the FWC. Further, Mr Steven Reynolds' interview of the Applicant was, based on his notes, somewhat superficial in nature and he made his recommendation to terminate without investigating the evidence of other witnesses identified by the Applicant. While Mr Steven Reynolds was not the ultimate decision maker, Mr Michael Reynolds conceded in response to my question during cross-examination that he had placed some weight on Mr Steven Reynolds' recommendation when making the final decision regarding termination.

[91] I put a number of questions to Mr Michael Reynolds regarding various elements of the termination process about which I had concerns. I asked him about the additional witnesses he caused to be interviewed regarding the alleged incident. Three of these witnesses had no recollection or were not within the vicinity of the Applicant. A further two supported the Applicant's version of events. However, while Mr Michael Reynolds discounted the two who supported the Applicant as simply being mates who were standing up for him, he conceded under cross-examination that he did not actually know whether the witnesses were indeed friends of the Applicant. Given that this further witness evidence was in favour of the Applicant, I asked Mr Michael Reynolds why he had not sought to investigate further. Mr Michael Reynolds could not recall.

[92] I also questioned Mr Michael Reynolds also about the process of the "show cause" interview as its purpose seemed unclear. At that interview, the Applicant sought to present evidence that he was not guilty of the allegations. However, Mr Peter Stillman advised the Applicant that he was not permitted to present that evidence. Nevertheless, Mr Michael Reynolds in his witness statement said that his decision to terminate the Applicant had been based, at least in part, on the fact that the Applicant had not said anything in the "show cause" interview to suggest he was not guilty of the alleged behaviour. I put to Mr Michael Reynolds that the Applicant had not said anything to call his guilt into question during the "show cause" meeting because he had been forbidden to do so by Mr Stillman.

[93] Mr Reynolds responded that he thought that the investigation had been completed at the site by Mr Steven Reynolds and thus there was no reason to re-visit the allegations themselves, but he also conceded that he did not know if Mr Steven Reynolds, upon whose recommendation to terminate he was in part relying, had interviewed any potential witnesses.

[94] In summary, I find that the process followed by the Respondent was deficient. The initial complainant was interviewed in front of the other witness she named. Then, based on assumed information about certain elements of the claim, for example that the complainant's witness had seen pornography, the Respondent interviewed the Applicant and put some accusations to him which were somewhat imprecise. When the Applicant offered up some witnesses to support his version of events, they were not interviewed. Nor was there a review of other data, such as the swipe card records. The site Employee Relations Manager proceeded instead to recommend termination and when the recommendation was received at the Respondent's head office, the evidence suggests there was an assumption that a proper investigation had taken place at site. While the Respondent sought some further evidence, some of which supported the Applicant and none of which corroborated the allegation, the Respondent nonetheless determined the Applicant had engaged in misconduct, as set out in the email of Peter Stillman dated 3 April 2023. No further opportunity was given to the Applicant to respond, meaning that the only chance he had to address the actual allegations was in the one meeting on site with Mr Steven Reynolds, at which time he was presented with two allegations that had been raised for the first time in somewhat unclear terms on the previous day and included an incident dating back three months. As a result, I am not satisfied the findings of the Respondent constituted a valid reason to terminate the Applicant's employment.

[95] As to whether the Applicant engaged in the alleged misconduct, the evidence that I have considered comes primarily from the Applicant, Mr Flowers, Ms Kimber and Ms Klimova. While I appreciate that the Respondent identified flaws and inconsistencies in the Applicant's

evidence, on review there are flaws and inconsistencies in much of the evidence presented by both of the parties.

[96] In conclusion, while I am persuaded, particularly by the evidence of Ms Klimova, that there was a culture of inappropriate activity on the work buses, I cannot be satisfied on balance of probabilities that the particular allegations against the Applicant have been made out. The Applicant's denial has been consistently resolute and is supported by Mr Flowers. While Ms Kimber is also resolute, contemporaneous records raise some issues with the accuracy of her recall. Ms Klimova's evidence is that she did not see the Applicant pass the phone, nor did she see what was on the phone. In these circumstances, I find that I cannot be comfortable that the Applicant is indeed guilty of what is alleged. I must add that I do not think that Ms Kimber is being untruthful, and I suspect she was exposed to some forms of inappropriate behaviour. I am, however, not satisfied that the precise allegations as presented can be attributed to the Applicant based on such evidence as has been submitted to the FWC.

[97] The second incident that led to the Applicant's termination was alleged to have occurred in a light vehicle park-up area. There were only two witnesses who could provide direct evidence of this alleged encounter, being the complainant Ms Kimber and the Applicant.

The Light Vehicle Park-up Area Incident

Witness evidence of Ms Sarah Kimber

[98] In her evidence Ms Kimber stated that she had an interaction with the Applicant on or about 6 March 2023 near a light vehicle park-up area. This incident occurred at the end of a night shift when she was walking to catch a bus back to camp. Her evidence was that the Applicant was standing near a light vehicle park-up area, and a number of other men were in a seating area in close proximity. She states that as she approached the area where the Applicant was standing, the Applicant looked her "up and down, sort of appraising my body" and said "Cooore look at that". The Applicant claimed that she again felt humiliated and belittled in front of a number of co-workers.

Witness evidence of the Applicant

[99] With respect to the incident near the light vehicle park-up area, the Applicant denied making the alleged comment and gave evidence that he had not had any interactions with Ms Kimber during the time period nominated. His evidence was that at that time he had been acting in a supervisory role and as such, would not have been in the vicinity of the light vehicle park-up area during the times that Ms Kimber would have been likely to be in that area.

[100] In his witness statement in reply, he clarified this by noting that the allegations that had always been put him were, consistent with the wording of Ms Kimber's initial Incident Witness Statement, that the alleged incident had happened at night. He noted that in her witness statement, Ms Kimber was subsequently stating that the interaction took place at the end of a night shift and thus in the morning.

[101] The Applicant conceded that on the basis of the allegation being about an interaction in the morning there could have been some period where both he and Ms Kimber were in the same

vicinity. However, his evidence was that this was unlikely as at the time Ms Kimber was finishing her shift, he would have been in the pit or alternatively in the company of other supervisors who would have overheard what he was alleged to have said. He continued to deny that he had had any interaction with Ms Kimber at the relevant time or said “Cooore look at that” to Ms Kimber or any other person. He did however state that if at any point he had made such a comment it may have been to describe a vehicle in the light vehicle park-up area that had been badly parked.

Witness evidence of Mr Michael Reynolds

[102] Under cross-examination, Mr Michael Reynolds was asked if he had asked his investigators to try to determine who had been the other men present at the light vehicle park-up area and he conceded that he had not.

Witness evidence of Mr Bryn Boyd.

[103] Mr Boyd in his evidence confirmed that the shift arrangements in place at the time meant that a supervisor on day shift would not usually interact with non-leadership employees on night shift in the evening, as they would leave the worksite prior to those employees arriving to commence their night shift. He further noted that the Applicant was relieving in a supervisory role on day shift at the relevant time and so would have been able to interact with Ms Kimber at the end of her night shift.

Witness evidence of Mr Jason Woolaston

[104] Mr Woolaston’s evidence was that contrary to the Applicant’s initial assertion that he could not have interacted with Ms Kimber due to the shift patterns, this could have indeed happened if Ms Kimber had been completing a night shift and the Applicant had been relieving as a supervisor on day shift. He further submitted that he had checked and confirmed that Ms Kimber was indeed on night shift on the day in question.

[105] Under cross-examination, Mr Woolaston was asked about the confusion between whether the alleged incident occurred in the morning or at night. He stated that he thought that when the allegations had been put to the Applicant there may have been some confusion over whether the alleged interaction was at night, being the end of a day shift, or in the morning, being the end of a night shift. He had raised this with Mr Steven Reynolds after the meeting with the Applicant. He also conceded that the Applicant had, as a result of this confusion, been given inaccurate information to which to respond.

Consideration

[106] Both Ms Kimber and the Applicant gave credible evidence on this matter. Under cross examination, neither of them did or said anything to call their evidence into question. The Applicant was challenged by the Respondent for the inconsistency of his evidence on this particular issue when considering his first and second statements. The Applicant made ready concessions about those inconsistencies, albeit that he had already provided a credible explanation for them. Ms Kimber was similarly straightforward during cross-examination. She

also made a ready concession when her attention was drawn to flawed logic in one of her statements.

[107] Deciding on whether this incident took place would have been aided by the Respondent conducting interviews with potential witnesses. In her original hand-written statement of what happened, Ms Kimber stated that the Applicant had made his comment “to men nearby” indicating that there were potential witnesses. Her witness statement for the FWC goes further and indicates that she “heard some of the men giggle”. Despite this, Mr Steven Reynolds made no attempt to identify these potential witnesses and interview them. I note that the complaint was made only 19 days after the alleged incident and so it should not have been difficult to determine who may have been in the vicinity.

[108] Nevertheless, in the absence of evidence that may have supported either the Applicant or the Respondent it still falls to the FWC to make a determination of whether or not the alleged behaviour took place. In the first instance, I find that the Applicant’s explanation of why his story changed is perfectly plausible. I find that the wording of the initial allegation against him was, consistent with the “Investigation Interview Questions” document submitted into evidence, that the incident had taken place at night as opposed to in the morning. On this basis, it is understandable that the Applicant initially claimed there would have been no crossover between himself and Ms Kimber: as confirmed by Mr Boyd, if the incident had occurred at night his claim would be correct. When the correction was made via Ms Kimber’s witness statement, the Applicant quite properly changed his position and conceded that there may have been some period where his path may have crossed with Ms Kimber. This is not inconsistency but rather an amendment based on needing to address a changed narrative and, in any case, the Applicant readily admitted under cross-examination that his original witness statement was in error in light of the new information.

[109] Although making a determination on this particular incident was difficult, I cannot conclude on balance of probability that it did take place as alleged. In making this finding, I have relied upon two main points. Firstly, it was not contested that the Applicant was, at the time, acting in a leading hand position. From this it emerges that it is likely, given the unchallenged evidence from the Applicant regarding the activities at the site, that at least some of the men who were the apparent witnesses would also have very likely been supervisors. In considering that evidence I find on balance of probabilities that if these men overheard the comment, they would have taken some action.

[110] Secondly, and again from the unchallenged evidence of the Applicant, in his leading hand role he would likely have already been at the pit by the time Ms Kimber was in the vicinity of the light vehicle park-up area. The swipe records for that day record that the Applicant swiped in at 5:13:47am. Ms Kimber swiped out at 6:06:35am. This means that she was probably at the light vehicle park-up area at about 5:45:00am – some half an hour after the Applicant had swiped in. The Applicant said in his unchallenged evidence that the Supervisors would not have allowed him to loiter around without engaging in productive work. That would have involved taking a light vehicle to drive to the pit. Ms Kimber conceded under cross-examination that there were a number of vehicles at the light vehicle park-up area. If this was indeed the case, I find that on balance of probabilities the Applicant was likely to have been at the pit rather than at the light vehicle park-up area waiting for a vehicle. As a consequence, I cannot be satisfied that the Applicant made the alleged comment to Ms Kimber. I do not wish

to suggest that Ms Kimber has fabricated her recollections and it may be, for example, that this was a case of mistaken identity in gloomy early morning light prior to sunrise. However, I cannot safely conclude, even on balance of probabilities, that the Applicant was the guilty party.

[111] As I have found that the Applicant did not engage in either of the behaviours for which he was terminated, I find that there was no valid reason for termination related to the Applicant's conduct.

Was the Applicant notified of the valid reason?

[112] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).¹³

[113] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.¹⁴

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[114] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.¹⁵ However, I will make the observation that implicit in the notion of procedural fairness is that it is not sufficient to simply provide an opportunity to respond. The response must be properly considered, and further investigations made if that consideration reveals potential flaws in process or suggests a line of defence not previously considered. While in this case a response was allowed, I am not satisfied that it was properly considered.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

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

[116] While the Applicant was not represented in the initial meeting with his supervisors, he was represented by his Union, the AWU, in his meeting with Mr Steven Reynolds and Mr Brynn Boyd and again in his meeting with Mr Michael Reynolds and Mr Peter Stillman. As such, I find that this factor is not relevant.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[117] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[118] Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[119] The Applicant submitted that the Respondent's enterprise did not lack dedicated human resource management specialists or expertise. The Respondent submitted that this consideration was not relevant to my considerations. I find that there was no absence of expertise or resources such that the procedures followed would have been impacted.

What other matters are relevant?

[120] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

Submissions

[121] The Applicant submitted that I should take into account a number of other factors. Firstly, that the evidence suggested the alleged behaviours would be out of character for the Applicant. As set out above, I did not rely on those parts of the witness evidence that were essentially character references.

[122] Secondly, the Applicant submitted that I should be mindful of the Respondent's attempts to shift the burden of responsibility to the Applicant, essentially requiring him to prove that he was innocent rather than the Respondent taking responsibility to establish his guilt. While I accept that there was some element of this, I think that my comments above and below on the quality of the Respondent's investigation sufficiently deal with this matter.

[123] Thirdly, it was submitted that I should take into account the poor quality of the investigation process. I have provided my views as to the efficacy of the Respondent's investigations above. The fact that the Applicant's termination was recommended based on such limited investigations is a serious flaw in the process. I further find that such additional evidence as was sourced by the Respondent following this recommendation was not supportive of its finding of guilt. In summary, I find that the lack of adequate rigour in the process followed by the Respondent contributes to the unjustness of the termination.

[124] The fourth submission from the Respondent on this factor was in the nature of an unsubstantiated allegation against the Respondent's management and I have accorded it no weight.

[125] The fifth and final submission from the Respondent was in a similar vein to the fourth with the addition of some gratuitous advice about cultural change and again I have accorded it no weight.

[126] The Respondent made no submission about other relevant matters.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[127] I have made findings in relation to each matter specified in section 387 as relevant.

[128] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.¹⁶

[129] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was unjust in that there was no valid reason for termination and the conclusions reached by the Respondent were based on an inadequate investigative process.

Conclusion

[130] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[131] Being satisfied that the Applicant:

- made an application for an order granting a remedy under section 394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of section 385 of the FW Act,

I may, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[132] Under section 390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

- (a) I am satisfied that reinstatement of the Applicant is inappropriate; and
- (b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

Submissions

[133] The Applicant submitted that reinstatement is appropriate in circumstances where the FWC finds that Applicant was dismissed without a valid reason.

[134] The Respondent submitted that it did not dispute that reinstatement was appropriate if the FWC found that there was no valid reason for termination.

[135] Having regard to the submissions and given the absence of any apparent impediment to the Applicant returning to work for the Respondent, I consider that reinstatement is not inappropriate.

Reinstatement – to what position should the Applicant be appointed?

[136] Section 391(1) of the FW Act provides that an order for the Applicant's reinstatement must be an order that the Applicant's employer at the time of the dismissal reinstate the Applicant by:

- (a) reappointing the Applicant to the position in which the Applicant was employed immediately before the dismissal; or
- (b) appointing the Applicant to another position on terms and conditions no less favourable than those on which the Applicant was employed immediately before the dismissal.

[137] Neither party sought to address the issue of the position to which the Applicant should be reappointed. Given the size of the Respondent's operation and the nature of the Applicant's job prior to his dismissal, I am satisfied that it is open to me to make an order reappointing the Applicant within seven days of the date of this decision to the position in which the Applicant was employed immediately before the dismissal.

Reinstatement - is it appropriate to make an order to maintain continuity?

[138] Section 391(2) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to maintain the following:

- (a) the continuity of the Applicant's employment;
- (b) the period of the Applicant's continuous service with the employer or, if applicable, the associated entity.

Submissions

[139] The Applicant sought an order to maintain the continuity of his employment and period of continuous service with the employer.

[140] The Respondent did not oppose such order if the FWC found there was no valid reason for dismissal.

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

Reinstatement - is it appropriate to make an order to restore lost pay?

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

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

- (a) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for reinstatement; and
- (b) the amount of any remuneration reasonably likely to be so earned by the Applicant during the period between the making of the order for reinstatement and the actual reinstatement.

[144] An order to restore lost pay does not necessarily follow an order for reinstatement. The Commission may only make an order if it considers it appropriate to do so and only make an order that the Commission considers appropriate.¹⁷ Where an employee has engaged in misconduct, the Commission may refuse to make any order to restore lost pay.¹⁸

Submissions

[145] The Applicant sought an order to pay lost remuneration to the Applicant, minus the period of notice paid by the Respondent.

[146] The Respondent did not oppose such an order if the FWC found there was no valid reason for dismissal.

[147] I will seek submissions from the parties regarding the amount of remuneration lost by the Applicant from the date of his termination to the date of his reinstatement and issue a separate order specifying the amount payable as lost remuneration.

Conclusion

[148] An order will issue for the Applicant to be reinstated into his former position within seven days of the date of that order, with continuity of employment and period of continuous service to be maintained. Once submissions on lost remuneration are received and considered, a separate order for payment of lost remuneration will issue.



DEPUTY PRESIDENT

Appearances:

E Ong for the Applicant.

S Pack for the Respondent.

Hearing details:

2023.

Perth.

August 7, 8 and 23.

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¹ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

² *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

³ *Ibid.*

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

⁵ *Edwards v Justice Giudice* [1999] FCA 1836, [7].

⁶ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

⁷ *Department of Social Security v Uink* 77 IR 244 [at 252].

⁸ *Rode v Burwood Mitsubishi* 1999 PR4471 [19].

⁹ *Briginshaw v Briginshaw* (1938) CLR 336; *Barber v Commonwealth* (2011) 212 IR 1 [93].

¹⁰ *Hijazi v Calvary Health Care ACT Ltd* [2021] FWC 13 [74].

¹¹ *Sydney Trains v Cahill* 2021 FWCFCB 1137 [38].

¹² Transcript at paragraphs [PN329] to [PN382].

¹³ *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFCB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFCB 533, [55].

¹⁴ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFCB 762, [46]-[49].

¹⁵ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFCB 762, [46]-[49].

¹⁶ *ALH Group Pty Ltd v/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]-[7].

¹⁷ *Aurora Energy Pty Ltd v Davison* [PR902108](#) (AIRCFCB, Watson SDP, Williams SDP, Holmes C, 8 March 2001), [25].

¹⁸ See, eg, *Regional Express Holdings Ltd v Richards* [2010] FWAFB 8753, [29].