[2023] FWC 3209[Note: An appeal pursuant to s.604 (C2023/8091) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Reece Goodsell

v

Sydney Trains
(U2022/9973)

DEPUTY PRESIDENT EASTON SYDNEY, 4 DECEMBER 2023

Application for relief from unfair dismissal – random drug testing – positive test result for a cocaine metabolite – drug and alcohol policy – testing for usage rather than impairment – connection between out-of-hours conduct and workplace safety – risk of impairment when attending work – valid reason found – mitigating factors – zero tolerance – employee on leave prior to testing – no risk of impairment – dismissal was harsh and unreasonable – reinstatement order.

Background

[1] On 12 October 2022 Mr Goodsell made an application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* (Cth) for a remedy, alleging that he had been unfairly dismissed from his employment with Sydney Trains. Mr Goodsell seeks reinstatement to his former position.

[2] On 4 June 2022 Mr Goodsell returned to work from a period of leave and took a random drug test. Mr Goodsell tested positive for a cocaine metabolite, was then suspended and ultimately dismissed on 23 September 2022.

[3] Mr Goodsell was represented by the Australian Rail, Tram and Bus Industry Union (**RTBU**) and Mr Saunders of counsel with permission under s.596 of the *Fair Work Act 2009* (Cth) ("**FW Act**"). Sydney Trains was represented by Maddocks and Mr Darams of counsel.

A Drug and Alcohol-Free Workplace: Sydney Trains' Drug and Alcohol Policy

[4] Both parties agreed that Mr Goodsell breached Sydney Trains' Drug and Alcohol Policy (**D&A Policy**). The terms of the D&A Poliy are not long or complicated.

[5] The D&A Policy states a 'vision' of a drug and alcohol-free workplace:

> "Sydney Trains is committed to providing a safe environment for all workers and customers through reducing the risks created by the use of drugs and alcohol in the workplace."

[6] The D&A Policy Statement is as follows:

"To achieve this vision, we:

- Have a random drug and alcohol testing program.
- Have test readings showing zero concentration of alcohol in the blood.
- Have a test reading less than the cut off level stipulated in the Australian / New Zealand Standard 4308 (AS/NZS 4308) for tolerances of drugs.
- Are not permitted to have or sell alcohol or prohibited drugs in the workplace.
- Must not be in possession of any item or piece of equipment for the use or administration of a prohibited drug at any Sydney Trains' workplace.

The Sydney Trains drug and alcohol program is consistent with our corporate values and behaviours. It also provides support for our workers to remain drug and alcohol free while at work.

Measures to reduce safety risk, absenteeism and other effects in the workplace, due to the consumption of drugs and alcohol, will include the opportunity to self-identify and seek help, rehabilitation programs and education on drug and alcohol related issues."

[7] The Drug and Alcohol Management Program describes the processes by which Sydney Trains manages the risk of drugs and alcohol in the workplace, maintains a drug and alcohol-free workplace and educates managers and workers about drug and alcohol use and the actions required for the maintenance of a drug and alcohol-free workplace.

[8] The Drug and Alcohol Management Program defines 'drug and alcohol free' to mean:

"
- a drug test reading less than the cut off levels stipulated in the AS/NZS 4308; and
- a blood alcohol concentration (BAC) of zero (0.00 grams of alcohol in 210 litres of breath)."

[9] The Drug and Alcohol Management Program prescribes the testing regime and communication requirements and defines a breach:

"A breach is when any worker:

- returns a positive test result;
- refuses a test;
- knowingly evades a test;
- fails to supply a sample without reasonable cause; and
- attempts to substitute or otherwise tamper with a sample.

All breaches will be managed in accordance with Sydney Trains' policies and procedures."

[10] Sydney Trains' Code of Conduct says the following in relation to drugs and alcohol:

> "You are responsible for complying with your agency's drug and alcohol policy and/or relevant legislation. This includes prescribed, over-the-counter and alternative medication which may negatively affect your ability to perform your duties, or pose a risk to your safety or that of others.
>
> Returning a positive drug or alcohol test, or tampering with or refusing a test, may be an offence or contravene agency policies/ procedures and may result in disciplinary action.
>
> You should inform your manager where you have reason to suspect anyone working for a transport agency may be abusing or under the influence of drugs or alcohol.
>
> You are encouraged to disclose if you have a drug or alcohol dependency, so appropriate action can be taken to provide relevant support and maintain a safe workplace.
>
> Refer to your agency's drug and alcohol policy for disclosure advice.
>
> No alcohol or prohibited drugs are permitted to be consumed on agency premises at any time.
>
> You may only store alcohol in the workplace or sell alcohol to customers when required to do so as part of your official duties. For instance, NSW Trains staff members may be expected to sell alcohol as part of their duties."

[11] The D&A Policy has two notable features:

(a) Sydney Trains defines 'drug free' by reference to passing or failing a drug or alcohol test, and not by reference to any actual impairment; and

(b) the pass or fail testing limits for drugs are those specified in AS/NZS 4308:2008 'Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine' (the **Australian Standard**).

Mr Goodsell's evidence: Mr Goodsell

[12] Mr Goodsell worked for Sydney Trains and its predecessors for 26 years. At the time of his dismissal he was in the role of Work Group Leader (Traction) and held a high level of responsibility and trust.

[13] Mr Goodsell described his duties as conducting pre-work briefings for scope of work to be carried out, identify hazards and putting controls in place to mitigate risk, liaising with protection officers to gain access to rail corridor under their instructions, closing of work orders of completed work scopes and labour costing of staff of completed work scopes and measurement of thickness of overhead wiring.

[14] Mr Goodsell said further in answer to Sydney Trains' evidence that the work of "conducting safety critical activities including working within the rail corridor, isolating electrical assets, use of mobile plant" was not part of his day-to-day work and was not work he performed on the day he tested positive.

[15] Mr Goodsell acknowledged that Sydney Trains invested heavily in his development. During his 26 years he worked his way up from a trainee to a workgroup leader. He was highly regarded in the organisation and was well respected. He said that this respect was "mainly due to my approach to carrying out work in a professional and safe manner and passing my extensive experience on to new employees and apprentices." Mr Goodsell had no performance issues or sanctions. Before June 2022 Mr Goodsell undertook more than 40 random drug and alcohol tests without ever testing positive.

[16] Mr Goodsell was offended by Sydney Trains' assertion that he did not understand or value the safety aspects of his role. He said:

> "I have worked with electricity for 26 years and during that time have always held huge respect for the safety of myself and all other workers. I understand that my work is safety critical work. My excellent work record speaks for itself. I make it my personal responsibility to make sure all possible safety precautions are taken. I believe anyone who has worked with me over many years would agree that I am one of the safest Work Group Leaders to work with. I have refused to let workers carry out certain jobs when they have wanted to, when I deemed it not safe enough to do so."

[17] Mr Goodsell was on leave from Wednesday, 25 May 2022 to Thursday, 2 June 2022 inclusive. He returned to work on Saturday, 4 June 2022 after taking an RDO on Friday, 3 June 2022.

[18] Four days before he was due to return to work, on Tuesday 31 May 2022, Mr Goodsell had a night out with friends he had not seen for a long time, and he accepted an offer to try some cocaine. He said "given I was on annual leave and not due back to work until Saturday, 4 June 2022, I believed by that time it would have been out of my system. This was a mistake in judgement and one which has had heavy consequences."

[19] At 12:43pm on 4 June 2022 Mr Goodsell underwent a random drug and alcohol test on his first day back at work. The testing officer observed in a report that Mr Goodsell did not appear to be impaired or under the influence of any substance.

[20] In relation to impairment Mr Goodsell said he felt completely normal on the day and:

> "Had I perceived that I was impaired or under the influence of the drug prior to the start of my shift on 4 June 2022, I would not have attended work. I genuinely hold the belief that I was not impaired or intoxicated with the effects of cocaine on this date."

[21] The initial testing of Mr Goodsell's urine sample returned a positive reading for cocaine metabolites. Further confirmatory testing by mass spectrometry returned a positive reading for benzoylecgonine at a concentration of 264ug/L. The testing cut-off for benzoylecgonine under the Australian Standard is 150 ug/L.

[22] Mr Goodsell was suspended from work on 8 June 2022 pending a formal investigation. He said that he was upfront and honest with his employer throughout the investigation.

[23] On 17 June 2022 Mr Goodsell was sent a Notification of Disciplinary Investigation and Request to Respond to Allegation. The allegation referred only to the taking of a drug test and the positive reading.

[24] Mr Goodsell's written response to this notice included the following:

> "I would like to bring to the investigator's attention that my decision to try cocaine was a one-off. I made an error in judgement for which I am deeply apologetic. At the time I attended work on 4 June 2022, I did not perceive or feel I was impaired or intoxicated in any way shape or form. If I honestly felt impaired in any way I wouldn't have attended work.
>
> … At no stage of my employment with Sydney Trains have I consumed prohibited drugs on agency premises at any time. Safety for workers, customers and myself is paramount which I take very seriously.
>
> …
>
> I am deeply remorseful of this one-off incident and since receiving notification of the allegation, I have been worried sick. I am worried about the ongoing employment with Sydney Trains and concern for my family.
>
> I would be devastated if significant remedial action was taken including the possibility of being demoted (or even worse, the possibility of losing my job).
>
> This was a one-off incident of poor judgement. I respectfully ask that this not blemish an otherwise excellent work/employee history and that no further action be taken in this matter."

[25] On 21 July 2022 Mr Goodsell was advised by letter that Sydney Trains found the allegations proven and that its preliminary view was that he should be dismissed. Mr Goodsell's response to this show cause letter included the following:

> "From the outset of the investigation, I have been truthful and honest in my disclosure of events. My actions have not destroyed the trust and confidence of the employment relationship.
>
> Dr Casolin [the Respondent's Chief Heath Officer] … states that my claim of having ingested the cocaine on 31 May 2022 … is plausible and consistent with the result …
>
> I cannot express how devastated I am with my poor choice of behaviour on 31 May 2022 that has led me to this point. The behaviour is completely out of character, a one-off and one I am truly remorseful of.

…

The test results show only the presence of benzoylecgonine. The Disciplinary Investigation Report states at paragraph 25 by Dr Casolin: "benzoylecgonine is a longer lasting metabolite of cocaine and thus usually takes longer to be eliminated from the body …"

The evidence of Dr Casolin at paragraph 25 supports my assertion that the illicit substance was consumed during my period of annual leave, when I was not required to be at work nor was I required to be on call.

Sydney Trains' *Drugs and Alcohol Policy* (**D&A Policy**) states that the policy will provide support for workers to remain drug and alcohol free while at work, including the provision of rehabilitation programs and education on drug and alcohol related issues. Similarly, clause 34.2(b) of the *Sydney Trains Enterprise Agreement 2018* (**the Agreement**) sets out that Sydney Trains will conduct 'employer initiated drugs and alcohol testing any associated programs (e.g. rehabilitation)'. Given the commitments in both D&A Policy and the Agreement, I ask that Sydney Trains provide me with an opportunity to preserve the employment relationship having regard to those instruments and obligations.

…

I am willing to partake in recommended courses or further assistance relevant to my incident to ensure Sydney Trains can maintain their trust in my ongoing committed employment.

I asked that the panel review the preliminary outcome and look more favourably on the matter, based on my early admissions, and truthful and honest accounts of what occurred to enable my continued employment with Sydney Trains."

[26] When cross-examined Mr Goodsell indicated that he did not do any research on how long cocaine, or cocaine metabolites, might stay in his system. He said his belief was that there was no longer any cocaine metabolites in his system was just a guess.

Mr Goodsell's evidence: Professor Robert Weatherby

[27] Professor Robert Weatherby is an Adjunct Professor in the Office of the Deputy Vice-Chancellor (Research) at Southern Cross University and was previously Professor in the Division of Research of Southern Cross University. He has research expertise in the areas of Drugs in Sport, Exercise Biochemistry and on psychoactive components of plants. He is a Registered Pharmacist and has a Bachelor of Pharmacy (Honours), Master of Science (Pharmaceutical Chemistry) and Doctor of Philosophy (Ph.D.) in Pharmacology. At Southern Cross University Professor Weatherby has taught in the discipline of Drugs in Sport from 1992. He has conducted research into aspects of exercise performance and effects of biochemical indicators of stress, and of the stimulant drugs caffeine and pseudoephedrine.

[28] Professor Weatherby's main area of expertise as an academic is in Pharmacology, specifically in areas of the use of central nervous system drugs and other psychoactive drugs including alcohol. He managed the co-ordination of analytical screening testing procedures at the drug testing laboratory of the 2000 Sydney Olympic Games, has extensive experience in the analysis and quantitation of drugs, and is currently an advisor to the Australian Academy of Sciences for issues on Drugs in Sport.

[29] Mr Goodsell relied on two reports and oral evidence from Professor Weatherby. In his first report Professor Weatherby explained:

(a) cocaine has a very short half-life in the human body, approximately 0.5-1 hour. That means it disappears from the body rapidly (about 2-3 hours). Therefore for a positive cocaine sample to be obtained, the cocaine would have been ingested in the immediate past i.e. within 2 hours;
(b) the duration of action of cocaine is relatively brief and can last for up to 90 minutes;
(c) while it is active in the body, cocaine impairs normal functioning by increasing the production of a neurotransmitter known as dopamine. Cognitive functioning is affected by the euphoric feeling which distracts attention from normal functioning. By improving mental alertness it can improve some aspects of performance both mentally and physically. Reasoning is affected due to being inattentive to situations and inappropriately responding in decision-making. Physical aggressiveness can occur;
(d) adverse effects of cocaine can be irritability and paranoia. Being tired and restless can also occur for a day or two after cocaine use;
(e) if Mr Goodsell consumed cocaine on 31 May 2022 there would be no intoxication or impairment due to cocaine on 4 June 2022. However the cocaine metabolites would have stayed in Mr Goodsell's system a lot longer, mainly the cocaine metabolite benzoylecgonine;
(f) benzoylecgonine is pharmacologically inactive and has no impairing effects. Benzoylecgonine is not considered a drug;
(g) the test that Mr Goodsell was given has no utility to determine impairment; and
(h) the benzoylecgonine detected in the test was present at a low concentration.

[30] Professor Weatherby provided a second report, primarily in response to the report of Dr Lewis (see below). In his second report Professor Weatherby said:

(a) benzoylecgonine has half-life of approximately 12 hours, however it can be longer;
(b) benzoylecgonine is detectable at least up to 4 days after use, and there is evidence that it can be detected after a longer period, even up to 21 days after use; and
(c) he does not agree with Dr Lewis that all traces of benzoylecgonine would be expected to be eliminated well prior to 48 hours after consumption of cocaine. The reference relied upon by Dr Lewis is quite old and is not scientifically valid because it is only a single reference.

[31] When cross-examined Professor Weatherby said:

(a) the time that cocaine remains active in the body does not depend on the amount of cocaine taken;
(b) the standard testing process does not look for cocaine because cocaine disappears so quickly that the likelihood of finding cocaine is not high;
(c) 2-3 days is the usual period that benzoylecgonine remains in a person's system but low amounts could still be found later;

(d) the concentration found in Mr Goodsell's system (264 ug/L) was a low concentration. The concentrations seen after a normal dose of cocaine is in the many thousands and so Mr Goodsell's body was at the very end of the process of eliminating the benzoylecgonine. Testing normally finds concentrations of around 9,000 ug/L and on some occasions 70,000 ug/L or more. Concentrations of up to 90,000 ug/L of benzoylecgonine could be detected after a single dose of cocaine;
(e) the low concentration for Mr Goodsell is consistent with his account of events;
(f) (when asked whether a concentration of 264ug/L is consistent with having consumed cocaine 12 hours before a test) it was possibly consistent but the cocaine dose would have been very low, in fact probably so low that Mr Goodsell would not have realised that he had consumed cocaine; and
(g) the testing cut-offs in the Australian Standard have nothing to do with the effects of the drug on performance or what that the drug might do but are set to ensure scientific confidence that the answer is correct. Testing can detect concentrations lower than the cut-offs but below the cut-offs the result might not be the correct result or there might be an error.

Sydney Trains' evidence: Dr Armand Casolin

[32] Dr Armand Casolin is Sydney Trains' Chief Health Officer. Dr Casolin is an occupational physician and has been the Chief Health Officer at Sydney Trains and Trainlink since 2005.

[33] Dr Casolin has a Bachelor of Medicine and a Bachelor of Surgery, a Graduate Certificate in Safety Science, a Master's degree in Science and Technology majoring in Occupational Medicine. He has been involved in teaching doctors how to interpret and report the results of workplace drug testing since 2007, is a founding member of the teaching faculty of the Australasian Medical Review Officers Association. Dr Casolin was invited to sit on the Australian Standards Committee for AS/NZS4760, being the Australia and New Zealand Procedure for specimen collection and the detection and quantification of drugs in oral fluid. Dr Casolin was also invited to sit on the Australian Standards Committee for the review of AS/NZS4308:2008, being the Australia and New Zealand Procedures for specimen collecting and detection and quantitation of drugs of abuse in urine, however he declined that appointment.

[34] As a Medical Review Officer and as Chief Health Officer for Sydney Trains Dr Casolin is frequently called upon to provide advice on all aspects of workplace drug testing, and he regularly reviews the results of drug tests to see if the results are consistent with declared medications and other explanations provided by employees and advises whether the explanations and declared medications are consistent with the relevant test result.

[35] In Dr Casolin's experience rehabilitation is generally offered to individuals who self-declare that they have a problem with drugs or alcohol. Assistance is provided to employees who ask. However, Sydney Trains' approach is different for employees who test positive in the course of random testing.

[36] Doctor Casolin explained Sydney Trains' testing procedure:

(a) Sydney Trains conducts targeted testing (when there is a suspicion that an employee may have used drugs) and post-incident testing when necessary;

(b) targeted and post-incident testing includes an on-site screening test so that immediate indication is available regarding whether a sample is negative or non-negative (and requires further testing);
(c) Sydney Trains also collects samples for random testing;
(d) samples collected from random tests are processed off-site and the results can be cross-referenced against declared medications;
(e) there is a two-step process for testing of random samples. Firstly an immunoassay screening process tests for metabolites of methadone, cannabis and cocaine, as well as for opiates, amphetamine-type substances and benzodiazepines. This screening tests for two particular metabolites of cocaine: benzoylecgonine and ecgonine-methyl-ester. The cutoff level for these two metabolites in the first screening under Australian Standard is aggregate concentration of 300ug/L;
(f) a second confirmation test involving chromatography and mass spectrometry is performed if any substances are detected above their respective cut-off levels; and
(g) the confirmatory testing for either cocaine metabolite is 150 ug/L. The confirmatory testing does not test for cocaine itself.

[37] Importantly, Dr Casolin explained that Sydney Trains does not test for impairment:

> "… Sydney Trains does not test for impairment as part of its drug testing program, but for presence. Testing for impairment in a manner that is objective, reliable and sensitive, would require neurocognitive testing, which is not practical to organise in the workplace in a timely manner in relation to working prior to a positive test. Any impairment detected by such testing would also be non-specific, as there are many possible causes of impairment, which may be unrelated to illicit drug use. The Sydney Trains' drug testing program, as outlined in its Drugs & Alcohol Policy (Policy), is focussed on testing for the presence of drugs, which is measured by readings which are more than the cut-off levels stipulated in the Standard. For the purposes of the Policy, a positive drug test is returned when a drug (and/or its metabolites if detectable) are identified at levels higher than the applicable cut-off levels set out in the Standard for that drug. In that sense, and for the purposes of Sydney Trains' policies (including the Policy and Section 10 of the Code of Conduct), the question of impairment is irrelevant. In this context, and while I was not involved in the decision to terminate Mr Goodsell's employment, I assume, based on my knowledge of Sydney Trains' operations, that Mr Goodsell was dismissed not because he was impaired at work, but because, as a result of the positive test he returned during random testing, he was found to be in breach of Sydney Trains' policies."

[38] Dr Casolin speculated in his witness statement that Mr Goodsell's account of events might not be correct:

> "… Given the results, it is possible that Mr Goodsell consumed a 'large' amount of cocaine on 31 May 2022, or some quantity of cocaine (whether small or large) at a day and time prior to 4 June 2022, but after 31 May 2022. Those factors, together with particularly Mr Goodsell's state of hydration, would all have a bearing on the levels recorded in the Pathology Report."

[39] When cross-examined Dr Casolin said:

(a) 'drug free' under the D&A Policy means no level of drug or inactive drug metabolites at sufficient concentration to be detected in urine at the threshold set by the standard;
(b) he does not recall having any involvement in the design of Sydney Trains' drug and alcohol policy; and
(c) the D&A Policy was last reviewed in November 2022 and Dr Casolin had no involvement in that review either.

Sydney Trains' evidence: Dr John Lewis

[40] Sydney Trains relied on a report and evidence from Dr John Lewis. Doctor Lewis is a Consultant Toxicologist and has over 30 years of experience in drug and alcohol testing. Doctor Lewis has a Bachelor of Science, a Master of Science and a Doctor of Philosophy. Dr Lewis was a Casual Academic at the School of Mathematical and Physical Sciences, Centre for Forensic Sciences, University of Technology Sydney until September 2021, an Assessor for the National Association of Testing Authorities, a Visiting Fellow at the National Drug and Alcohol Research Centre, Faculty of Medicine, University of NSW (2006-2016), and previously was the Principal Scientist and Head of the Toxicology Unit, Pacific Laboratory Medicine Services, Northern Sydney and Central Coast Health Service.

[41] Dr Lewis was the Chairman of the Standards Australia Committee CH-036 from 1993 until 2020. This Committee prepared the testing standard AS/NZS 4308:2008 'Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine.'

[42] In his report Dr Lewis said:

(a) prior to 1995 there were no rules, guidelines or other references to competency in drug testing. Doctor Lewis and other toxicologists consulted widely with medical, pathology groups and others to try to seek some form of standard for competency in drug testing;
(b) Australian Standard AS4308 was first released by Doctor Lewis' committee in 1995. Later versions were released in 2006 and 2008. This standard allows the National Association of Testing Authorities to accredit laboratories to a minimum level of competence in medicolegal drug testing (urine);
(c) cocaine may only be detected within the first few hours of use. If cocaine is detected in urine then the drug must have been consumed within 1-4 hours or so;
(d) the Australian Standard only tests for cocaine metabolites and not the active drug because there is a very low probability of detecting cocaine;
(e) the presence of metabolites but a lack of cocaine in urine merely suggests that the drug had been consumed from between a few hours and 1-2 days prior;
(f) it is not possible to assume impairment from the results of a urine, saliva or hair test. The Australian Standard is not an impairment measuring document;
(g) the Australian Standard is a document designed to measure the competence of a laboratory, such that compliance with that Australian Standard should ensure a correct result, viz, the presence or absence of a drug/metabolite being indicative of either recent or not recent ingestion;
(h) the results of a drug test cannot be correlated with impairment; however, they can indicate a risk of impairment by the fact that drugs included in AS/NZS 4308: 2008 do cause impairment;

(i) cocaine use can lead to severe withdrawal effects including sadness, fatigue, insomnia, an inability to stay awake and social withdrawal [referring to a study by Lago and Kosten]. These symptoms tend to peak 2-4 days from abstinence;
(j) studies have demonstrated that benzoylecgonine is eliminated within about 48 hours and drug tests according to the Australian Standard should not record a positive finding after this time if a person had taken cocaine as a one-off;
(k) Mr Goodsell claimed to have taken cocaine 4 days prior to his drug test; in other words, approximately 96 hours prior. If he had consumed less than 32 mg of cocaine he should have eliminated all traces of benzoylecgonine well prior to 48 hours and if he had consumed more than 42 mg of cocaine, his body he should have eliminated benzoylecgonine at a faster rate and the test would have been negative; and
(l) no benzoylecgonine should have been present in Mr Goodsell's urine four days after a one-off consumption of cocaine.

[43] When cross-examined Dr Lewis said:
(a) benzoylecgonine is pharmacologically inactive, meaning it has no effect on bodily functions;
(b) Mr Goodsell's concentration of 264 ug/L of benzoylecgonine in his urine at testing time cannot be correlated with any hangover effect experienced by him;
(c) the Australian Standard does not identify or distinguish between abusers, non-abusers, regular users or one-off users of cocaine;
(d) the study of withdrawal effects of cocaine by Lago and Kosten, cited by Dr Lewis in his report, refers to 'stimulant withdrawal', defined by reference to DSM-III-R as 'cessation of cocaine after at least several days of heavy use', which is a different scenario to one-off use; and
(e) he based his opinion of excretion rates for benzoylecgonine, particularly his assertion that no benzoylecgonine should be present four days after consumption, on a study by Cone et al that is more than 20 years old and refers to only six subjects who were all regular cocaine users.

Sydney Trains' evidence: Mr Paul Bugeja

[44] Mr Bugeja commenced work with Sydney Trains in 1978. At the time of Mr Goodsell's dismissal, Mr Bugeja was employed in the role of Deputy Executive Director, Network Maintenance. In this role Mr Bugeja's primary duties involve leading and coordinating the delivery of routine and fixed asset maintenance, including workforce scheduling and planning to ensure that maintenance supports Sydney Trains reliability requirements, including maintenance inspection compliance, asset performance and availability, customer satisfaction, on-time running of trains and train delay minutes.

[45] Mr Bugeja said there are approximately 1250 employees employed in Network Maintenance. Mr Goodsell worked in Network Maintenance.

[46] As part of his role, Mr Bugeja is required to attend to management matters involving employees from Network Maintenance, including sitting on disciplinary review panels. He said the other members of the disciplinary review panel usually are representatives from the Professional Standards and Conduct Unit, a representative from Sydney Trains' internal legal team, and a human resources representative. Mr Bugeja said he is required to sit on each disciplinary review panel related to Network Maintenance employees under his delegation.

[47] Bugeja explained that the Professional Conduct Unit arranges for investigations into misconduct and prepares reports for disciplinary review panels to consider.

[48] Mr Bugeja said panels firstly consider the relevant materials and information, including any investigation reports, and other information such as the employee's employment history, training records and disciplinary history. Panels then have a discussion about the material and a preliminary view is formed about the appropriate action to be taken in relation to the matter. The preliminary view is then communicated to the employee, who is given an opportunity to provide the panel with any further information. The panel then meets again to discuss the employee's response before making a final decision. There is also an internal appeal mechanism available to employees.

[49] Mr Bugeja does not know Mr Goodsell personally. There is no evidence of Mr Bugeja ever meeting with or even speaking to Mr Goodsell. Mr Bugeja gave evidence about Mr Goodsell's employment history, presumably based on information contained in Mr Goodsell's employment files or information provided to him by others.

[50] Mr Bugeja said that as the Work Group Leader, Mr Goodsell was accountable for overseeing health and safety, including the running of briefings at the commencement of each shift and other safety-related functions. Mr Bugeja's witness statement emphasised the safety-related aspects of Mr Goodsell's responsibilities.

[51] Mr Bugeja became aware of Mr Goodsell's positive drug test by email on 6 June 2022. In the course of preparing his statement for these proceedings, Mr Bugeja was told by others that Mr Goodsell did not work on 6 June 2022, and when he returned to work on 7 June 2022, he was allocated non-rail safety work before being suspended later in the day.

[52] Mr Bugeja said he has sat on approximately 40 to 50 disciplinary review panels in the last couple of years. He said that at least seven or eight of those panels were related to drugs and alcohol. Mr Bugeja said that "for me, while I carefully consider all of the relevant circumstances, the primary thing I consider is whether they are a rail safety worker and whether they are responsible for the health and safety of others."

[53] Mr Bugeja said that for him the default position is that anyone who tests positive for drugs is likely to be terminated. He explained his rationale:

> "… my primary consideration in these types of DRP matters is safety and the duty of care owed to other employees ... in our area, we are dealing with electrical hazards and also working in the danger zone (rail traffic), electrical currents and trains which are pretty unforgiving. It is the safety of all employees that is at the forefront of my mind. I have previously been involved in situations where I have had to meet the families of workers who have been seriously injured or killed as a result of something which has occurred during their work and I have had to explained to them what happened to their loved one and why. Because of these very difficult experiences, I am conservative in my approach to safety and I believe that if a worker is a rail safety worker then, if they have come back with a positive drug test, then in the absence of any compelling evidence to

persuade me otherwise, my view is that their employment should be terminated, irrespective of their length of service."

[54] In preparing his witness statement Mr Bugeja reviewed again Mr Goodsell's submission to the disciplinary review panel. In his witness statement Mr Bugeja made comments on what he recalls were his thoughts at the time:

(a) Mr Goodsell's 26 years of service counted against him rather than for him because his length of service meant he had spent a significant amount of time working on the track, being inducted to the relevant sites on numerous occasions, and attending worksite briefings where he would have been reminded of his obligations in respect of drugs and alcohol every time he is involved in a pre-work briefing;

(b) the drug and alcohol policy did not require Sydney Trains to consider the question of impairment at all. In Mr Goodsell's case, he returned a positive test which was not in accordance with the Australian Standards and was therefore in breach of the drug and alcohol policy and Code of Conduct; and

(c) "I also took into account Mr Goodsell's view on the financial hardship the decision would cause him. Whilst I appreciated that the decision was likely to have had a financial implication for Mr Goodsell, I believe that the standards Sydney Trains expects regarding drugs and alcohol are clear and that in choosing to take cocaine, whether as a one off or otherwise, he took a gamble and put his job in jeopardy."

[55] In relation to the possibility of Mr Goodsell being reinstated, Mr Bugeja said:

"I understand that in his application to the Fair Work Commission, Mr Goodsell has sought reinstatement into his role. I have concerns about Mr Goodsell being re-instated because it will mean that he will go back to supervising a team of people and that does not sit well with me for the reasons set out in this statement.

In my view, Mr Goodsell's unfair dismissal claim and his submissions further reinforce my view that, despite adequate training and awareness, Mr Goodsell does not understand or value the safety aspects of his role or the role of any Rail Safety Worker especially one that also holds an electrical authorisation, which is a key element of his role.

In addition to this, and given his previous admission to taking the drugs in question, I cannot guarantee that it will not happen again. As I have said in this statement, I have safety obligations to those working with Mr Goodsell and I do not want to take that chance, there is no guarantee that he will not do it again."

[56] In cross-examination Mr Bugeja said:

(a) he was the only operations person on the disciplinary review panel that considered Mr Goodsell's employment;

(b) all of the other people on the panel were from Sydney Trains' People and Culture Unit or the Workplace Conduct Unit;

(c) the panel's preliminary decision that dismissal was appropriate took less than 16 minutes;

(d) the panel made the preliminary decision without knowing Mr Goodsell's disciplinary history;

(e) in writing to Mr Goodsell inviting him to show cause why his employment should not be dismissed, the panel did not raise any concern that Mr Goodsell might have taken cocaine previously, nor any concern that he might repeat the behaviour, nor any concern that the fact he had been employed for 26 years counted against him;
(f) he does not remember any of the discussion at the second meeting of the panel;
(g) for him the starting point is that if a Category 1 rail safety worker returns a non-negative drug test they ought to be dismissed unless there are compelling reasons otherwise;
(h) of the eight disciplinary review panels that Mr Brown participated in that involved drugs, two employees resigned before the process was finalised and the remaining six employees were all dismissed;
(i) of all the disciplinary review panels involving non-negative drug tests, no employee has ever presented Mr Brown with a compelling reason why their employment should continue;
(j) in his view a long period of service counts against an employee and also a short period of service counts against an employee;
(k) Mr Goodsell's 26 year spotless work history counted against him because he should have known better because of the training he had received;
(l) he is not aware of any training provided to employees on how long a metabolite of a prohibited drug might remain in a person's system; and
(m) separate to the fact that Mr Goodsell failed a drug test, one of the reasons Mr Brown recommended Mr Goodsell's employment be terminated was the fact that he took cocaine.

Sydney Trains' evidence: Mr Jamie McDonald

[57] Mr Jamie McDonald is Sydney Trains' Director Network Standards, Systems and Quality Safety, Environment, Quality and Risk. Amongst other things Mr McDonald has responsibility for Sydney Trains' safety management system, including with respect to its maintenance and currency, as well as Sydney Trains' safety programs regime, which includes health assessments and health services, occupational hygiene, drug and alcohol program and dealing with hazardous materials.

[58] From July 2013 until September 2022 Mr McDonald was the Director of Risk and Assurance. In that role Mr McDonald's duties included responsibility for development and maintenance of policies and procedures for risk and assurance, developing and renewing Sydney Trains' risk register, reporting on risks as part of annual reports, undertaking safety assurance for all new and altered assets and providing appropriate levels of safety assurance for any of those changes.

[59] Mr McDonald was not involved in the development of Sydney Trains' current drug and alcohol policy. Mr McDonald nonetheless feels qualified to provide a view as to the rationale of the D&A Policy because he has had some involvement in reviewing and updating other policies.

[60] Mr McDonald explained that Sydney Trains' approach to several policies is to provide a high-level policy statement with a number of procedures and safety management systems sitting behind the policy statement. Both the high-level policy statement and the procedures and systems are communicated to employees through Sydney Trains' intranet. Mr McDonald said that the current drug and alcohol policy is an example of this high-level policy statement.

[61] Mr McDonald also indicated that Sydney Trains is required to comply with the *Rail Safety National Law (NSW) No 82a* ***(Rail Safety National Law (NSW))*** and its corresponding regulations (**RSNL**) as a rail transport operator in NSW. The RSNL is very prescriptive in the context of drugs and alcohol in particular, and requires that Sydney Trains maintain a drug and alcohol management program that includes a number of compulsory aspects or components such as testing requirements.

[62] Mr McDonald reinforced the policy rationale that Sydney Trains does not test for impairment, only presence:

> "The Sydney Trains drug and alcohol policy, and the procedures which sit behind that policy have been developed and reviewed to comply with the requirements of the RSNL and the reason that Sydney Trains undertakes drug testing in accordance with the AS/NZS 4308 is because that is what is required for Sydney Trains to comply with its statutory obligations. The reason we test for presence and not impairment is because random drug tests take a number of days to process and you cannot test for impairment retrospectively … under the RSNL, we are required to test for presence, not impairment."

[63] When cross-examined Mr McDonald said:

(a) he was not involved in the development of the Sydney trains drug and alcohol policy, he is not medically qualified, he is not a lawyer, he does not know Mr Goodsell and he is not directly aware of what training Mr Goodsell has received or not received;
(b) in order to understand the full definition of 'drug-free' under Sydney Trains' D&A Policy, an employee would have to access a range of background documents available on Sydney Trains' intranet;
(c) employees are not provided with access to the Australian Standard, nor a list of drugs that are tested for in the standard, nor any information on how long those drugs and their metabolites last in the body;
(d) employees are not advised that testing is concerned with the presence of metabolites rather than impairment;
(e) testing of oral fluids is accepted by the rail regulator as a suitable means of conducting random tests;
(f) the oral fluid standard can test for cocaine, being the substance that causes intoxication;
(g) Sydney Trains does test for presence of impairment when it tests for alcohol (and assumes that any presence of alcohol equates with impairment); and
(h) Sydney Trains has chosen not to test for cocaine.

The Applicant's Submissions

[64] In his closing submissions on behalf of Mr Goodsell, Mr Saunders accepted that a breach of the D&A Policy simpliciter is capable of being a valid reason for dismissal. Sydney Trains has both an obligation and a right, generally as an employer, but specifically under the *Rail Safety National Law (NSW)*, to manage risks associated with drug and alcohol use and misuse by its staff. The relevant risk is that a worker will be impaired and cause risk of harm due to the intoxicating effect of certain drugs or alcohol. Mr Goodsell properly accepted that the risk is real and serious and, in the context of a safety critical environment, it is appropriate for Sydney Trains to take a serious and stringent approach to managing that risk.

[65] However Mr Goodsell also submitted that having traces of the metabolite benzoylecgonine in his system in circumstances where he is not impaired is not a valid reason for dismissal. In support of this submission Mr Goodsell relies on the absence of any evidence that he was impaired at work, that he was not able to perform his duties safely; or that there was a risk to the public, his co-workers or to Sydney Trains. Merely asserting that either Mr Goodsell, his co-workers or the public were at risk by Mr Goodsell having traces of benzoylecgonine in his system does not make it a safety risk.

[66] Mr Saunders submitted that Sydney Trains misapplies the Full Bench decision in *Sydney Trains v Hilder* [2020] FWCFB 1373 (**Hilder**) and, he said, Sydney Trains seems to submit that returning a non-negative test will always be a valid reason for dismissal, and that no consideration needs to be taken as to the nature and extent of the breach, or indeed, the underlying drug.

[67] Mr Sauders said that Mr Goodsell is not asking the Commission to depart from *Hilder*. Mr Goodsell's situation is a fundamentally different factual situation to that which was before the Full Benches in *Hilder* and also in that confronted the Full Benches in *Harbour City Ferries v Toms* [2014] FWCFB 6249 and in *Sharp v BCS Infrastructure* [2015] FWCFB 1033.

[68] Mr Saunders submitted on behalf of Mr Goodsell:

(a) *Hilder* does not give Sydney Trains a right to implement a zero-tolerance drug and alcohol policy, either in respect of the question of valid reason, or of course, the broader evaluative exercise of whether a dismissal is unfair;
(b) *Hilder, Toms* and *Sharp* are all cannabis cases and rely on the particular medical, scientific evidence that was before the Commission and evidence that actual impairment could not effectively have been ruled out;
(c) if cocaine is in the body, it follows that the person may be impaired. The degree of impairment may be difficult or impossible to assess, but that's not the point. Cocaine's directly impairing effect operates because of its presence in the body as an intoxicant, which persists for up to 90 minutes;
(d) there is scientific evidence about the impairment that cocaine causes directly and indirectly. The direct impairment is when it is functioning and active in the body as an intoxicant;
(e) the presence of benzoylecgonine cannot be correlated with habitual use, or any hangover effect;
(f) the breach of the D&A Policy was not deliberate or reckless breach. Mr Goodsell knew that he was required to attend work drug-free and his self-assessment was reasonable;
(g) he did intentionally consume cocaine but he did not intentionally breach the D&A Policy because he had a reasonable and honest belief that enough time had passed. This is particularly significant because of Sydney Trains' total failure to actually explain its policies to staff;
(h) Sydney Trains has been directly warned by the Full Bench in *Hilder* of the need to explain what it means by drug free, in a way that is comprehensible to the average rail worker, and has made next to no effort to do so. In Sydney Trains' documents the Australian Standard is mentioned occasionally in a meaningless way;
(i) Mr Goodsell has made his best endeavours to comply with the D&A Policy, in circumstances where he has been given no assistance by Sydney Trains to do so;

(j) Sydney Trains' D&A Policy does not place a ban on taking illicit drugs outside of the workplace. If Sydney Trains wants to have a policy based solely on testing it must give employees some assistance as to how to comply, otherwise employees like Mr Goodsell will simply make their best efforts to comply;
(k) it is necessary to consider proportionality because Mr Goodsell's breach is not of the severity to potentially warrant termination, particularly given that Mr Goodsell tested positive on his first day back from leave;
(l) Mr Goodsell's breach did require a response from Sydney Trains such as counselling and the like. Mr Goodsell's offer to undertake targeted testing was rejected;
(m) Mr Goodsell could not have worked in the period in which he was impaired by the cocaine, because he was on leave. The circumstances would be theoretically different if Mr Goodsell had worked during the four days before the test because then there would be a possibility that he worked with an intoxicant in his system;
(n) when considered against a number of employees who, having failed a drug or alcohol test with Sydney Trains, have nonetheless been granted clemency in the circumstances, the prescriptive 'zero tolerance' policy and procedures surrounding it, have not been applied consistently or in the alternative, have been applied arbitrarily;
(o) if the Commission is satisfied that there was a valid reason for dismissal, the dismissal was nonetheless harsh because the breach is the narrowest possible range of conduct that breaches the drug aspect of the drug and alcohol policy. There is no surrounding or ancillary conduct or circumstances, there is no presence of the relevant risk;
(p) Mr Goodsell is a man with a young family who has given significant and loyal service to Sydney Trains, who poses no appreciable risk of repeated conduct, who is and has always been remorseful, honest and co-operative;
(q) dismissal was disproportionate to the misconduct in the circumstances where Mr Goodsell was not impaired by cocaine and could perform his duties safely, and his employment record was otherwise exemplary;
(r) Mr Goodsell was treated differently to other employees who tested positive in random drug tests but who were not dismissed;
(s) the submission that Sydney Trains cannot be satisfied that Mr Goodsell will not engage in similar conduct in the future is completely unfounded in 26 years of employment and also Mr Goodsell's repeated statements of remorse; and
(t) the *Sydney Trains Enterprise Agreement 2018* contains a range of alternative measures other than dismissal including caution or reprimand, a fine, a reduction in position, rank or grade and pay, suspension from duty without pay.

[69] In relation to procedural fairness Mr Goodsell submitted:
(a) Mr Goodsell was advised of the reason for his dismissal (s.387(b));
(b) Mr Goodsell was given an opportunity to respond to the allegations against him (s.387(c));
(c) Mr Goodsell was given the opportunity to have a support person (s.387(d));
(d) Mr Goodsell was terminated for serious misconduct. Therefore a warning was not relevant (s.387(e));
(e) procedural fairness extends beyond pure process. It requires more than an opportunity to speak, the decision-maker must also actually listen;
(f) in terms of procedural fairness the decision-making process was conducted by five lawyers and HR officers, and a Sydney Trains manager who had never laid eyes on Mr Goodsell;

(g) the preliminary decision to dismiss him was made in a TEAMS meeting that took 16 minutes. The agenda suggests that two of those minutes were taken up with the welcome to country and explaining confidentiality to the participants. It is not a process that is suggestive of consideration of anything, or anything other than a default position that dismissal will follow;
(h) Sydney Trains had a closed mind to the question of Mr Goodsell's continued employment. It is indicative of a process that is in substance, procedurally unfair. There is nothing he could have said to change Sydney Trains' mind;
(i) it is intolerably clear from Mr Bugeja's evidence that Sydney Trains took a zero-tolerance approach to Mr Goodsell's breach of the D&A Policy; and
(j) zero tolerance, being automatic dismissal for particular offences, is procedurally unfair in the sense that involves a denial of a real opportunity to respond to the reason for the putative dismissal.

[70] In relation to Sydney Trains' testing regime more generally, Mr Goodsell submitted:
(a) Sydney Trains' reliance on a 'zero tolerance' approach to drugs and alcohol is inconsistent with the type of testing regime it uses;
(b) the deficiencies of Sydney Trains' testing regime lies at the root of its inability to ascertain contemporaneous breaches or impairment;
(c) the design of the policy is fatally flawed if the intention of the policy is to manage or eliminate risks to the health and safety of employees. The inherent delay due to testing of samples results in Sydney Trains being unable to ascertain a breach of the policy at the time of taking the sample;
(d) the matters raised by Sydney Trains are out-of-work conduct, in which it has no legitimate interest and has not purported to regulate. Extraneous matters such as the lawfulness of consuming cocaine are not relevant; and
(e) viewed sensibly, the policy actually prohibits employees from consuming drugs and alcohol outside of work in such a manner that results in them attending work with residual drug metabolites above a certain level.

Sydney Trains' Submissions

[71] Mr Darams on behalf of Sydney Trains submitted that Mr Goodsell's circumstances are not distinguishable at all from the circumstances in *Hilder* in which the Full Bench strongly made the finding that the drug and alcohol policy was a reasonable and lawful policy, and a breach of the policy provided a valid reason for dismissal because of the nature of Sydney Trains' business and the nature of the circumstances.

[72] Mr Darams identified the parallels between Mr Goodsell's circumstances and Mr Hilder's circumstances:
(a) Mr Hilder tested positive for a cannabis metabolite, as opposed to an intoxicating substance;
(b) there was no dispute that Mr Hilder had breached the D&A Policy;
(c) Mr Hilder was aware of the D&A Policy and its significance;
(d) Mr Hilder's duties required him to perform safety related functions;
(e) the D&A Policy applies in the same context of operations (see *Hilder* at [29]);
(f) Mr Hilder's conduct constituted a breach of a significant safety policy;
(g) the actual reason for dismissal was a breach by Mr Hilder of a policy simpliciter, by attending for work with a prescribed level of drugs in his system;

(h) it was not in dispute that Mr Hilder intentionally smoked the marijuana cigarette which caused him to be in breach of the policy; and
(i) there's a cut-off for the cannabis metabolite under the Australian Standard and Mr Hilder's test exceeded that cut-off.

[73] Sydney Trains submitted that there was some variability in the science of how long after consumption would the benzoylecgonine level be undetectable (or at least below the level in the Australian Standard). As such the employer is less able to independently test the account given by the employee.

[74] There is said to be further variability in interpreting the results which impacts on identifying the risk of impairment at work. Sydney Trains suggests that it's not possible to say who is going to be affected and how long they're going to be affected by these particular consequences.

[75] Sydney Trains relied on these scientific limitations to say that its approach of testing for presence of drugs (or their metabolites) rather than testing for impairment is reasonable - because there isn't any scientific data or evidence that can properly establish impairment, or lack of impairment.

[76] Sydney Trains submitted that because of this uncertainty "there's a risk that that impairment still arises from that previous use, whether that use was 24 hours, 48 hours or 72 hours ... The evidence doesn't say there is no risk of impairment."

[77] Sydney Trains challenged Mr Goodsell's assertion that he made a reasonable and honest mistake. Reasonability would depend on levels of knowledge and investigation by Mr Goodsell of the risk that he might attend for work and fail a drug test. Mr Goodsell admitted in cross-examination that he was just guessing about whether he would pass a drug test on his return to work, which necessarily could not have been a reasonable mistake:

> "… at the end of the day he's engaged in illegal behaviour and had the consequences where he doesn't really think about what's going on in a reasonable way, he doesn't do it, and then turns up for work and breaches the policy. So, that's the seriousness of the conduct that's occurred in this case."

[78] In response to the submission by Mr Saunders that the D&A Policy is not clear, Mr Darams referred to the absence of any evidence from Mr Goodsell of any confusion or uncertainty about the policy.

[79] Sydney Trains also submitted that:
(a) the assessment of a valid reason is assessed from this perspective of the employer;
(b) no one has pointed to a scientifically endorsed or recommenced test for impairment for cocaine;
(c) there are risks that arise just because of the fact that Mr Goodsell consumed cocaine because the effects of cocaine vary from person to person, and those variations cannot be tested;

(d) the margin by which the benzoylecgonine concentration is over the testing threshold, even if it is small, makes no difference because the non-negative result is a breach of a serious policy;
(e) the fact that benzoylecgonine is an inactive metabolite is not a determinative or distinguishing factor;
(f) the two key propositions from *Sharp* and *Hilder* are that (1) there is a lack of scientific evidence for determining impairment and (2) the employer must otherwise rely on what the employee tells them without being able to independently test the explanation provided;
(g) the evidence does not establish that Mr Goodsell could not have been impaired when he attended work "because the issue is he had used cocaine in the recent days. We don't know whether it was three and a half days, three days, two days, one day. We don't know that because his test result can be explained on each of those basis" and that "the science doesn't allow us to say, no, you're not going to be impaired after this period of time";
(a) the intentionality of the breach is irrelevant to the question of valid reason;
(h) Mr Goodsell was afforded procedural fairness and there is no evidence to establish that Mr Bugeja did not properly consider the materials submitted by Mr Goodsell;
(i) prior to his dismissal Mr Goodsell did not claim to have any confusion or uncertainty about the requirements of Sydney Trains' D&A Policy; and
(j) intentionality might be something addressed under 387(h).

Consideration: principles from *Toms, Sharp* and *Hilder*

[80] The three most significant Full Bench authorities on workplace drug and alcohol testing are *Harbour City Ferries v Toms* [2014] FWCFB 6249, *Sharp v BCS Infrastructure* [2015] FWCFB 1033 and *Sydney Trains v Hilder* [2020] FWCFB 1373.

Harbour City Ferries v Toms

[81] In the case of *Harbour City Ferries v Toms* [2014] FWCFB 6249 Mr Toms was dismissed from his position as a Master after testing positive to a cannabis. Mr Toms was called in to work at short notice to replace another Master who was on sick leave. Mr Toms was tested after his ferry collided with a pylon at a wharf. The employer's policy required him to be "drug free" which was defined to mean "any level of drug less than the cut-off levels for each class of drug stipulated by [the Australian Standard]." Mr Toms said that he smoked one marijuana cigarette to assist him with shoulder pain in the evening before the day he received the phone call to work. At the time Mr Toms was on holiday relief, meaning he replaced other Masters who were on planned leave. Harbour City argued that Mr Toms' misconduct was a serious breach of its Code of Conduct which provided "zero tolerance" for drugs and alcohol.

[82] Deputy President Lawrence at first instance accepted that there was no evidence of impairment (see *Toms v Harbour City Ferries Pty Ltd* [2014] FWC 2327 at [62]), found that Mr Toms' breach of the employer's policy was a valid reason for the termination of employment (at [61]) but, notwithstanding that valid reason, the dismissal of Mr Toms was harsh, unjust or unreasonable because of a range of mitigating factors.

[83] The Full Bench on appeal was not persuaded that urine testing in accordance the Australian Standard is a guide as to the actual presence of marijuana in an employee's system or any impairment arising as a consequence (at [8]). The Full Bench identified Mr Toms'

misconduct to be his attending work in breach of the employer's policy (at [9]) and found no error in the original conclusion that there was a valid reason for dismissal.

[84] However the Full Bench found that "there is a wider context and a higher level of seriousness involved in the misconduct of Mr Toms which was not taken into account by Deputy President Lawrence" (at [20]). The Full Bench quashed the original decision and dismissed Mr Toms' application, finding at [27]-[28]:

> "[27] The lack of any impairment arising from drug use, the absence of a link between drug use and the accident and the absence of substantial damage to the [ferry] are not factors relevant to the ground of misconduct identified as non-compliance with the Policy. The fact is that Harbour City required its policy complied with without discussion or variation. As an employer charged with public safety it does not want to have a discussion following an accident as to whether or not the level of drug use of one of its captains was a factor. It does not want to listen to the uninformed in the broadcasting or other communications industry talk about drug tests establishing impairment. It does not need to have a discussion with any relevant insurer, litigant or passenger's legal representative about those issues. What it wants is obedience to the policy. Harbour City never wants to have to have the discussion.
>
> [28] The mitigating factors referred to and relied on by Deputy President Lawrence are not mitigating factors that address the core issue, which was the serious misconduct which led to the dismissal of Mr Toms. The core issue, the valid reason for termination of Mr Tom's employment was his deliberate disobedience, as a senior employee, of a significant policy. The Deputy President does not address Mr Tom's failure to comply with the Policy. The only mitigating factor relevant to this issue was the use of marijuana as pain relief. Consequent upon that explanation is the decision to accept a shift while aware of the likelihood of being in breach of the Policy."

Sharp v BCS Infrastructure

[85] The Full Bench decision in *Sharp v BCS Infrastructure* [2015] FWCFB 1033 was an appeal from the decision of Vice President Catanzariti in *Sharp v BCS Infrastructure* Support [2014] FWC 7310. Mr Sharp performed safety sensitive aviation activities at Sydney Airport and was subject to random drug and alcohol testing. Mr Sharp was tested one Monday morning after, he said, smoking a single joint the Saturday night before. Mr Sharp tested positive for cannabinoids and was dismissed.

[86] At first instance the Vice President found that there was a valid reason for dismissal, being that Mr Sharp attended for work and failed a drug test. The Vice President did not regard the fact that Mr Sharp had smoked cannabis two days before commencing work to be a reason for dismissal. Rather, the Vice President's finding focused on the at-work conduct by Mr Sharp. The Vice President also found that the absence of any evidence of impairment was not relevant to the question of valid reason for dismissal. At first instance Mr Sharp's conduct was found to be serious misconduct and his dismissal was not harsh or unfair.

[87] On appeal the Full Bench also regarded the failed drug test to be at-work conduct. The Full Bench said that the critical consideration was the fact that there was no direct scientific test for impairment due to cannabis. Because of this limitation in establishing impairment, a policy

that provides for disciplinary action including dismissal where an employee tests positive for cannabis simpliciter may, at least in the context of safety critical work, be adjudged to be lawful and reasonable (at [24]). The Full Bench found no appealable error by the Vice President in relation to harshness, but observed at [38] by reference to *Toms*:

> "… Although the outcome is not necessarily the one we would have arrived at had we considered the matter ourselves, nonetheless it was not outside the range of outcomes within which a proper exercise of the discretion might be expected to reside, particularly having regard to other unfair dismissal remedy decisions concerning drug and alcohol testing [Footnote: See e.g. *Harbour City Ferries Pty Ltd v Toms* [2014] FWCFB 6249; *McCarthy v Woolstar Pty Ltd* [2014] FWC 1186]

Sydney Trains v Gary Hilder

[88] Mr Hilder was employed by Sydney Trains and its predecessor from 2012 to 2019. Mr Hilder failed a random drug test, testing positive for cannabis metabolites. Mr Hilder was tested at 7:00am on a Friday morning at his workplace. Mr Hilder said that the day before the test he had some drinks with an old friend he had not seen for years. He said his friend offered him a single marijuana cigarette and he believed it would not be a problem. Sydney Trains dismissed Mr Hilder for breaching its D&A Policy.

[89] At first instance (see [2019] FWC 8412) Deputy President Sams found that Mr Hilder's conduct was a one-off incident, but a serious error of judgment, was not reckless, deliberate or intentional and did not lead to him being incapable or incoherent when at work. The Deputy President concluded that it was not serious misconduct and that there was no valid reason for dismissal. The Deputy President also concluded that the dismissal was harsh as well as unreasonable, or "at the very least" harsh, and therefore unfair.

[90] The Deputy President was critical of many aspects of Sydney Trains' treatment of Mr Hilder, including:

(a) "[Sydney Trains] cannot have a strict 'zero tolerance' approach at the same time as [professing] to take into account personal and mitigating circumstances or an employees' show cause response. Both cannot apply in parallel" (at [110]);

(b) "As Sydney Trains has a 'zero tolerance' approach to drugs and alcohol, it would not matter one jot what personal or mitigating circumstances were considered, or whether the employee responded or not. The outcome would still be the same. The problem here is that no one would expressly acknowledge the obvious. It is little wonder that employees are left confused and bewildered, as I am sure Mr Hilder was" (at [111]);

(c) "Perhaps more significantly, to adopt a 'one size fits all' dismissal policy, where harshness factors are ignored, or worse still, are said to be taken into account, when in truth they are not, is a very risky proposition for an employer to defend as a legitimate basis for dismissal. Inadvertently, it will mean that the statutory definition of an unfair dismissal at s 385 being, inter alia, one which is 'harsh, unjust or unreasonable'" (at [115]); and

(d) "If Sydney Trains believes it is appropriate to have a Drugs and Alcohol Policy which makes clear that any detected level of alcohol or illicit drugs will (not may) result in dismissal, then that is a matter for Sydney Trains' management. What it cannot do is have two policies inconsistent with each other and in circumstances where employees are not even told the less draconian policy will never be applied. This must be so because

> the evidence was that: (a) Sydney Trains had not communicated to its employees the true effect of its 'zero tolerance' policy since 2017, (b) Sydney Trains had not advised employees that anyone who is found to return a positive test for drugs or alcohol, will be dismissed, and (c) employees had been unaware that personal and mitigating circumstances would not be considered, if any trace of illicit drug use was detected in their systems" (at [117]);

[91] On appeal the Full Bench found that the Deputy President erred in taking into account a range of mitigating factors when considering whether there was a valid reason for dismissal. At [29] the Full Bench said:

> "…As the Deputy President recognised, there was no dispute as to the occurrence of the conduct which was the reason for Sydney Trains' dismissal of Mr Hilder. Nor was it in dispute that this conduct constituted a breach of the Policy. Mr Hilder conceded that he was aware of the Policy and its significance. The only question to be resolved therefore was whether the breach of the Policy was a matter of sufficient gravity to constitute a sound, defensible, well-founded and therefore valid reason for dismissal. This required an assessment of the importance of the Policy in the context of Sydney Trains' operations and Mr Hilder's work duties."

[92] In this context the Full Bench found that the Deputy President erred in taking into account the evidence that Mr Hilder was not "incapable or incoherent when at work" (at [31]) and observed at [32] that the lack of impairment was a potentially relevant factor under s.387(h):

> "That is not to say that evidence in this case concerning the lack of any impairment was not relevant at all. In accordance with the principles earlier stated, it was **potentially relevant under s 387(h) in the context of a consideration of the seriousness of Mr Hilder's conduct and the proportionality of dismissal as a disciplinary response**. However it was not relevant to the actual reason for dismissal."
>
> [emphasis added].

[93] The Full Bench found at [35] that Mr Hilder's conduct in breach of the D&A Policy was a valid reason for dismissal:

> "We consider that it is reasonably obvious that Mr Hilder's contravention of the Policy constituted a valid reason for dismissal. Not every established breach of a requirement of workplace policy will constitute a valid reason for dismissal. If the policy requirement pertains to a matter which is trivial in nature or inessential to the fundamental requirements of the employee's employment, an established breach of the policy on a single occasion is unlikely to constitute a valid reason for dismissal. But that is plainly not the situation here. Sydney Trains' operations are safety-critical. The Policy here is designed to ensure that employees do not perform safety-critical functions with drugs or alcohol in their system. Mr Hilder's duties required him to perform safety-related functions. Compliance with the Policy was therefore a fundamental element of his employment. As to the general importance of compliance with safety policies in the context of Sydney Trains' operations, we could not put it better than the Deputy President did himself in *Singh v Sydney Trains* [2019] FWC 182 when he said:

> "[325] That an employee's conduct, which has the potential to cause an imminent risk to the safety of other employees, constitutes a valid reason for dismissal, is plainly an important consideration in cases such as this. The very identification in s 387(a) of such conduct serves to demonstrate how serious the legislature views the 'safety and welfare' of others...
>
> . . .
>
> [327] In my view, the conduct in question need not necessarily be wilful, deliberate or reckless to constitute a valid reason for dismissal. Conduct which is negligent, accidental, inadvertent or careless, particularly in the rail industry, can have disastrous, life-threatening consequences. Adherence to safe working policies and practices, particularly where persons are specifically trained to be aware of ever present dangers, is a cardinal principle for any workplace, but even more so in the rail industry where the risk to the safety of employees and the public is obviously so much more acute. It involves fast moving trains and potentially dangerous infrastructure. Employees are commonly working in high risk track environments as a daily feature of the working environment. Such conduct need not be repeated behaviour, but may involve a single instance of conduct which threatens the safety of employees or others…".

[94] Ultimately the appeal was dismissed because the Full Bench found no appealable error in the Deputy President's alternative finding that the dismissal was harsh. In reaching this conclusion the Full Bench reinforced the Deputy President's concerns regarding the inconsistency said to exist between Sydney Trains' "zero tolerance" approach and its professed policy of taking mitigating factors into account when considering the taking of disciplinary action, and also Sydney Trains' failure to clearly communicate "in terms intelligible to the average Sydney Trains employee" the uncompromising way in which Sydney Trains administered its policy:

> "[38] … We have earlier set out the matters identified by the Deputy President in the decision which caused him to conclude that Mr Hilder's dismissal was harsh. Only two matters have any intersection with the matters which the Deputy President took into account under s 387(a): the inconsistency said to exist between Sydney Trains' "zero tolerance" approach and its professed policy of taking mitigating factors into account when considering the taking of disciplinary action. We consider that the Deputy President was entitled to have regard to these matters under s 387(h). As to the first matter, we agree that there is a clear inconsistency between the "zero tolerance" approach, which was clearly characterised by Sydney Trains' witness Mr Christopher Walsh as one whereby any breach of the Policy would result in the termination of employment, and the consideration of mitigating factors in decision-making concerning disciplinary action. The inference is available that the mitigating factors in Mr Hilder's case were not truly taken into account when Sydney Trains decided to dismiss him. As to the second matter, there was no challenge in the appeal to the Deputy President's finding of fact that employees had not been informed of the true nature of the "zero tolerance" approach after its adoption in 2017.

> [39] We would add that we do not cavil per se with a decision by an employer to recalibrate its response to breaches of drug and alcohol policies and impose a zero-tolerance approach. However, if such a course of action is undertaken, it is desirable that the employer clearly communicates the terms of the new policy to employees, ensures they are trained in it, and gives adequate warning regarding the date upon which the new policy will be implemented and relied upon. Clarity of communication is also highly desirable as to the actual terms of an employer's drug and alcohol policy. We note in this respect that the Policy here, which we have earlier summarised, simply cross-refers to the Standard in respect of the cut-off levels for drug use without either incorporating the relevant parts of the Standard or summarising their effect in terms intelligible to the average Sydney Trains employee."

Consideration: testing standards and readings

[95] The Australian Standard sets protocols and standards for urine testing. Amongst other things the Australian Standards set minimum "cut off" limits for detection of certain substances. As Dr Lewis said:

> "The Standard is **not an impairment measuring document**, as stipulated in AS/NZS 4308: 2008 Clause 1.1 SCOPE, Notes 2. **The Standard is a document designed to measure the competence of a laboratory**, such that compliance with that Standard should ensure a correct result, viz, the presence or absence of a drug/metabolite being indicative of either **recent or not recent ingestion**."

[96] Professor Weatherby's and Dr Lewis' evidence was that the cut off limits are set to avoid measurement errors and to provide confidence in testing outcomes. In other words, the cut off limits are set in the Australian Standards by reference to margins of error in the accuracy of the results recorded.

[97] Benzoylecgonine is a case in point. The testing cut-off limit in the Australian Standard is 150ug/L, which is a cut-off level determined by the technology and methodology used in the testing process. As Professor Weatherby said, a normal positive reading might be 7000ug/L, which is 46 times larger than the cut-off. This relativity suggests that the testing process can reliably detect minute concentration levels.

[98] For drug testing, and particularly tests for cocaine metabolites, there is no utility in comparing a particular positive reading to the cut-off level. Where one might think a blood alcohol level of 0.10 is significant because it is twice the legal driving limit of 0.05, the same kind of comparison for testing cut-off limits is not helpful.

[99] The fact that Mr Goodsell's result was almost double the testing limit sounds terrible for Mr Goodsell, but it just means that his concentration was very low compared to an even lower cut-off limit.

Consideration: connection to risk of impairment

[100] For Mr Goodsell therefore, all that the test revealed was that he had consumed cocaine at some point in the previous days. None of the experts who gave evidence suggested that Mr Goodsell's positive test meant any more than this.

[101] Such information might be all that is needed when, for example, testing athletes for banned substances. For the purposes of workplace testing relating to cocaine, further consideration is required because cocaine is only active in the body for a short period of time and its inactive metabolites are present in the body for considerably longer.

[102] The taking of drugs by an employee away from work is only relevant to the employment if it has a connection to the performance of work. As was observed in *Rose v Telstra Rose,* Print Q9292 [1998] AIRC 1592:

> "… employers do not have an unfettered right to sit in judgment on the out of work behaviour of their employees. An employee is entitled to a private life. The circumstances in which an employee may be validly terminated because of their conduct outside work are limited..."

[103] The D&A Policy and the information provided to employees try to grapple with the vexed potential overlap between out of hours conduct (be it legal or illegal out of hours conduct) and workplace safety. The D&A Policy properly focuses on conduct and attendance at the workplace but nonetheless recognises that out of hours conduct can affect the state in which an employee attends for work.

[104] In workplaces the fundamental link between consumption of alcohol or drugs out-of-hours and the employer's testing regime is the *risk* that the employee might be impaired when they attend for work. The conduct that breaches these kinds of policies is the attendance at work and testing positive to certain substances. In a safety critical environment the testing regime authorised by the policy is a fair and reasonable measure to address this risk.

[105] As can be seen from *Toms, Sharp* and *Hilder,* policies that rely on testing may be lawful and reasonable when the employer is not otherwise able to assess whether employees are impaired by drugs or alcohol when they attend the workplace. Testing for use rather than impairment is a blunt instrument however, as the authorities say, may nonetheless be fair and reasonable if there is not an effective way to test for impairment.

[106] Mr Bugeja said under cross-examination that the fact that Mr Goodsell consumed cocaine while on leave (separate to the fact that Mr Goodsell failed a drug test) was one of the reasons he recommended that Mr Goodsell be dismissed. Mr Bugeja's evidence was the closest Sydney Trains came to leading evidence from a decision-maker. Sydney Trains was careful not to submit that Mr Goodsell's consumption of cocaine was a reason for dismissal and properly so. Mr Bugeja's evidence does raise a question as to whether he properly understood Sydney Trains' D&A Policy, the out-of-hours conduct about which Sydney Trains is entitled to take disciplinary action, and the out-of-hours conduct that is irrelevant to employment. Mr Bugeja's strike-rate on disciplinary matters involving drugs or alcohol, where every disciplinary matter that he has overseen concluded with the employee finishing employment, reinforces this concern.

[107] Sydney Trains does not allege that Mr Goodsell was impaired in any way when he attended for work on Saturday 4 June 2022. This concession was necessary because there is no evidence of any actual impairment.

[108] I accept, as I must, the Full Bench approaches in *Toms, Sharp* and *Hilder* to be correct. The dilemma in relation to cocaine is that the connection between the testing regime and the risk of impairment is significantly weaker. The experts agree that the time after consumption during which an employee might be impaired by cocaine is quite short. However, the testing process under the Australian Standard, particularly the low cut-off level for cocaine metabolites under the standard, can detect use several days later.

Consideration: risk of impairment

[109] My concern is best illustrated by a hypothetical comparison: if a test was available that could detect alcohol consumption up to 5 days after the effects of the alcohol had worn off, quite obviously employers could only use the results of such a test with extreme caution.

[110] Frankly, in Mr Goodsell's case Sydney Trains does not appear to have exercised any caution and instead blindly accepted the positive test result to be proof of a risk that Mr Goodsell attended work under an impairment.

[111] Dr Casolin's expertise is summarised in paragraphs [32]-[34] above. Dr Casolin was the Chief Health Officer at the time Sydney Trains' D&A Policy was first introduced but he said he was not consulted about the policy at the time, which is extraordinary given his expertise. The policy was reviewed in 2022 and Dr Casolin was not consulted in this review either, which is even more extraordinary after the *Hilder* proceedings.

[112] A Senior Investigator sought Dr Casolin's advice by email about Mr Goodsell's test result, asking whether "the test result (264ug/L Benzoylecgonine) is consistent with [Mr Goodsell's] claim that he ingested the cocaine almost 4 days earlier". Dr Casolin's whole advice to the investigator was "Good morning Mark the history provided is plausible and consistent with the result." Dr Casolin was also asked about the testing procedure and screening cut-off levels and he advised on these matters. Dr Casolin cannot be criticised about his advice: he was asked two very narrow questions and he answered those questions.

[113] Dr Casolin was not told that Mr Goodsell had been absent from work for 8 days prior to testing, and Dr Casolin was not asked any questions by the Senior Investigator about the benzoylecgonine concentration detected nor whether there was any material risk that Mr Goodsell could have attended work in an impaired state.

[114] In the hearing Sydney Trains did not accept that there was no risk that Mr Goodsell was impaired when he attended work on the day he was tested. Conversely Sydney Trains did not establish that there was any risk that Mr Goodsell was impaired and/or that there was any link between Mr Goodsell's positive test result and the risk that he attended work in an impaired state.

[115] To be clear, by the reasoning in *Toms, Sharp* and *Hilder* Sydney Trains does not have to prove that Mr Goodsell was in fact impaired when he attended work. Those decisions recognise the inherent difficulty for employers in testing for or otherwise proving impairment. However the employer must establish that there was a risk that Mr Goodsell was impaired at work.

[116] In Mr Goodsell's case he was absent from the workplace for the 8 consecutive days immediately prior to testing. The benzoylecgonine concentration was described by Professor Weatherby as "low" and Professor Weatherby thought that when Mr Goodsell was tested he was near the end of the process of eliminating the benzoylecgonine from his system, which necessarily means that the cocaine had been consumed in the days before testing while Mr Goodsell was on leave.

[117] In Mr Goodsell's particular circumstances there is no proper basis upon which I could find that there was a risk that Mr Goodsell attended work on 4 June 2022 under any impairment arising from his consumption of cocaine during approved leave.

[118] Central to this conclusion is the relatively low concentration of benzoylecgonine detected, and Professor Weatherby's assessment that if cocaine had been consumed only 12 hours before testing then the dosage would have been so low that Mr Goodsell probably would not have realised that he had done so. Even if the cocaine had been consumed 12 hours before the test, and even if that consumption had caused some noticeable impairment 10-12 hours before testing, the very small effects caused by such a low dosage would have long passed before Mr Goodsell attended work and was tested.

Consideration: Section 387

[119] Section 387 of the *Fair Work Act 2009* (Cth) (**FW Act**) requires me to take into account the following matters in determining whether Mr Goodsell's dismissal was harsh, unjust or unreasonable to the extent that they are relevant to the factual circumstances before me:

(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.

[120] I accept Mr Goodsell's version of events in relation to how he came to test positive for benzoylecgonine on Saturday 4 May 2022, including that:

(a) during a period of leave and several days before he was due to return to work, he consumed some cocaine;
(b) on the day he returned to work he did not feel any kind of impairment, nor did anyone else identify that Mr Goodsell was suffering from any kind of impairment when he attended for work on 4 May 2022;
(c) Mr Goodsell was genuinely remorseful about his actions;
(d) there is nothing to indicate any likelihood that Mr Goodsell will fail another drug test;
(e) there is no greater risk that that Mr Goodsell might attend for work under the influence of drugs or alcohol than any other employee; and
(f) Mr Goodsell fully co-operated with Sydney Trains' investigation.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct (s.387(a))?

[121] Mr Goodsell properly acknowledged that he breached Sydney Trains' D&A Policy by testing positive to benzoylecgonine in a drug test at work. It is clear from the earlier decisions in *Toms*, *Sharp* and *Hilder*, that this breach of policy was a valid reason for dismissal.

[122] Sydney Trains' operation is safety-critical and Sydney Trains is entitled to place significant demands on its employees regarding matters of safety. In this context, Sydney Trains' policies can impose on conduct outside of the workplace if that conduct compromises safety in the workplace – the most obvious example being the consumption of drugs or alcohol outside of work that causes an employee to attend work impaired.

Was the Applicant notified of the valid reason (s.387(b))?

[123] Section 387(b) requires me to take into account whether the employee "was notified of that reason." Sections 387(b) and (c) direct the Commission's inquiry to matters of procedural fairness. In general terms a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case.

[124] In context, the inquiry to be made under s.387(b) is whether the employee was "notified" of that reason *before* the employer made the decision to terminate.

[125] It is accepted by both parties that Mr Goodsell was notified of the reason for his dismissal in plain and clear terms.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct (s.387(c))?

[126] The opportunity to respond to which s.387(c) refers is an opportunity to respond to the reason for which the employee may be about to be dismissed.

[127] Sydney Trains undertook a disciplinary process that had the appearance of affording him procedural fairness and an opportunity to respond to the reasons for dismissal.

[128] Mr Goodsell accepted that he had been given an opportunity to respond to the allegations against him. However Mr Goodsell also submitted that Sydney Trains had closed its mind to

Mr Goodsell's continued employment, which was said to be indicative of a process that was in substance, procedurally unfair. Mr Goodsell submitted that there is nothing he could have said to change Sydney Trains' mind and that it was intolerably clear from Mr Bugeja's evidence that Sydney Trains took a zero tolerance approach to Mr Goodsell's breach of the D&A Policy.

[129] This submission is quite understandable, particularly when Mr Goodsell's case is compared to Mr Hilder's case. Of what can be seen of Sydney Trains' employment practices from the outside, there does not appear to have been any proper consideration of Mr Goodsell's particular circumstances.

[130] However s.387(c) is primarily concerned with the *opportunity* given to the employee to respond, rather than the adequacy, fairness or reasonableness of the employer's consideration of that response. How the employer considers or acts upon the employee's response is more relevant to matters examined under s.387(h) and perhaps s.387(a).

[131] I am satisfied that Mr Goodsell was in fact given the opportunity to respond to the reason for dismissal.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal (s.387(d))?
[132] This factor is not a relevant consideration in this matter.

Was the Applicant warned about unsatisfactory performance before the dismissal (s.387(e))?
[133] As the dismissal did not relate to unsatisfactory performance, strictly speaking 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 (s.387(f))?
[134] Neither party submitted that the size of Sydney Trains' enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of Sydney Trains' 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 (s.387(g))?
[135] Sydney Trains' enterprise does not lack dedicated human resource management specialists.

What other matters are relevant (s.387(h))?
[136] There are a number of other matters that I consider to be relevant (per s.387(h):

(a) Mr Goodsell's lengthy and unblemished employment history;
(b) Mr Goodsell's cooperation with Sydney Trains' investigation, his remorse and that he unconditionally accepted responsibility for his actions;
(c) the absence of any risk that Mr Goodsell was impaired when he attended work in the circumstances;
(d) the employer's mind was closed in the disciplinary process to Mr Goodsell continuing in his employment;

(e) the information available to employees about the D&A Policy; and
(f) Sydney Trains' failure to consider options other than dismissal.

Employment history, cooperation and remorse

[137] Mr Goodsell was employed by Sydney Trains and its predecessors for 26 years. He was highly regarded, particularly on matters of safety, and had undertaken more than 40 random drug and alcohol tests without ever testing positive. As he said in his response in the disciplinary process, he was "deeply remorseful of this one-off incident … devastated [by his] poor choice of behaviour [that was] completely out of character."

[138] Nobody from Sydney Trains asked to meet with Mr Goodsell to eyeball him and test the genuineness of his remorse and regret. In fact no one from Sydney Trains involved in the discipline process has ever met Mr Goodsell nor, it seems, made any internal inquiries about his character, truthfulness or the actual likelihood that he might attend work impaired by drugs or alcohol in the future.

[139] Mr Goodsell cooperated with Sydney Trains' investigation and discipline process. He queried some aspects of the testing procedure, as was his right, respectfully.

[140] These aspects of Mr Goodsell's case all support the conclusion that his dismissal was harsh and unreasonable.

No risk of impairment

[141] The reasoning in *Toms, Sharp* and *Hilder* is compelling: If there is a risk that a worker might attend the workplace impaired by drugs, and there is a difficulty identifying and proving that impairment, then testing for usage rather than impairment is likely to be fair and reasonable. If a worker fails a test, and the possibility or risk that the worker was impaired when they took the test cannot be eliminated, it is prima facie fair and reasonable that the employer takes strong action including dismissal.

[142] As I have considered in more detail above, I am not satisfied that there was any risk that Mr Goodsell attended work on 4 June 2022 impaired by cocaine: see paragraphs [100]-[109] above regarding the connection between testing and risk of impairment, and also paragraphs [110]]-[118] regarding the actual risk of impairment in Mr Goodsell's circumstances.

[143] Assuming that Mr Goodsell was impaired for a period of time after consuming the cocaine, that relatively short period of impairment was some time in the previous 2 to 5 days. Mr Goodsell was on leave for all of those days and so the period of impairment could only have been while Mr Goodsell was away from the workplace on leave. As Mr Saunders properly conceded, the circumstances would be theoretically different if Mr Goodsell had worked during the four days before the test because then there would be a possibility that he worked with an intoxicant in his system.

[144] The concentration of benzoylecgonine was very low, albeit measured against an even lower cut-off limit under the Australian Standards. Sydney Trains' Chief Health Officer said that the benzoylecgonine concentration measured in the test was consistent with Mr Goodsell's account that he had consumed the cocaine almost 4 days prior. Dr Casolin and Dr Lewis said the positive test result was also consistent with the cocaine having been consumed less than

four days prior but, as Professor Weatherby said, even if it had been consumed 12 hours prior to testing, the concentration level at test time means that the impairment at the time of consumption would have been so low that Mr Goodsell would probably not have even noticed.

[145] The absence of a risk of impairment supports the conclusion that his dismissal was harsh, unjust and unreasonable.

Sydney Trains' collective mind was closed

[146] Mr Goodsell submitted that Sydney Trains' mind was closed to the possibility of his employment continuing, that Mr Bugeja took a zero-tolerance approach to drugs, that there was therefore nothing that Mr Goodsell could have said that would have changed Sydney Trains' mind, and that therefore Sydney Trains' superficially thorough disciplinary process was in substance unfair.

[147] Sydney Trains adopted what seems to be its regular practice of shielding the decision maker from scrutiny by leading no direct evidence at all from that person. As stated above, Mr Bugeja's evidence is the closest Sydney Trains comes to evidence from the decision maker. At least when he gave his evidence Mr Bugeja was honest enough to say his default position is that anyone who tests positive for drugs is likely to be terminated (see [53] above). For completeness I note that Mr Bugeja said that "*in the absence of any compelling evidence to persuade me otherwise*, my view is that their employment should be terminated, irrespective of their length of service", but none of the evidence in this case gave hope to the possibility that Mr Bugeja would or could be persuaded otherwise.

[148] In *Hilder's* case Deputy President Sams (see [90] above) and the Full Bench (see [94] above) identified many concerns and failings in Sydney Trains' application of the D&A Policy in disciplinary matters. Most notably the Full Bench said:

> "… we agree that there is a clear inconsistency between the "zero tolerance" approach, which was clearly characterised by Sydney Trains' witness Mr Christopher Walsh as one whereby any breach of the Policy would result in the termination of employment, and the consideration of mitigating factors in decision-making concerning disciplinary action. The inference is available that the mitigating factors in Mr Hilder's case were not truly taken into account when Sydney Trains decided to dismiss him."

[149] The failings identified in *Hilder* by and large related to Sydney Trains' lack of proper consideration of the individual employee's circumstances. Recognising that the breach of the D&A Policy was a valid reason for dismissal, what made Mr Hilder's dismissal unfair were the other mitigating factors that applied to him that were either ignored or disregarded by Sydney Trains.

[150] Most of the same mitigating factors in Mr Hilder's case apply to Mr Goodsell: a long employment history without blemish, the absence of any evidence of impairment at the time of testing, the apparent zero tolerance/one size fits all dismissal policy, remorse, the lack of a clear information provided to employees about the policy, and so on.

[151] Sydney Trains' decision to terminate Mr Goodsell's employment came after a 2- or 3-step process. Firstly an investigator was appointed to investigate the allegation, then a Discipline Review Panel invited and received a response from Mr Goodsell, and then the decision maker received various papers from the Panel and made a decision.

[152] All of the information that was provided to the decision maker was in evidence in the proceedings.

[153] The investigator collected information about the failed drug test. There was some correspondence between the investigator, Mr Goodsell and Dr Casolin regarding some of the finer points of the test result. The Investigation Report does no more than record the details of the testing process, the test results and Mr Goodsell's response. The closest the report comes to any "analysis" is the following paragraph:

> "The investigation takes Mr Goodsell's claim that the test result did not show he was "impaired or acting under the influence" as reference to the possibility that he was not under the influence of drugs, specifically cocaine, at the time of testing. Irrespective of Mr Goodsell's thoughts or beliefs around his level of impairment, the Sydney Trains Drug and Alcohol Policy sets out that all employees are required to be drug and alcohol free while at work. Being drug and alcohol free means having a reading less than the cut off level stipulated in the Australian/New Zealand Standard 4308."

[154] The Discipline Review Panel received the Investigation Report, formed a preliminary view in its 16-minute meeting that dismissal was the appropriate outcome, invited and received a response from Mr Goodsell and then at a shorter second meeting, prepared a recommendation for the decision-maker. The recommendation from the Panel was in the form of an email that was two pages long when printed. Most of the email/recommendation described the procedure applied to Mr Goodsell. The email/recommendation attached Mr Goodsell's response but did not otherwise refer to it, or refer to any matter that could be described as a mitigating factor. The pertinent parts of the email/recommendation, omitting the procedural matters, are as follows:

> "<u>Background</u>
>
> - On 4 June 2022, Mr Reece Goodsell, Work Group Leader Traction participated in a random drug test and returned a positive result for Cocaine Metabolites (benzoylecgonine -264 - cut off 150 ug/L), which was not consistent with any declared medications.
> - On 6 June 2022, the results were received by PSC and the business.
>
> <u>Actions Taken</u>
>
> - In light of the serious nature of the allegations, PSC determined that it would be appropriate for [Mr Goodsell] to be suspended with pay pending a disciplinary investigation.
>
> …

Recommendations

- As per Sydney Trains HR Delegations 14(g), PSC are now seeking your endorsement as to the final disciplinary outcome being dismissal or any other disciplinary outcome as considered appropriate by the Delegate.

Supporting documents attached

- Investigation Report
- Preliminary Outcome Letter
- Show Cause Response
- Draft Final Outcome Letter"

[155] Despite every member of Mr Goodsell's disciplinary review panel other than Mr Bugeja being either a lawyer or a "People and Culture" specialist, no information or recommendation provided to the decision maker suggests that Sydney Trains has learnt anything from the *Hilder* litigation or paid any attention to the Commission's findings about the unfairness and inadequacies of Sydney Trains' approach to the D&A Policy. If any of the panel members recognised that there were mitigating factors in Mr Goodsell's favour, they stayed quiet about it and chose not to include any such acknowledgement in their email/recommendation to the decision maker.

[156] In his evidence in the proceedings Mr Bugeja described his reasoning for recommending that Mr Goodsell be dismissed. He referred to four particular matters that a reasonable person would regard as points in Mr Goodsell's favour. However Mr Bugeja found a way to see each point as a positive reason to dismiss Mr Goodsell. Mr Bugeja's view was:

(a) Mr Goodsell's unblemished 26 years of service counted against him because his length of service meant that he had spent a significant amount of time working on the track, being inducted to the relevant sites and so on;
(b) Mr Goodsell's belief that he was not impaired when he attended for work counted against him because he was not in a position to judge whether or not he was impaired. Mr Bugeja also held the view, erroneously, that when Mr Goodsell attended for work "an illicit drug was present in his sample above the cut off limits for that drug";
(c) because Mr Goodsell failed a random test he "tested positive … by chance" and therefore Mr Bugeja "had no way of being sure that he would not fail to comply with our policies on drugs in the future"; and
(d) even though dismissal would cause Mr Goodsell financial hardship "in choosing to take cocaine, whether as a one off or otherwise, [Mr Goodsell] took a gamble and put his job in jeopardy."

[157] Mr Goodsell's allegation that Sydney Trains' mind was closed to the possibility of him continuing in his employment is very difficult to prove. And in context, whether or not the decision-maker, Mr Burge, in fact considered mitigating factors will not ultimately determine the outcome of the case. It is possible that Mr Burge had a more informed understanding of fairness in employment matters than those on the panel that advised him, but Sydney Trains chose to lead no evidence from him.

[158] I am satisfied that Sydney Trains' approach to Mr Goodsell's breach of the D&A Policy was procedurally unfair. Even though Mr Goodsell was given the opportunity to provide a response to the breach, there is no evidence at all to suggests that anyone involved in the process fairly considered the Applicant's response or was open to the possibility that Mr Goodsell could remain in employment.

[159] The process adopted by Sydney Trains supports the conclusion that his dismissal was unjust and unreasonable.

[160] The criticism of Sydney Trains' administration of its own policy in the *Hilder* litigation has essentially been ignored. Sydney Trains' conduct in Hilder that was criticised by the Commission was repeated.

Information provided to employees

[161] On a similar note, Deputy President Sams and the Full Bench in *Hilder* emphasised the need for Sydney Trains to explain to its workforce what it means by drug free in a way that is comprehensible to the average rail worker. Sydney Trains was critical of Mr Goodsell's decision to attend for work without sure knowledge that he was 'drug-free'.

[162] In the circumstances, Sydney Trains' criticism was unreasonable. The information Sydney Trains made available to its workforce is not clear on how the Australian Standards apply, or that in reality the random testing program tests for use rather than impairment, and so on.

[163] As referred to earlier, the information obtained from the testing regime under the Australian Standard, being evidence of use of a drug at some time prior to testing, might be sufficient for screening athletes in a sport that bans all use of certain drugs. If Sydney Trains applies its D&A Policy in the same way as a sports administrator and brings sanction upon anyone who consumes certain drugs at any time (inside or outside of work), the material supplied to employees should unambiguously state Sydney Trains' expectations.

[164] The lack of clarity in the information Sydney Trains makes available to its employees supports the conclusion that Mr Goodsell's dismissal was harsh and unreasonable.

Other options/Rehabilitation

[165] Sydney Trains is entitled to have a "zero tolerance" for breaches of the Code of Conduct. But zero-tolerance does not mean that every transgression of the Code must result in dismissal of employment.

[166] Dr Casolin said that rehabilitation is generally offered to individuals who self-declare that they have a problem with drugs and alcohol. Recognising that the priority for the employer is to have a drug-free workplace, Sydney Trains does work more cooperatively with employees who recognise their own limitations and seek help.

[167] Certain procedures are put in place when an employee makes such a declaration. Those procedures recognise and reflect the heightened risk *for that worker* that they might attend the workplace impaired by drugs or alcohol.

[168] Even if one was to accept that after Mr Goodsell failed a random test the employer's assessment of the risk that Mr Goodsell might attend work impaired by drugs is heightened, it was reasonably open for Sydney Trains to put measures in place that recognise and reflect this risk. I note in this regard that Mr Goodsell indicated during the disciplinary process that he was prepared to "partake in recommended courses or further assistance relevant to my incident" and also in any targeting testing regime.

[169] Sydney Trains' failure to consider and implement alterative arrangements for Mr Goodsell support the conclusion that his dismissal was harsh and unreasonable.

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

[170] I have made findings in relation to each matter specified in section 387 as relevant. I must consider and give due weight to each as a fundamental element in making an overall determination as to whether the termination was harsh, unjust or unreasonable and therefore an unfair dismissal.

[171] Overall I find that the dismissal of Mr Goodsell was harsh, unjust and unreasonable, and therefore unfair.

[172] There was a valid reason for dismissal however when the mitigating factors referred to above are taken into account, I am comfortably satisfied that the dismissal was unfair.

Remedy - reinstatement

[173] Being satisfied that Mr Goodsell made an application for an order granting a remedy under s.394, was a person protected from unfair dismissal and was unfairly dismissed within the meaning of s.385 of the FW Act, I may order Mr Goodsell's reinstatement, or the payment of compensation to Mr Goodsell, subject to the FW Act.

[174] The Commission must perform its functions and exercise its power in a manner that is fair and just and promotes harmonious and co-operative workplace relations (per s.577 of the FW Act) and must take into account the objects of the FW Act, and equity, good conscience and the merits of the matter. The power to order reinstatement is "a very drastic one" (per *Slonim v Fellows* (1984) 154 CLR 505 at 515, [1984] HCA 51, cited in *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at 548, [2005] HCA 22 at [28]). As the High Court observed in *Blackadder*, such an order is an intrusion into the personal relationship of employer and employee, and an intrusion that is "deliberate and envisioned by the Act" (at [28]).

[175] As the Full Court in *Perkins v Grace Worldwide Australia Pty Ltd* (1997) 72 IR 186 at 190, [1997] IRCA 15 observed, the employment relationship is capable of withstanding some friction and doubts:

> "Each case must be decided on its own merits. There may be cases where any ripple on the surface of the employment relationship will destroy its viability. For example the life of the employer, or some other person or persons, might depend on the reliability of the terminated employee, and the employer has a reasonable doubt about that reliability. There may be a case where there is a question about the discretion of an employee who

> is required to handle highly confidential information. But those are relatively uncommon situations. In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party."

[176] Mr Bugeja's concerns about the possibility of Mr Goodsell returning to employment, described in paragraph [55] above are not persuasive. His suggestion that Mr Goodsell should not be reinstated because "despite adequate training and awareness, Mr Goodsell does not understand or value the safety aspects of his role or the role of any Rail Safety Worker especially one that also holds an electrical authorisation" is without foundation. Mr Bugeja's reluctance to 'take the chance' that 'he will not do it again' is similarly unreasonable. For the same reasons that Mr Goodsell should not have been dismissed, I am satisfied that Mr Goodsell's reinstated employment is capable of withstanding some friction and "doubts."

[177] Taking all these matters into account I find that it would be appropriate to order that Mr Goodsell be reinstated to his former position pursuant to s.391 of the FW Act.

[178] Further, it is appropriate to make an order that maintains the continuity of Mr Goodsell's employment (per s.391(2)(a)) and to make an order that Sydney Trains pay to Mr Goodsell an amount for the remuneration lost by Mr Goodsell because of the dismissal (per s.391(3)).

[179] In making an order under s.391(3) I am required by s.391(4) to consider:

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

[180] An order to restore lost pay pursuant to s.391(3) is a discretionary one and the Commission may take into account all of the circumstances of the case, including the conduct of the employee that led to the dismissal (see *Humphries v Buslink Vivo Pty Ltd* [2015] FWC 6278 citing *Kenley v JB Hi Fi*, Print S7235 at [36]).

[181] In an order for lost wages is reduced because of the employee's conduct, the reduction ought to be proportionate to the conduct. In *Kenley v JB Hi Fi*, Print S7235 at [37]-[38], the Full Bench of the AIRC regarded the reduction in backpay as imposing a "financial penalty" on the employee, likening the backpay that was withheld at first instance to a period of suspension without pay.

[182] Any pay in lieu of notice of termination must be considered in the calculation of lost earnings (per *Nyrstar Hobart Pty Ltd v Cannan* [2015] FWCFB 888 at [105] and [110]).

[183] Recent examples of reductions in back pay because of the employee's conduct include:

(a) *Hilder v Sydney Trains* [2019] FWC 8412 – a 50% reduction in lost earnings where the dismissal was because of a breach of the D&A Policy (at [142]);

(b) *Dyson v Centennial Myuna Pty Ltd* [2020] FWC 5486 – six months backpay was reduced by three months because it was considered appropriate that the employee bear a substantial degree of responsibility for the financial consequences of his dismissal;

(c) *Johnson v Chelgrave Contracting Australia Pty Ltd* [2020] FWC 5784 – backpay was reduced by 15% because the employee had not done everything he could have done in order to avoid a safety breach;

(d) *Morcos v Serco Australia Pty Ltd* [2019] FWC 7675 – no backpay was ordered because the employee had "had made a mistake by attending work after having consumed alcohol"; and

(e) *Wakefield v Sunraysia Institute of TAFE* [2019] FWC 4979 – backpay was reduced by 25% to take into account the employee's misconduct in sending the email to his former employer, and to "reinforce to the Applicant the importance of not repeating this behaviour in the future" (at [123]).

[184] I have decided to reduce the amount Sydney Trains is required to pay as compensation by 20% in recognition that Mr Goodsell failed a drug test.

[185] As such I will make an order in due course requiring Sydney Trains to pay an amount compensating Mr Goodsell for lost pay as a result of the dismissal, calculated as follows:

(a) the amount Mr Goodsell would have received as ordinary time earnings but for the dismissal;

(b) MINUS any amount paid by Sydney Trains in lieu of notice;

(c) MINUS any amounts received by Mr Goodsell as income from employment or other work since his dismissal;

(d) MINUS a further 20% of the amount calculated after the above steps.

[186] I will make an order[1] that Mr Goodsell be reinstated to the position in which he was employed immediately before his dismissal (per s.391(1)) by no later than 22 December 2023, an order that maintains Mr Goodsell's continuity of employment (per s.391(2)(a)) and also the following directions for the filing of material by the parties in order to facilitate the making of an order to restore lost pay (per s.391(3)):

(a) Parties must confer on the calculation of the lost pay as per paragraph [185] above;

(b) If the amount payable is agreed between the Parties by 13 December 2023, Mr Goodsell must advise the Commission by no later than 4:00pm on that day;

(c) If the amount payable is not agreed between the Parties by 13 December 2023, each party must file and serve submissions and any supporting evidence by no later than 20 December 2023 in relation to (1) the amount each party submits to be the correct amount the Commission should order; (2) the amount of remuneration earned by Mr Goodsell from employment or other work during the period between the dismissal and the making of the Order for reinstatement; and (3) the amount of any remuneration reasonably likely to be earned by Mr Goodsell during the period between the making of the Order for reinstatement and the actual reinstatement.

DEPUTY PRESIDENT

Appearances:

L Saunders of Counsel instructed by *J Hart* of the Australian Rail, Tram and Bus Industry Union
J Darams instructed by *K Kossian* of Maddocks

Hearing details:

2023.
Sydney
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