DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Anthony Montana
v
DP World Sydney Limited
(U2022/9219)

COMMISSIONER MCKENNA SYDNEY, 28 MARCH 2023

Application for an unfair dismissal remedy

[1] Anthony Montana has made an application, pursuant to s.394 of the *Fair Work Act 2009* ("Act"), in which he seeks an unfair dismissal remedy in relation to his termination of employment by DP World Sydney Limited ("DPW").

Preliminary matters

[2] As to the initial matters to be considered, as set out in s.396 of the Act, there was no issue, and I otherwise find, that the application was made within time; Mr Montana is a person who was protected from unfair dismissal; DPW is not a small business, with the result that consideration of the *Small Business Fair Dismissal Code* does not arise; and the termination of employment was not a genuine redundancy.

Background

[3] DPW is a stevedoring company with operations in Port Botany, New South Wales. Mr Montana was employed by DPW as a stevedore at its Port Botany terminal from November 2009 to the date he was summarily dismissed on 23 August 2022. By way of background, on 29 June 2021 Mr Montana sustained a "*very serious*" injury while at home – being a laceration to his left forearm that left Mr Montana with what he described as "*residual thumb numbness, rendering* [him] *unable to safely operate a forklift or a Rubber Tired Gantry … crane*". As the injury Mr Montana sustained was not work-related, workers' compensation rights and obligations were not engaged. Mr Montana asked that he be allowed to return to work on light duties, but was informed by DPW that he was ineligible for light duties because the injury was not work-related. Although Mr Montana was not entitled to workers' compensation benefits following the non-work injury, clause 18.8 of the *DP World Sydney Enterprise Agreement 2020* ("enterprise agreement") contains certain income protection provisions where an employee is unable to attend for work because of personal injury or illness. Following the injury and a waiting period, Mr Montana periodically provided medical certificates and accessed the income protection payments that are conferred by the enterprise agreement. Mr Montana remained off work due to his injury until he was summarily dismissed on 23 August 2022 for serious

misconduct concerning: (a) conduct related to attendance at an independent medical examination ("IME"); and (b) a comment allegedly made to his supervisor on the morning of the show cause meeting.

Circumstances preceding the dismissal

[4] On 7 July 2022, Brendan Pak, who was formerly employed as a DPW Human Resources Advisor (and who did not give evidence in the proceedings), apparently advised Mr Montana in a telephone conversation that DPW required information about the injury from his orthopaedic and hand surgeon, Dr Damian Ryan. That same day, Mr Pak sent an email to Mr Montana which confirmed matters in the following way:

> "I refer to our conversation on 7 July 2022 [in] which I advised that the Company requires further medical information from your treating medical practitioner Dr Damian Ryan regarding your current fitness for work and whether you are fit to return to pre-injury position as a Stevedore at DP World, Sydney Terminal.
>
> You are required to sign the authority enclosed with this letter and provide a copy either directly to Dr Ryan or myself.
>
> Once we have received a copy of Dr Ryan's report, we will be in contact with you to discuss the next steps."

[5] The authority that Mr Pak advised Mr Montana that he was to sign read:

> "Dear Dr Ryan,
>
> I authorize you to provide to DP World Sydney a report relating to my ability to perform the duties involved with my employment as a Stevedore.
>
> Please forward the Report to the address below.
>
> Brendan Pak, Human Resources advisor
>
> By Email: [email address]
>
> Or
>
> By Fax: [fax number]
>
> Yours faithfully,
>
> Anthony Montana".

[6] The evidence in DPW's case was that on the same day that Mr Pak sent the email confirming those matters (being that DPW required medical information from Dr Ryan and requiring Mr Montana to sign the authority for that information to be provided to DPW), Mr Montana then subsequently returned the signed authority.

[7] On 7 July 2022, Mr Pak also sent correspondence to Dr Ryan, asking for information from him to assist DPW "*to make an informed decision about Mr Montana's current fitness for work and whether he is fit to return to his normal, pre-injury duties*". Among other matters, the correspondence from Mr Pak to Dr Ryan:

- noted aspects of a medical certificate from Dr Ryan dated 27 April 2022, where Dr Ryan was quoted as having written that Mr Montana "*is certified to perform light duties*" and "*Some degree of abnormality is likely to persist in the long term*";

- noted that DPW has certain duties of care, including a duty to ensure that employees have the capacity and ability to fulfil "*all of the inherent requirements*" of employment with DPW;

- advised that Dr Ryan's assessment "*is required to ensure Mr Montana is able to fulfil all of the inherent requirements of his employment with DP World Sydney and is fit to return to his pre-injury/illness work duties*";

- set out certain background information concerning Mr Montana, the medical certificates and "*Functional Workplace duty information*" related to the inherent requirements for a general stevedore, and what were described as Mr Montana's tasks/duties requiring certain functional capacities. Mr Pak's correspondence to Dr Ryan also included several pages of associated annexures about job-related matters for employees performing the tasks of "*Bus Driver*", "*Forklift*", "*General Duties Clerk*", "*Internal Transport Vehicle*", "*Lashing*", "*Rubber Tyre Gantry Crane*" and "*Rubber Tyre Gantry Crane – Kalmar*".

[8] Mr Pak set out as series of questions to Dr Ryan to answer, which read:

> "Taking into account the role requirements, work environment, could you please provide a comprehensive medical report and provide your medical opinion and ensure your report addresses the following questions:
>
> 1. What are your current clinical findings and diagnosis of Mr Montana [sic] current condition?
>
> 2. In your opinion and with respect to your knowledge of the workplace and the task analysis, what incapacity does Mr Montana have to perform his job as a Stevedore safely?
>
>   - Please specify current physical restrictions in relation to any particular functions of the pre-injury position
>
> 3. Are these restrictions permanent? If not, when would you expect that he fully recovers from his current condition?
>
> 4. In your opinion, an estimate of how long it would be before Mr Montana would be capable of returning to the pre-injury position?

5. Do you believe Mr Montana will ever have the capacity to return to his pre-injury position as a Stevedore?

6. Do you believe Mr Montana will require further treatment? If so, what are the proposed timeframes for this treatment and the prospects of that treatment resulting Mr Montana being able to continue to perform his pre-injury duties as a Stevedore?

7. In your opinion is there any further assistance that DP World Sydney could offer Mr Montana in order for him to safely perform the pre-injury position?

Mr Montana will provide you with an authority form containing his consent to release information."

[9] DPW/Mr Pak did not receive a response from Dr Ryan. As to that, the evidence in DPW's case was that Mr Montana returned the signed authority to DPW. Moreover, Mr Pak had advised Mr Montana that he was required to sign the authority and Mr Montana was given the option to provide a copy either directly to Dr Ryan or to Mr Pak – opting, it appears, to provide it to Mr Pak. There was no evidence that Mr Pak/DPW provided Mr Montana's signed authority to Dr Ryan after Mr Montana signed it and provided it to Mr Pak/DPW. Moreover, there was no evidence that Mr Montana was (separately) instructed by DPW to provide the authority to Dr Ryan, albeit the correspondence from Mr Pak/DPW to Dr Ryan separately asserted towards the end of the letter that "*Mr Montana will provide you with an authority form containing his consent to release information*". In passing, there was no evidence as to how Dr Ryan was to be paid for his professional time that would have been involved in providing the information DPW sought from him about Mr Montana, in circumstances where this was not, for example, a workers' compensation-covered injury. I set these matters out because part of DPW's case referred to the lack of a response from Dr Ryan in ways that appeared critical of Mr Montana and his approach to participating in the provision of medical information.

[10] In any event, against the background of a lack of response from Dr Ryan to the correspondence from DPW/Mr Pak seeking information about Mr Montana, Mr Pak apparently advised Mr Montana in a telephone call on 2 August 2022 that DPW required him to attend an IME with Dr Michael McGlynn OAM. Dr McGlynn was previously a specialist plastic and reconstructive surgeon, and hand surgeon; he retired from active surgical practice eight years ago and now works full-time as a medico-legal advisor, including with referrals from an organisation named Medicins Legale. It was Medicins Legale which was, in due course and on behalf of DPW, to organise the appointment for Mr Montana's IME with Dr McGlynn

[11] On 2 August 2022, Mr Pak sent correspondence to Mr Montana which read in part:

"I refer to our conversation on 2 August 2022 where you have been advised that you are required to attend an IME appointment as the Company did not receive a response from your treating doctor, Dr Damian Ryan, to obtain further information around your hand injury.

We require further information around your condition and how it impacts on your ability to perform the requirements of your position as Stevedore.

> In order to assess your fitness for work and understand your ability to perform your substantive position without further risk to yourself, you are directed to attend a Fitness for Work Assessment as follows:
>
> [Table with the details about the appointment]
> [Covid-19-related information]
>
> At the end of your assessment, the treating medical professional will provide DP World with a report responding to a number of specific questions which have been asked. You will need to complete the **enclosed** release and take a copy with you to your appointment.
>
> Please bring with you to this appointment any relevant x-rays, MRIs, referrals or any other information to assist in assessing your fitness for work.
>
> If it is not possible for you to attend your appointment, please notify myself as soon as possible so alternate arrangements can be made. Please note, if you do not attend the appointment and do not have a reasonable excuse, you may be liable for disciplinary action, which may include up to the termination of employment. …". (Bold in original)

[12] On 2 August 2022, Mr Pak also sent correspondence to Dr McGlynn confirming the upcoming appointment with Mr Montana. The correspondence set out information and questions for Dr McGlynn in terms broadly similar to, but not identical to, the earlier correspondence that Mr Pak had sent to Dr Ryan. The correspondence sought a "*detailed report*" from Dr McGlynn on identified topics. The correspondence also (apparently) attached documentation concerning "*Functional Duties*" and "*Medical Certificates*", although those attachments were not put into evidence by DPW.

[13] On 4 August 2022, Mr Montana sent an email to Mr Pak, indicating that he did not understand why he needed to attend an IME. Mr Montana's email, in a way that is not entirely clear in meaning on the face of the document, also referred to the authority for Dr McGlynn to release information to DPW in connection with the IME (i.e., a second authority, rather than the earlier authority he had signed and returned to DPW which authorised Dr Ryan to release information to DPW). Mr Montana's email read (as written):

> "I don't understand why I need a independent examination when all medical and surgeons documents have been provided to your requirements. I see attached is a consent form for me to sign, I cannot sign that as DR Ryan has provided to me and passed to you. Thanks"

[14] On 5 August 2022, Mr Pak sent an email to Mr Montana which relevantly read:

> "We require further medical information around your injury.
>
> Based on the medical information we have received so far, you are only able to perform light work duties.
>
> Therefore, we're directing you to an independent medical examination."

[15] Mr Montana then sent an email to Mr Pak on 5 August 2022 which read (as written):

> "I don't like the way you use your words (directing). Much better wording can be used apart from dictate to me.
>
> Check your records more than just a certificate has been provided".

[16] In turn, Mr Pak sent a further email to Mr Montana which relevantly read (as written):

> "As previously discussed via phone and email, we do require you to attend the appointment on Monday, 8 August 2022.
>
> As the Company requires further information regarding your non work related injury."

[17] While the tone of Mr Montana's email to Mr Pak was regrettable and/or inappropriate, there was no evidence of any further communications between Mr Montana and DPW following the immediately preceding reply email from Mr Pak confirming attendance was required at the IME.

The medical appointment on 8 August 2022

[18] On 8 August 2022, Mr Montana attended for the IME appointment with Dr McGlynn. What unfolded in connection with Mr Montana's attendance at the appointment with Dr McGlynn, or DPW's assessment of what occurred, was to be the catalyst of the ensuing summary dismissal on 23 August 2022.

[19] I will return later in the decision to the evidentiary accounts by Mr Montana and Dr McGlynn of what happened *during* the IME appointment and related matters. Before doing so, I will first recount some of the key developments that occurred *after* the meeting.

[20] After the appointment was terminated, Mr Montana immediately contacted DPW by telephone. Mr Pak later returned Mr Montana's call. Mr Pak set out in writing the following matters concerning the telephone conversation he had with Mr Montana (as written by Mr Pak):

> "[Anthony Montana] Advised at 10:30am on 8 August 2022:
>
> I went to see Dr Michael McGlynn on 8 August 2022
> The appointment was ended as the Surgeon was putting his hands on me. The Doctor advised that he needed to touch me.
> The doctor then said we're ending this meeting.
>
> Anthony continued to say on the phone to me:
> Difference between examining and pulling me towards the scale to weigh my weight.
> Doing a medical assessment on somebody does not mean grabbing and putting on the scale.
> there is difference. examining is different.
> If you got another doctor to not put his hands on me and examining me. I got not a problem.

He will email us the events that took place this morning.

[Brendan Pak] Advised:
We will wait for your email to review."

[21] Shortly thereafter on 8 August 2022, Mr Montana sent an email to Mr Pak which read (as written):

"Hi
I just went to see your doctor. Visit was cancelled as your doctor (DP World) putting his hands on me to pull me towards a weight scale. I told him to get his hands off me and stop pulling me.
At anytime I go to a doctor is to get examined, not to be grabbed and pulled along.
I told the Doctor that and there is a difference, he then cancelled the appointment.
I'm happy to go to another Dr to do my examination for DP World.
Anthony"

[22] Later on that same day of 8 August 2022, Mr Pak sent an acknowledgement email to Mr Montana and advised, among other matters, that "*We are currently investigating into your allegation made against Dr Michael McGlynn at your appointment and will be in touch with you in due course.*"

[23] What then happened as to the investigation of Mr Montana's allegation was set out in a hearsay-on-hearsay way in the evidence of Scott Eadie, DPW's General Manager Operations, as to what occurred on 9 August 2022. In the extract of the Mr Eadie's evidence-in-chief below, "*Anthony*" is Mr Montana and "*Karlie*" is Karlie Hucker-Stewart, DPW's Human Resources Manager. Mr Eadie's evidence read:

"22. Due to concerns about what had transpired between Anthony and Dr McGlynn, Karlie contacted Medicins Legale, the third party that organised the independent medical examination by Dr McGlynn. Karlie spoke to Brandon Richards. Brendan [sic] told Karlie that Dr McGlynn had told him that Anthony had acted aggressively, and that Dr McGlynn had never, in his 51 years' experience in the medical profession, felt so threatened by a patient."

[24] Also on 9 August 2022, Mr Montana made a complaint/report at Sutherland Police Station about Dr McGlynn allegedly having assaulted him. A statement in such respects was made and signed that day. A police officer separately spoke with and/or interviewed Dr McGlynn in relation the matter.

[25] On 9 August 2022, a police officer sent correspondence to Ms Hucker-Stewart, which relevantly read:

"Thankyou for calling me back today. As I said in my discussion with you, Anthony MONTANA reported an assault [to me] today by Dr Michael McGLYNN where he was required to have a medical assessment done. I have not identified any wrong doing on behalf of Dr McGLYNN and I have created event number [number] which reflects my finding.

If you need to contact me regarding this matter, please feel free to send me an email."

[26] On 9 August 2022, Ms Hucker-Stewart sent an email to Mr Eadie, which relevantly read (as written):

"Further to our conversation:

Yesterday Anthony Montana was booked into see Dr Michael McGlynn for an independent medical examination. The reason for sending Anthony was due to the limited information received from his treating practitioner.

Please find below events that took place prior to the consultation, at the consultation and post consultation.

1. On Friday 5 August 2022 – Anthony emailed Brendan asking why he was required to attend the IME (see attached email)
2. On Monday 8 August 2022 – Anthony called Brendan to advise that allegedly the Doctor put his hands on him (see Brendan's file notes)
   I spoke to Brendan and advised to follow up with Medicins legal on the events that occurred.
3. On Tuesday 9 August 2022 – I called Medicins legal and spoke with Brandon Richards, who received an account from Dr McGlynn. In short – Anthony was 5 minutes late to the appointment. Dr McGlynn checked Anthony's height and then asked him to be weighted. With the digital scales they need to go to 'zero' before stepping onto them. Apparently, the Doctor put his hand on Anthony's elbow to stop him from getting onto the scales. Anthony then acted aggressively and angry. The doctor has been in the medical profession since 1971 and has never felt as threatened by a patient than with Anthony. The doctor immediately ceased the consultation and doesn't want to see him again.
   I have requested Brandon to ask Dr McGlynn to put a statement in writing.
4. On Tuesday 9 August 2022 – Senior Constable Michael Quick from Sutherland Police station left a voice message for Brendan Pak to call him. I returned the call and spoke to Senior Constable who advised that Anthony Montana went to the station this morning to report he was assaulted by a Doctor which the company asked him to see. The Senior Constable asked if he had any mental health issues, which I advised I wasn't aware. The appointment was a physical assessment. The Constable asked Anthony Montana if he was on IP and who the provider was, which Anthony was unable to answer. The Senior Constable advised that he has spoken to the doctor (The Constable was able to name him), and he had an obligation to inform all parties including the Company as we were mentioned by Anthony. The Constable advised that he won't be pursing. The Senior Constable advised he will email me a report number.

As I receive the information, I will forward to you.

I am in the process of arranging a meeting with Kathryn to discuss next steps".

[27] By letter dated 11 August 2022, Mr Eadie advised Mr Montana of matters including the following. Mr Eadie relevantly gave Mr Montana an opportunity to respond to allegations about the itemised dot-pointed allegations in the extract below (bold in original):

> "**Incident – Opportunity to respond**
>
> On Monday 8 August 2022, you attended an independent medical examination (**IME**) with Dr Michael McGlynn.
>
> Since this IME, I have been made aware to the following conduct:
>
> - During the IME, when the Doctor allegedly touched you, that you became aggressive towards him;
> - As a result of your conduct, the Doctor terminated the appointment, and the IME didn't not occur;
> - You subsequently made a complaint to the Sutherland Police alleging the Doctor assaulted you.
>
> DP World takes these allegations seriously, and accordingly has commenced an investigation.
>
> DP World endeavours to provide a work environment of integrity, equity and respect for all. DP World is committed to a safe, healthy and productive environment where employees and others in the workplace are treated fairly and with respect.
>
> Under our Code of Conduct you have an obligation to not engage in unacceptable workplace behaviour which includes any behaviour that would be offensive, intimidating, belittling, abusive, threatening or harmful to an individual or group of people.
>
> If substantiated, these allegations may constitute a breach of these policies and procedures."

[28] Mr Eadie's letter advised Mr Montana to provide a written response by 16 August 2022.

[29] In correspondence dated 12 August 2022 (which Dr McGlynn sent to DPW after a request to him made via Medicins Legale), Dr McGlynn wrote as follows to Ms Hucker-Stewart (bold in original; yellow highlighting not reproduced; formal parts omitted):

> "**Re** **: Anthony Montana**
> **Date of Birth** **:** [date]
> **Claim No** **:** [number]
> **Date of consult:** **: 8/08/22**
> **Appointment Commenced** **: 09:12 (arrived 09:10 for 09:00 appointment)**
> **Appointment Concluded** **: 09:15**
> **Date of Injury:** **: 7/07/21** [sic; 29/06/21]
>
> ---

Private and Confidential – Addressee Only
Not to be disclosed to Mr Montana or any third parties

I refer to the letter dated 2 August 2022, signed by Brendan Pak Human Resources Advisor DP World seeking an independent medical examination of your employee, Mr Anthony Montana. Also to your email to Medicins Legale on 12 August 2022 requesting a statement from me regarding the events that occurred on Monday 12 August 2022. As you may be aware, the examination was terminated shortly after commencement due to Mr Montana's behaviour.

I have set out the incident which occurred for your information. **Due to concerns for my physical safety, I request that this report not be disclosed to Mr Montana or his representatives without my express permission.**

At 9.10am on 8 August 2022, Mr Montana attended for his appointment scheduled for 9.00am. At the commencement of the appointment, I explained to him I would need to record his height and weight. While standing beside Mr Montana, I asked him to stand on the scales at the same time touching his right arm with my left hand near the elbow. This is my usual practice to support patients as they stand on the scales to reduce the risk of falling. Mr Montana reacted immediately on my touch with sudden movement away from me saying he did not want to be touched and that touching him without permission was assault.

Unfortunately, Mr Montana continued to escalate; I felt threatened; the appointment terminated approximately 3 minutes after commencing. I note that Mr Montana subsequently made a complaint to police who sought information from me.

I have advised Medicins Legale not to re-book Mr Montana with me. I apologise for being unable to complete the independent assessment, as requested."

[30] Mr Montana's emailed response to Mr Eadie's correspondence dated 11 August 2022 giving him an opportunity to respond was sent to Mr Eadie on 15 August 2022. It attached his statement to the police and event number information. The email read (as written):

"Hi Scott
As instructed I attended the IME in good faith. I allege that the doctor has breached facets listed in your Code of Conduct hence my formal complaint to the police. I do not see this as a workplace issue however I have attached my Police statement and event number for transparency.
I remain committed to the process of returning to work and I am more than willing to attend any other doctor of your choice.
Reagrds

Anthony".

[31] On 19 August 2022, Mr Eadie next advised Mr Montana of a meeting scheduled for 23 August 2022 to show cause why he should not be dismissed. The letter read, in part (bold and italics in original):

"**Your Role and Obligations**

You are employed by DP World as a Stevedore.

As part of your contract of employment, you are required to:

- act in DP World' [sic] best interests and use your best efforts to promote the interest of DP World;
- comply with DP World' [sic] policies and procedures.

Under or Code of Conduct you have an obligation to not engage in unacceptable workplace behaviour which includes any behaviour that would be offensive, intimidating, belittling, abuse, threatening or harmful to an individual or group of people.

Investigation Findings and Allegations

As you are aware, DP World has been investigating allegations surrounding your conduct during an IME with Dr McGlynn.

You were advised of the following allegations:

- During the IME, when the Doctor allegedly touched you, that you became aggressive towards him;
- As a result of your conduct, the Doctor terminated the appointment, and the IME didn't not occur;
- You subsequently made a complaint to the Sutherland Police alleging the Doctor assaulted you.

In response, you provided the following statement via email:

> "*As instructed I attended the IME in good faith. I allege that the doctor has breached facets listed in your Code of Conduct hence my formal complaint to the police. I do not see this as a workplace issue however I have attached my Police statement and event number for transparency. I remain committed to the process of returning to work and I am more than willing to attend any other doctor of your choice.*"

You also provided a copy of your Statement to Police and the Event Number.

Having reviewed all of the information, I am satisfied that the Allegations have been substantiated.

The Allegations individually and collectively amount to serious misconduct under your contract and would justify summary dismissal.

In light of the above information, DP World holds the view that you have engaged in serious misconduct and you have acted contrary DP World' [sic] policies and values.

> As a result of your conduct, DP World has lost trust and confidence in your ability to discharge your duties and functions in a matter [sic] which does not impact on the reputation, viability, or profitability of our business.
>
> **Request to attend meeting**
>
> As a result of the investigation, the Company would like you to show cause as to why its should not terminate your employment for serious misconduct.
> You are required to attend a meeting with me and accompanied by Karlie Hucker-Stewart, Human Resources Manager as follows: [details for meeting on 23 August 2022].
>
> I confirm this is serious. During this meeting the Company will consider your response and any further information you can provide in relation to this matter which may assist the Company in its decision in relation to your ongoing employment.
>
> Following receipt of your response, the Company will decide whether disciplinary action will be taken, this may include up to termination of your employment.
>
> If you do not participate in this process, the Company will consider all relevant matter and decide on the information before it."

[32] The show cause meeting was held on 23 August 2022. In attendance were Mr Montana and his union representative/support person, namely, Brad Dunn of the Construction, Forestry, Maritime, Mining and Energy Union (The Maritime Union of Australia Division) ("MUA"). Mr Eadie and Ms Hucker-Stewart represented DPW. Various matters were discussed, some of which I will return to. At some time between 10-30 minutes after the conclusion of the show cause meeting, Mr Eadie informed Mr Montana that he was terminating his employment, effective immediately, for serious misconduct. There was no evidence that anything more than advice concerning the summary dismissal was conveyed by Mr Eadie to Mr Montana on 23 August 2022, i.e., there was no evidence of any reasons or explanation contemporaneously being given for the decision.

[33] Mr Eadie subsequently sent correspondence dated 26 August 2022 about the dismissal. To avoid doubt, Mr Eadie's correspondence is not what ordinarily might be described as the "*dismissal letter*". That is, the summary dismissal had already been advised to Mr Montana/effected not long after the conclusion of the show cause meeting on 23 August 2022. This is so notwithstanding comments in Mr Eadie's letter of 26 August 2022 such as "*I have now had the opportunity to consider your response and I have taken it into account in making my decision*" and "*In light of the seriousness of this matter, I have made the decision to terminate your employment for serious misconduct, effective 23 August 2022*" (in circumstances, it may be noted, where a dismissal cannot be effected with a retrospective date). Mr Eadie's letter read, in part:

> "I write to confirm the matters discussed with you during out meeting on 23 August 2022. In attendance at this meeting with me was Karlie Hucker-Stewart, HR Manager. Your support person was Brad Dunn, Assistant Branch Secretary, MUA.

I also refer to the show cause letter dated 11 August 2022 (see attached), in which you were asked to show cause as to why your employment should not be terminated and invited to provide any further information you wanted me to consider as part of the investigation and review of your ongoing employment.

Show Cause Response

On 15 August 2022 you provided me with your written response. Your response included:

- Your statement from the Police and the Police Event number.
- The following statement:
  As instructed I attended the IME in good faith. I allege that the doctor has breached facets listed in your Code of Conduct hence my formal complaint to the police. I do not see this as a workplace issue however I have attached my Police statement and event number for transparency. I remain committed to the process of returning to work and I am more than willing to attend any other doctor of your choice.

At the meeting on 23 August 2022, I provided you with a further opportunity to respond. You reiterated your account of events that took place at the Independent Medical examination (IME).

I have now had the opportunity to consider your response and I have taken it into account in making my decision.

Furthermore, it was raised with me in one of the meeting breaks that prior to our meeting, you allegedly accused one of the Operations Supervisors of working in an unethical way. You deny that this occurred. This subsequent event, raises concerns about your ability to interact with persons in a way which is consistent with our expectations and code of conduct.

Decision

I have taken into account the seriousness of these matters, your responses, the matters you have raised in response, your length of service, and the impact that this decision will have on you.

I have also taken into account your prior disciplinary history being Two (2) Final Warnings, three (3) Formal Warnings, Absence Management Plan (AMP) and Five (5) File notes.

Unfortunately, despite the matters you have raised, your conduct goes against the trust and confidence we can have in you to perform your position to the standard expected of a Stevedore.

Further, your conduct:

- Is behaviour that does not demonstrate that you have acted in DP World' [sic] best interest nor that you have used the best efforts to promote the interest of DP World;
- Is inconsistent with our policies and procedures
- Demonstrates a failure to comply with the DP World Code of Conduct. Namely that you have an obligation to not engage in unacceptable workplace behaviour which includes any behaviour that would be offensive, intimidating, belittling, abusive, threatening or harmful to an individual or group of people.
- Was in breach of a lawful reasonable instruction to attend for an IME for us to determine your fitness to perform the inherent requirements of your role. Your conduct during the IME meant the consultation was terminated.

In light of the seriousness of this matter, I have made the decision to terminate your employment for serious misconduct, effective 23 August 2022. …".

Consideration

(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)

[34] As noted earlier, two matters were relied on by DPW in summarily dismissing Mr Montana for serious misconduct – being: conduct related to attendance at an IME; and a comment allegedly made to his supervisor. I will deal first with the IME and then the comment to the supervisor.

A. The IME

[35] In considering whether there was a valid reason for the dismissal related to Mr Montana's conduct concerning the IME with Dr McGlynn, I note the evidence and/or submissions concerning the following matters – and, where relevant, make findings based on what was advanced in the case.

[36] DPW sent correspondence to Mr Montana's own surgeon, Dr Ryan, seeking certain detailed medical information. For reasons which were not addressed in the evidence and/or submissions, Dr Ryan did not respond to that correspondence. Mr Montana's evidence was to the effect that he personally did not know what went backwards and forth/was discussed, if anything, between DPW and Dr Ryan, i.e., he could not "*say or guess*", other than to say that DPW informed him it had not received a response from Dr Ryan. As to that, there is no evidence to indicate that Mr Pak/DPW provided Mr Montana's authority to Dr Ryan after Mr Montana had signed the document and returned it to Mr Pak/DPW. Moreover, Mr Pak's correspondence otherwise asserted to Dr Ryan that Mr Montana "*will*" provide him with an authority form containing his consent to release information – albeit the signed authority was provided by Mr Montana to Mr Pak/DPW and there is no evidence that Mr Pak/DPW otherwise advised or directed Mr Montana to provide the authority to Dr Ryan. There was some criticism and/or inherent criticism in aspects of DPW's case that Dr Ryan had not responded to DPW's request for information (e.g., submissions that read "*after Mr Montana failed to provide updated medical information about his injury, DP World directed him to attend an independent medical examination*" (my underline) with Dr McGlynn). I think there is an available inference that Dr Ryan did not respond to DPW's request for medical information about Mr Montana because

Mr Pak/DPW did not provide Mr Montana's signed authority to Dr Ryan and, otherwise, advised Dr Ryan that Mr Montana will provide him with an authority form with consent to release information to DPW. Other than noting the underlying and potentially unfair criticism about a failure to provide updated medical information to DPW, nothing appears to turn on this, because it would have been open for DPW to direct Mr Montana to attend an IME regardless of whether Dr Ryan had provided a response to DPW. I mention this matter by way of backdrop, because the view of DPW appears to have proceeded against a background that Mr Montana was being generally uncooperative concerning medical information-related matters – being a view that was also separately informed by Mr Montana's email to Mr Pak cavilling about being directed to attend the IME (being a matter I will address later).

[37] In any event, DPW determined to direct Mr Montana to attend an IME. The IME was a work-related appointment, which was booked through Medicins Legale on behalf of DPW. It was plainly a work-related appointment because Mr Montana was absent from work and in receipt of enterprise agreement-specific income protection insurance payments - and the IME concerned an assessment of Mr Montana's fitness to return to work at DPW.

[38] Mr Montana's emailed response to DPW indicated that the advice to attend an IME (specifically) by means of a "*direction*" was not well-received by him. In cross-examination, Mr Montana said that he perceived the email directing him to attend the IME as "*attacking*" him; and if this had been communicated face-to-face it would have been regarded by Mr Montana as "*aggressive*". Mr Montana took Mr Pak to have written the email "*out of frustration*" and he considered that Mr Pak was "*agitated*", "*aggravated*" and "*angry*". Mr Montana said he "*took offence*" and could not believe how the email had been worded by Mr Pak. The email that Mr Montana sent to Mr Pak is indicative of the types of concerns about the direction *itself*. It is unclear, but the effect of Mr Montana's evidence seems to have been that it was unnecessary to have received a direction when he could just have been requested/asked to attend the IME. However, that displays Mr Montana's lack of knowledge or understanding about how these types of written communications are typically written by an employer to an employee. Despite Mr Montana's descriptions of the correspondence in his evidence, Mr Pak's email with DPW's direction to attend the IME was, when considered objectively, an unremarkably-worded item of correspondence – and it was inappropriate for Mr Montana to respond in the tone he did. Relevantly (given some reliance was later placed on it in a post-dismissal letter from DPW), Mr Montana was not advised at the time that the tone of his email was considered inappropriate. Nor, for example, was he file-noted or warned about it.

[39] Mr Montana attended the scheduled IME with Dr McGlynn, albeit he was late for the appointment by approximately (either) five or 10 minutes. Nothing turns on whether Mr Montana was five or 10 minutes late; one way or the other, Mr Montana was running late for the appointment. I separately note that Mr Montana asserted in a statement to the police and in his evidence-in-chief that he attended on time, but it is otherwise now common ground on the evidence that he was late. Mr Montana was running late for the appointment, but this was because he could not initially locate Dr McGlynn's office within the dual-level arcade and sought directions. I accept Mr Montana's evidence about initially being unable to locate Dr McGlynn's office; I do not consider he was deliberately late as some indicator of lack of cooperation.

The evidence concerning the IME

[40] I will recount, first, a summary of what Mr Montana said in his evidence as to what occurred in the IME appointment, followed by a summary of what Dr McGlynn said occurred. I have also included some additional matters or comments in each summary.

[41] *Mr Montana's account of the appointment:* Mr Montana's account was that, following a brief exchange with the receptionist, Dr McGlynn asked him to come into his office. Just as Mr Montana was going to sit down, Dr McGlynn said "*Before you sit down, I'll measure your height*". Mr Montana said "*Okay*" and then walked towards the height scale against the wall. Mr Montana put his back against the wall and Dr McGlynn measured his height. Dr McGlynn then said "*I'll take your weight on the scale*". Mr Montana said "*Okay*". He was standing next to Dr McGlynn.

[42] Dr McGlynn activated a digital weighing scale by tapping it with his foot. The scale turned on. Dr McGlynn then stepped back, and Mr Montana straight away went to walk onto the scale, but it turned off before he could step on to it. Dr McGlynn sounded agitated when he then said, "*Wait! The scale turned off I'll have to turn it back on*". Mr Montana said "*Okay*", then stepped back next to Dr McGlynn and waited for him to activate the scale again.

[43] When the scale turned on (on the second attempt), Dr McGlynn "*forcefully*" grabbed Mr Montana's arm and "*aggressively pulled*" him onto the scale. Mr Montana was shocked and said words to the effect of "*Get your hands off me, keep your hands to yourself.*"

[44] Dr McGlynn then sat down and Mr Montana sat on the chair next to him. Dr McGlynn said "*You came in for an examination, so I can touch you*" and then Mr Montana said "*There's a difference between you touching me and examining me, and you grabbing me and pulling me*". Dr McGlynn told Mr Montana to "*Be quiet*". Dr McGlynn then said "*I'm going to end this examination, you came here to get an examination*". Mr Montana responded "*I came to get an examination, not to get assaulted*". Dr McGlynn swivelled his chair around and started to write something. Dr McGlynn then said "*Get out, the examination is over.*" Dr McGlynn got up out of his chair and walked to the door of his office and opened it. Without Mr Montana saying another word, Mr Montana stood from his chair and walked out of Dr McGlynn's office.

[45] Mr Montana immediately telephoned DPW's Human Resources section to report what had happened and left a message for Mr Pak asking for a return call. When Mr Pak retuned the call shortly thereafter, Mr Montana explained what had happened. Mr Montana said he would be happy to attend an IME with an alternative doctor.

[46] Mr Montana's characterisation of the touching included that Dr McGlynn "*grabbed me and reefed me, pulled me onto the scale*" (and, as a result, he could have fallen and been injured) and he considered that Dr McGlynn's actions constituted an "*assault*"; and that Dr McGlynn had otherwise touched him without even "*once*" asking.

[47] The following day, 9 August 2022, Mr Montana filed a report of common assault against Dr McGlynn with the Sutherland Shire Police Area Command. A copy of Mr Montana's statement to the police was in evidence. It contains some matters of detail not otherwise included in the evidence-in-chief, such as responding to Dr McGlynn's (alleged) words "*Be*

quiet" with Mr Montana saying "*Beg your pardon, don't tell me to be quiet*". Mr Montana's police statement also incorrectly indicated that Mr Montana had attended the appointment on time (in circumstances where it is common ground that he was late for the appointment). The police determined not to file any charges against Dr McGlynn. The relevant police officer explained to Mr Montana that he did not believe he could prove the complaint beyond a reasonable doubt because it would be Mr Montana's word against Dr McGlynn's word, and because the assault had not left any bruising or lacerations.

[48] *Dr McGlynn's account:* I next set out Dr McGlynn's characterisation of what occurred.

[49] Mr Montana arrived 10 minutes late for the appointment, being the time recorded by Dr McGlynn's secretary/office manager in her electronic diary. Shortly thereafter, Dr McGlynn invited Mr Montana into his office.

[50] Dr McGlynn always commences – because he tends to forget to do it – by recording height and weight. So Dr McGlynn informed Mr Montana that he was going to measure his height and weigh him, and asked him to stand at the height stick.

[51] As Mr Montana moved into position to stand at the height stick, Mr Montana kicked the weighing scale towards the office door. Dr McGlynn put his foot out to block the scale so it did not hit the office door, and then manoeuvred it back into position with his right foot. Dr McGlynn then proceeded to measure Mr Montana's height by lowering the stick on the height stick to the top of Mr Montana's head to read off the scale Mr Montana's height in centimetres.

[52] Dr McGlynn asked Mr Montana to approach the weighing scale or stand on it, being a digital scale which is activated by Dr McGlynn touching/tapping and then the client standing on the scale. As the first foot tap of the scale by Dr McGlynn did not work, Dr McGlynn tapped the scale for a second time. Dr McGlynn denied being annoyed that Mr Montana did not get on the scale the first time and specifically denied being annoyed on the basis that "*time is money*" – separately adding that it was his termination of the assessment which meant that he could not bill for the time that had been booked, so that cost him a "*four figure sum*".

[53] As it is his habit of always touching a client's right arm with his left hand as the client steps on the scale (because of concern that people might fall over), Dr McGlynn touched Mr Montana's arm. Dr McGlynn elaborated that the scale is probably two inches high on carpet, and thus not as stable as, for example, a lower-rise scale on a bathroom floor. As Dr McGlynn touched Mr Montana's arm, Mr Montana drew back (away from Dr McGlynn) "*suddenly and violently, just went backwards*" and said "*You can't touch me*". In cross-examination, Dr McGlynn otherwise described Mr Montana as having "*stepped backwards very quickly*". Dr McGlynn also appeared to suggest that Mr Montana "*suddenly stepped backwards and he's going to push my hand out of the way as he does it, and that's what happened*". When asked whether Mr Montana had made any physical motions towards him that would be considered threatening in any way, Dr McGlynn otherwise answered: "*None at all*".

[54] Dr McGlynn said he explained to Mr Montana that he always touches someone in that way in case they might fall over, because the scale is about two-and-a-half inches above floor level and he was just worried people might be unstable. Dr McGlynn was "*a little bit shaken*" by what had occurred. It is unknown/unclear on the evidence whether Dr McGlynn recorded

Mr Montana's weight, but it appears he did not. Dr McGlynn could feel his heart racing, so he sat down and asked Mr Montana to sit opposite him and said "*Now can we quieten down and proceed?*", and Mr Montana accused Dr McGlynn of assaulting him. Dr McGlynn explained again to Mr Montana that all he did was touch his arm, as he does with everyone, in case they might fall; and that touching a patient or client is a standard part of any medical examination, which is what Mr Montana was there for. Mr Montana said "*You can't touch me, it's an assault.*" Dr McGlynn said "*We aren't getting very far.*" Dr McGlynn felt that his pulse rate was about double normal and, in such respects, said to Mr Montana "*My pulse rate's way up and probably my blood pressure with it and I'm not feeling very happy about this. Will you quieten down?*". Dr McGlynn said he spoke "*very quietly*" to Mr Montana stating that he had not assaulted him, in explaining what he was doing (or had been doing in touching him) and in asking him to sit quietly opposite him so he could continue. Mr Montana just said "*You can't assault me*", so Dr McGlynn stood up and walked to the door; he does not think he even asked Mr Montana to leave. Dr McGlynn opened the door and Mr Montana left. Dr McGlynn said he explained his practice in relation to scales to Mr Montana a couple of times, and Mr Montana "*just kept saying each time, you assaulted me*". This was a "*very ultra-brief conversation*" that lasted less than a minute. The time (overall) involved in the appointment was about three minutes. Dr McGlynn said "*It wasn't like a major event, however*".

[55] For the medical reasons outlined in his evidence, Dr McGlynn said he is very conscious of his heart rate; here was an episode where his heart rate had doubled as a stress response to the episode with Mr Montana. Dr McGlynn "*was stressed*" and "*felt threatened*". Dr McGlynn felt threatened by the general demeanour and behaviour of Mr Montana, including "*commencing with kicking the scales out of the way*" and the "*sudden move when I touched his elbow*". Dr McGlynn added that he "*got the feeling*" that Mr Montana did not want to be at the appointment and was "*cross*"; and later said that he felt Mr Montana "*was aggressive and didn't want to be there*".

[56] Dr McGlynn said that Mr Montana spoke firmly and loud enough for his secretary to hear what was said, but Mr Montana did not shout during the appointment (Dr McGlynn's secretary told him afterwards that she was wondering whether she should have come into his office). Dr McGlynn described Mr Montana as having spoken in a "*strident, full fashion*", which he took to be aggressive. Mr Montana was being "*loud and disturbing*", which was upsetting to Dr McGlynn and he felt threatened. Dr McGlynn said that his "*risk indicator*" went up. Dr McGlynn confirmed that it was he who effectively terminated the appointment – being something he had never done in his more than five decades of practice. Dr McGlynn later informed Medicins Legale about matters and presumes that the organisation informed DPW. He later also prepared a letter to DPW.

[57] Dr McGlynn denied he had assaulted Mr Montana. He explained that the physical contact was very brief because "*almost the moment my hand touched his arm, he stepped back suddenly*". When shown the written evidence-in-chief of Mr Montana, Dr McGlynn denied the characterisations set out by Mr Montana – stating that it contained "*lots of things that did not happen*". Specifically, Dr McGlynn denied having forcefully grabbed Mr Montana's arm and aggressively grabbing him, and denied having said to Mr Montana to get out of here (rather, Dr McGlynn said "*We're not getting anywhere*" and Dr McGlynn then walked to the office door). Dr McGlynn also referred to what had been written in his contemporaneous notes taken that day (albeit those notes were not in evidence). Dr McGlynn denied having told Mr Montana to

be quiet; rather, he had asked him to *"quieten down*" adding, "*but that's totally different to saying be quiet*". This was in circumstances where Mr Montana was repeatedly ("*probably three*" times) saying that Dr McGlynn had assaulted him.

[58] Dr McGlynn personally felt threatened and he felt that Mr Montana was "*being aggressive without reason*". Dr McGlynn said that "*The sense of it disturbed my sleep for a couple of weeks after*", with his disturbed sleep described later in his evidence as lasting for "*three weeks afterwards*". Dr McGlynn confirmed that, in Mr Montana stepping backwards from the weighing scale, this was in a direction away from him. Dr McGlynn otherwise confirmed that Mr Montana:

- did not make any physical motions of a threatening nature;
- did not use any swear words;
- did not make any overt threats;
- did not issue any verbal threats;
- did not yell; and
- left without any "*fanfare*" after Dr McGlynn had walked to his office door and opened it for Mr Montana to leave.

[59] Dr McGlynn said that he did not want the papers (which I take to be his letter of 12 August 2022) he sent to DPW to be publicly available as he did not want to "*create more angst*" in Mr Montana that might lead to the police being called. Dr McGlynn was concerned about coming to the Commission to give evidence, concerned about the effect it might have on Mr Montana.

[60] Dr McGlynn said that, in retrospect, he should have terminated the appointment the moment Mr Montana kicked (with a "*full kick*") the weighing scale out of the way on the floor (as this was "*quite abnormal*") and he had put out his foot to stop the scale hitting the office door about a metre further over. Dr McGlynn said it was very hard to explain, but Mr Montana's demeanour disturbed him significantly and he "*felt completely threatened*" and sat down because his "*pulse had doubled*." In his 52 years of practising medicine, Dr McGlynn had never terminated an appointment other than the appointment with Mr Montana on 8 August 2022. Dr McGlynn's "*impression*" or "*take on the activity*" was that Mr Montana behaved the way he did to avoid being assessed in the IME and Dr McGlynn being in a position where he could produce a reasonable assessment to answer DPW's questions. Although Mr Montana did not say anything along those lines, Dr McGlynn considered that Mr Montana's behaviour made it impossible to assess him.

[61] Dr McGlynn received a telephone call the day after the appointment from a police sergeant from a local police station (suggesting, apparently, that Mr Montana had walked straight out his office on 8 August 2022 to the station – albeit that understanding is incorrect because the complaint/statement by Mr Montana was not made until the following day, 9 August 2022). Dr McGlynn felt "*a bit annoyed, distressed*" about the complaint, but later said it was "*disturbing*" or "*upsetting*" and did cause some distress as opposed to being annoying – because he considered the complaint to be unfounded. Dr McGlynn noted that a complaint made to the Health Care Complaints Commission along lines similar to Mr Montana's police complaint was dismissed.

Alleged assault

[62] It is unnecessary for me to determine, or purport to determine, whether Dr McGlynn "*assaulted*" Mr Montana. What is relevant is what Mr Montana said or did, because it was Mr Montana's alleged conduct at the appointment that led DPW to form the view that dismissal was appropriate (considered with the other matters upon which DPW relied in making that decision).

The scale-kicking allegation

[63] As to what seems to be the most serious issue of allegedly aggressive behaviour – kicking the weighing scale in Dr McGlynn's office with a "*full kick*" - it seems to me to be less than probable that Mr Montana kicked the scale while approaching the height stick to have his height measured. In so finding, I note the following matters (in no particular order):

- The scale-kicking allegation by Dr McGlynn apparently did not feature in what little is known of the initial discussion between Dr McGlynn and Medicins Legale about why Dr McGlynn had terminated the appointment. Certainly, there is no note of this matter in what Ms Hucker-Stewart conveyed in her email to Mr Eadie concerning her telephone conversation with Medicins Legale.

- The scale-kicking allegation did not feature in Dr McGlynn's own letter to DPW about what had unfolded in the appointment. An allegation about scale-kicking would have been, presumptively, a highly pertinent matter for Dr McGlynn to have included in his letter to DPW as to the decision he made to terminate the appointment. Approached another way, the scale-kicking allegation would have been a notable thing to have included by Dr McGlynn in his letter to DPW had it occurred. It is counterintuitive that alleged conduct of this nature would not have been canvassed, or mentioned, even if briefly, being an allegation that involved, on Dr McGlynn's evidence, Mr Montana giving the weighing scale a "*full kick*" with sufficient force that the scale was propelling towards a door a metre away, were it not for Dr McGlynn stopping the scale's trajectory with one of his feet. Indeed, on a reading of Dr McGlynn's letter to DPW, nothing of any note occurred before Mr Montana was in the process of being weighed (and it is common ground that Dr McGlynn first measured Mr Montana's height before the two of them stood at the scale and Dr McGlynn then next tapped the scale with his foot to activate).

- The scale-kicking allegation by Dr McGlynn is also to be considered in the context of his other evidence indicating that, following Mr Montana's alleged "*full kick*" of the scale towards the door of the office located about a metre across the carpeted floor, that Dr McGlynn said nothing at all to Mr Montana about that immediately after this kick had occurred or even later (during the otherwise very short appointment). As Dr McGlynn's account would have it, he stopped the trajectory of the moving scale, with one of his feet, so the scale did not hit the office door, and he then manoeuvred the scale back into position with his right foot. Again as Dr McGlynn's account would have it, without any further ado, he then just proceeded to measure Mr Montana's height by lowering the height stick on to the top of Mr Montana's head to read Mr Montana's height in centimetres. It seems implausible that Dr McGlynn would not

have said anything at all about what had just happened involving the weighing scale being kicked by Mr Montana and, instead, simply proceed to measure Mr Montana's height. It is otherwise common ground that Mr Montana cooperatively stood against the wall/height stick to have his height measured – with Dr McGlynn positioning the stick at the top of Mr Montana's head and duly reading the measurement.

- It seems inherently improbable or unlikely that Mr Montana would have approached the police to make a complaint about Mr Montana if Dr McGlynn could then have countered with detail about Mr Montana having given his weighing scale a full kick (and there is no evidence that Dr McGlynn said to the police officer that Mr Montana had kicked the scale).

[64] I have considered an alternative scenario, being that: Mr Montana did give a full kick to the weighing scale on his way to the height stick; Dr McGlynn did stop the moving scale with his foot; Dr McGlynn did then deftly manoeuvre the scale back into place with his foot; Dr McGlynn then, without saying a word, proceeded to lower the height stick to the top of Mr Montana's head and measure the height of a person who had just engaged in what accurately could be described (had it occurred) as aggressive and/or abnormal behaviour - and, by extension, then might potentially kick Dr McGlynn after having just given a full kick to the weighing scale; then telling Mr Montana or gesturing to him to next move to the weighing scale and tapping it to activate it, as if nothing had otherwise happened - let alone Mr Montana just having given the same item a full kick. I consider that this scenario, or any similar variant relevantly involving Mr Montana allegedly having given the scale a full kick before politely standing in place to have his height measured, is inherently implausible.

[65] It is the case that after-acquired knowledge can be relevant to the question of whether a dismissal was unfair and/or questions of remedy, but this matter of scale-kicking had never been raised previously or put to Mr Montana. That is, the scale-kicking allegation was not put to Mr Montana by DPW at any stage preceding the dismissal and it was not put to him in cross-examination. DPW cannot be criticised for not putting the scale-kicking allegation to Mr Montana as being a manifestation of "*aggressive*" behaviour during the appointment, because Dr McGlynn said in evidence that even if he had been contacted by DPW he would have referred to his letter (being his letter dated 12 August 2022) and not answered any questions that DPW may have asked. What was set out in Dr McGlynn's letter is, his evidence indicated, what he wished to put back to DPW and that is all he wanted to say. Dr McGlynn did not provide a witness statement for the proceedings before the Commission; he declined to do so when asked by, or on behalf of, DPW. Dr McGlynn gave evidence further to an attendance order of the Commission, being an order sought by DPW. Dr McGlynn's decision to exercise his prerogative not to provide a witness statement was, at least seemingly, informed by discussions Dr McGlynn had with his medical indemnity insurer. Moreover, Dr McGlynn gave his evidence after Mr Montana's evidence.

[66] Thus, I can appreciate that DPW had some difficulty in its case concerning Dr McGlynn's termination of the appointment (and, likewise, Mr Montana was not aware of what was to be alleged). True it is that DPW had no knowledge of what Dr McGlynn now alleges occurred in this respect - however, DPW then specifically referred to the (alleged) scale-kicking incident in its written closing submissions as one of the manifestations of Mr Montana's aggression. Indeed, the scale-kicking allegation was the first manifestation of alleged

aggression that was listed in those submissions. That is, DPW's closing submissions relevantly read: "*Not only did Mr Montana kick Dr McGlynn's scales, but he …* [reference to various matters]".

[67] For the reasons I have outlined, I find, on the balance of probabilities, that the alleged scale-kicking did not occur.

The weighing

[68] It is common ground that after Dr McGlynn had measured Mr Montana's height, Mr Montana moved to the weighing scale to be weighed. After an initial unsuccessful foot tap on the scale by Dr McGlynn to activate it, or an activating tap that lapsed, Dr McGlynn successfully activated the scale with a second tap. There was a physical interaction, initiated by Dr McGlynn, as Mr Montana was stepping onto the scale to be weighed or when he was already standing on the scale.

[69] The nature of the physical interaction was sharply disputed in the evidence. The effect of Mr Montana's evidence was that Dr McGlynn touched him on the arm without consent/permission and, relevantly, in such a forceful way as to involve what he considered to be an assault. The effect of Dr McGlynn's evidence was that, although he did not seek prior consent/permission to touch Mr Montana's arm, the physical contact was entirely benign and consistent with his standard practice of trying to assist in stabilising a client as he or she steps on the weighing scale and/or to try to assist in preventing a potential fall caused by any destabilisation while the client is stepping onto or standing on the scale; and that the nature of the physical contact he initiated could not be characterised as an assault by him on Mr Montana.

[70] It is common ground that Dr McGlynn had initially touched Mr Montana in lowering the measuring stick onto his head; and that physical interaction or touch did not result in any reaction, comment, or complaint by Mr Montana. Whatever it was about the nature or extent of Dr McGlynn's subsequent unannounced physical interaction at the weighing scale, it so startled Mr Montana that he immediately stepped backwards off the scale, away from Dr McGlynn and uttered some words in a raised voice. I find that this stepping backwards off the scale was not some form of premediated ploy by Mr Montana to be uncooperative at the appointment and/or to derail the IME; what Mr Montana did and said immediately after the physical interaction in effectively springing backwards was, I find, a genuinely spontaneous reaction. As to not having been asked about being touched, it is common ground that Dr McGlynn did not foreshadow what he was about to do or explain what he was about to do before touching Mr Montana. Dr McGlynn acknowledged in cross-examination that before a doctor touches a patient it is best practice to explain what he or she is about to do and also acknowledged that people react differently to human touch. Here, as noted, it is common ground that Dr McGlynn did not state/explain to Mr Montana what he was about to do even though he acknowledged it as being best practice to do so; rather, Dr McGlynn adopted what he described in his evidence as being his own usual practice and the reason/s for that practice – principally to assist with balance or stability and/or preventing a potential fall as a client steps onto his weighing scale.

[71] Dr McGlynn said that Mr Montana "*suddenly and violently, just went backwards*" (and Dr McGlynn further appeared to suggest that that, in so doing, Mr Montana also pushed Dr McGlynn's hand out of the way - i.e., Dr McGlynn's later evidence was that Mr Montana

"*suddenly stepped backwards and he's going to push my hand out of the way as he does it, and that's what happened*"). I do not accept Dr McGlynn's characterisation that a sudden backwards step by Mr Montana off the scale, in a direction that was to move further away from Dr McGlynn, could be characterised as "*violent*" even if it was sudden and involved a comment by Mr Montana to Dr McGlynn to the effect that he was not to touch him without permission and/or that he had been assaulted. Stepping backwards and away from someone just is not something that would ordinarily be understood to be "*violent*"/involve an act of violence (or even "*aggression*"), even if the word "*violent*" is sometimes used synonymously with, for example, forceful. I very much doubt that Mr Montana pushed Dr McGlynn's hand out of the way as he suddenly moved backwards, away from him. Apart from the few words of evidence that I have set out earlier, there was not a hint anywhere else that Mr Montana responded to the physical interaction by pushing Dr McGlynn's hand out of the way at the weighing scale.

[72] On balance, I consider that the physical interaction at the weighing scale was not as light in touch as Dr McGlynn appeared to contend, given the stated purpose was, in effect, to provide some form of hold or grip to stabilise and/or prevent a potential fall. Equally, I do not consider that this hold or grip was as forceful or physically insistent as Mr Montana appeared to contend, albeit Dr McGlynn's unannounced hold or grip was sufficiently strong or firm as to startle Mr Montana into suddenly and spontaneously stepping backwards and away from Dr McGlynn, and also making a spontaneous comment to him about the physical interaction. I consider there were some elements of, as the respective case may be, embroidery and downplay in the descriptions given by each of the witnesses. I might add that, while it is common ground that prior consent was not obtained before Dr McGlynn's self-initiated physical contact with Mr Montana, the assault as alleged by Mr Montana involved Dr McGlynn, a person who is at least in his 70s and who is alleged to have "*reefed*" Mr Montana onto the scale; and, Mr Montana, a person in his late-50s, of taller stature than Dr McGlynn, and whose usual pre-injury occupation was as a stevedore working at Port Botany. I separately note, should this be of any relevance, that I do not accept DPW's submission describing Dr McGlynn as "*softly-spoken*". In his presentation in the witness box, Dr McGlynn spoke in a well-modulated and well-projected voice, rather than being softly-spoken. As to the further description in DPW's submissions of Dr McGlynn as being "*mild-mannered*" that may well be the case, but, equally, from my evaluation of both Dr McGlynn and Mr Montana in the witness box and the content of their evidence, it appears that neither of them would easily or readily brook a view that differed from his own about what had unfolded, or the respective perceptions of what had occurred. Moreover, Dr McGlynn was the authority figure in the room not only because he was telling Mr Montana what to do, or what not to do, but because he carried the imprimatur of being the person appointed to conduct an IME to provide medical information/opinion that had been requested by Mr Montana's employer relevant to his ongoing employment.

After the weighing scale incident

[73] It is common ground that after Mr Montana had suddenly stepped backwards off the weighing scale and in a raised voice said some words around having been touched without consent, what next relevantly unfolded in the sequence of events was that Dr McGlynn and Mr Montana sat down on chairs in the office. Dr McGlynn had told Mr Montana to sit down after what had occurred in connection with the weighing. Thus, Mr Montana compliantly did what Dr McGlynn told him to do by sitting down in a chair. There then ensued a short conversation with some (otherwise largely) repetitive backwards and forth between the two men involving

comments by Mr Montana about unauthorised touching/an allegation regarding assault, and denials by Dr McGlynn - including Dr McGlynn more than once describing his usual practice in relation to patients who are being weighed by him.

[74] It is also common ground that, while they were seated, Dr McGlynn said to Mr Montana words to the effect that he was to be quiet or that he was to quieten down. I find that, on whichever version of the precise words was used, the practical effect was the same, namely, Dr McGlynn indicated that Mr Montana should be quiet by (relevantly) not saying/repeating that there had been lack of consent and/or an alleged assault when Dr McGlynn disagreed with such characterisations and had made comments of his own about the matter. Moreover, it is common ground that Mr Montana did not shout or yell at any point, but he did raise his voice.

[75] Having made some written notes, Dr McGlynn unilaterally decided to terminate the appointment within a few minutes of it starting, by peremptorily showing Mr Montana the door – not only metaphorically, but literally. On balance, I consider that Dr McGlynn did articulate to Mr Montana words to the effect that he was to "*Get out*". That is, Dr McGlynn merely walking to the office door and opening that door may have had as its anticipated or perceived purpose, for example, Dr McGlynn speaking to his staff member in the reception area - were this move by Dr McGlynn to the doorway not also accompanied by a comment to Mr Montana by Dr McGlynn to the effect of telling him to immediately leave his office. Approached another way, Mr Montana did not just get up from his chair and leave the office of his own volition or on his own initiative in connection with Dr McGlynn doing no more than simply walking to his office door and opening it.

[76] As to the allegation that Mr Montana was aggressive, I have taken into consideration Dr McGlynn's evidence about matters such as his beating heart and pulse rate increasing during the appointment. Matters of these types concern Dr McGlynn's own physiological reaction to circumstances that, on his evidence, he found to be stressful (i.e., Mr Montana's comments about non-consensual touching and/or alleged assault). Dr McGlynn feeling, for example, that his pulse rate increased is not objectively indicative of Mr Montana having been aggressive to him. I have also taken into account Dr McGlynn's evidence of two weeks of disturbed sleep (later in evidence expanded to three weeks) – attributed by Dr McGlynn to Mr Montana. While that evidence about weeks of disturbed sleep is as it is, it seems a tad surprising that such a seasoned medical professional as Dr McGlynn would have been affected in this way by what unfolded in an appointment that lasted for only a few minutes before he terminated it. Again, any disrupted sleep is not objectively indicative of Mr Montana having been aggressive to Dr McGlynn.

The IME-related allegations made by DPW – valid reason/s

[77] Against the background of my distillations of the evidence and findings above concerning the appointment, and to recap, the allegations against Mr Montana that were made by DPW – which Mr Eadie later advised "*have been substantiated*" and which "*individually and collectively amount to serious misconduct under your contract and would justify summary dismissal*" – were threefold. I will refer to the allegations as Allegation 1, Allegation 2 and Allegation 3:

- Allegation 1: "*During the IME, when the Doctor allegedly touched you, that you became aggressive towards him*";

- Allegation 2: "*As a result of your conduct, the Doctor terminated the appointment, and the IME didn't not* [sic] *occur*";

- Allegation 3: "*You subsequently made a complaint to the Sutherland Police alleging the Doctor assaulted you*".

[78] As to what was written in Allegation 1, it is common evidentiary ground that Dr McGlynn in fact touched Mr Montana, so there is no need for any determination about whether touching occurred. Mr Eadie also raised the allegation that Mr Montana "*became aggressive*" towards Dr McGlynn after he had been touched. That element of Allegation 1 arose against the following, somewhat surprising, background: Mr Eadie's recount was that Ms Hucker-Stewart had told him that Mr Richards of Medicins Legale had told her that Dr McGlynn had told Mr Richards that Mr Montana had acted aggressively in the appointment. In passing, I note that this chain of hearsay information contained what can now be seen on the evidence to involve at least one inaccuracy. That is, DPW was proceeding on the basis of the hearsay that the physical interaction had occurred as a result of Dr McGlynn putting his hand on Mr Montana *to stop* him getting on the scale (and the hearsay that Mr Montana then acted "*aggressively and angry*"). Nothing in the evidence of either Mr Montana or Dr McGlynn suggested anything to indicate that Dr McGlynn initiated a physical interaction to *stop* Mr Montana from getting on the weighing scale.

[79] Dr McGlynn's subsequent letter to DPW, which post-dated Allegation 1, notably did not, within terms, actually refer to aggressive behaviour by Mr Montana although his letter did mention that he "*felt threatened*" – but without any identification of what Mr Montana said or did to cause him to feel threatened.

[80] I find that Mr Montana was assertive in what he said to Dr McGlynn in relation to the weighing but his actions (relevantly stepping back suddenly off the weighing scale, away from Dr McGlynn) and comments (relevantly referring to unannounced and non-consensual touching and/or alleged assault) were not "*aggressive*". Dr McGlynn set out in his oral evidence seemingly amorphous accounts lacking in any relevant detail concerning what concrete thing Mr Montana was claimed to have said or done that would objectively or reasonably be considered to involve "*aggressive*" behaviour in the IME and/or lead him to feel threatened. I consider that an appropriate characterisation of what occurred between Mr Montana and Dr McGlynn, once they were both seated, was no more than them expressing their respective points of view - and disagreeing with each other - relevantly about the characteristics of what had happened concerning the physical interaction. I have dealt elsewhere in the decision with my findings concerning the alleged scale-kicking, the alleged pushing away of Dr McGlynn's hand and other matters such as Dr McGlynn's pulse rate and disturbed sleep.

[81] Mr Montana was reasonably entitled to state his own views about matters to Dr McGlynn in such respects. It is common ground that this involved a raised voice, at least at some point or points (but not "*yelling*" as DPW appeared to suggest and rely upon – with agreement on the evidence that Mr Montana did not "*yell*" at Dr McGlynn). Notably., the evidence also indicated that Mr Montana in fact did what he was told to do in the appointment

on instruction from Dr McGlynn. For example, he (compliantly) stood at the height stick to have his height measured when told to do so; he (compliantly) next moved to the weighing scale; he (compliantly) stood at the weighing scale when Dr McGlynn attended to tapping the weighing scale to activate it; he (compliantly) stood and waited, as Dr McGlynn had told him to do, while Dr McGlynn made his second attempt at activating the scale; and he (compliantly) moved towards or onto the scale, when told to do so, after Dr McGlynn's second tap was successful. After the sudden stepping backwards off the scale following Dr McGlynn's unannounced physical interaction and what he said, Mr Montana next (compliantly) sat in a chair in Dr McGlynn's office, when told to do so. Mr Montana was not "*quiet*" when Dr McGlynn said that should occur (as I have noted, there were some largely repetitive comments going backwards and forwards between the two men and, on Mr Montana's part, in an assertive but not aggressive way). Mr Montana (compliantly) continued to be seated until Dr McGlynn stood from his own chair, walked to the office door opened it - and in all probability also told Mr Montana that he was to leave or get out. Mr Montana again (compliantly) did what Dr McGlynn told him to do, by leaving the office. Mr Montana left without saying anything more - and without any "*fanfare*", let alone any form of aggressive conduct to Dr McGlynn or his staff after being told to leave.

[82] I find that Allegation 1 is not made out as to Mr Montana being "*aggressive*" towards Dr McGlynn; conduct that reasonably could be described as being "*aggressive*" did not occur. Allegation 1 does not ground a valid conduct-related reason for dismissal for serious misconduct.

[83] As to Allegation 2, it is common ground that Dr McGlynn terminated the appointment a few minutes after it had commenced, with the result that the IME did not occur. Dr McGlynn self-determined to terminate the appointment, primarily, I consider, because he took umbrage at Mr Montana's statements and/or was offended or annoyed by statements about lack of prior consent to being touched and/or allegedly having assaulted Mr Montana. The two men had a difference of opinion about the nature and/or characteristics of what occurred and said so to each other in various ways. The appointment would have continued had it not been for Dr McGlynn's unilateral decision to terminate the IME, in circumstances where, I have found, Mr Montana's actions (stepping back suddenly off the weighing scale, away from Dr McGlynn) and comments (around non-consensual touching and alleged assault) were not aggressive, but his statements were said in an assertive way.

[84] I find that Allegation 2 is not made out as to the Dr McGlynn terminating the appointment and the IME not occurring "*As a result of your* [aggressive] *conduct …*". The supposedly aggressive behaviour such as to lead, as if inexorably, to Dr McGlynn's decision to tell Mr Montana to get out of his office did not occur; it was Dr McGlynn who determined, for his own reasons, to terminate the IME. Allegation 2 does not ground a valid conduct-related reasons for dismissal for serious misconduct.

[85] As to Allegation 3, it is common ground that Mr Montana attended a police station the day after the appointment with an allegation about Dr McGlynn having assaulted him and made a police statement to that effect. On no view of matters could it be a valid reason to dismiss Mr Montana for serious misconduct because of the fact that he "*subsequently made a complaint to the Sutherland Police alleging the Doctor assaulted you*". Allegation 3 does not ground a valid conduct-related reason for summary dismissal for serious misconduct. Indeed, it almost defies

belief that an employee should have been subjected to disciplinary allegations and findings of serious misconduct for making a police complaint, being an allegation that was said to have "*individually*" amounted to serious misconduct. As to that, it may be recalled that in his show cause letter of 19 August 2022 concerning Allegations 1, 2 and 3, Mr Eadie wrote (my underline):

> "Having reviewed all of the information, I am satisfied that the Allegations have been substantiated.
>
> The Allegations individually and collectively amount to serious misconduct under your contract and would justify summary dismissal.
>
> In light of the above information, DP World holds the view that you have engaged in serious misconduct and you have acted contrary DP World' [sic] policies and values. As a result of your conduct, DP World has lost trust and confidence in your ability to discharge your duties and functions in a matter [sic] which does not impact on the reputation, viability, or profitability of our business."

[86] In view of my findings concerning Allegations 1, 2 and 3, it is unnecessary to consider the operation of obligations under DPW's Code of Conduct and the contract of employment, and alleged breaches of obligations thereto. Breaches of employment-type obligations of the type adverted to in DPW's evidence and submissions as to the Code of Conduct and/or the contract of employment just have not been established. Specifically, Allegations 1, 2 and 3 did not, individually or collectively, constitute valid reasons for the dismissal related to Mr Montana's conduct whether considered in the context of the Code of Conduct or otherwise.

B. Alleged comment to supervisor

[87] Separately from the matter concerning the IME, DPW's case relies on the matter of a comment allegedly made by Mr Montana to Angelo Dymock, Operations Manager.

[88] The evidence around this matter was shorter than the evidence concerning the IME. The effect of it was as follows.

- The show cause meeting concerning Allegations 1, 2 and 3 was scheduled for 23 August 2022. The meeting was attended by Mr Montana and Mr Dunn of the MUA; and, for DPW, Mr Eadie and Ms Hucker-Stewart.

- Just after the commencement of the show cause meeting on 23 August 2022, Gabriel Condon, Operations Manager, approached Mr Eadie and told him that Mr Dymock had reported "*an altercation*" with Mr Montana that same morning.

- Mr Eadie asked Mr Condon to have Mr Dymock make a file note of what had transpired. The file note written by Mr Dymock recorded an incident time of 10.10am on 23 August 2022 and had as its subject descriptor "ABUSIVE BEHAVIOUR" by Mr Montana. The full text of Mr Dymock's file note read (with uppercase in original):

> "I WAS WALKING OUT THE FRONT DOORS FOR MY BREAK. A. MONTANA WAS OUT THE FRONT ON HIS PHONE. AS I WALKED PASSED [sic] HE SAID "ARE YOU STILL HERE?" I SAID "SORRY".
> A.M. "DOES THE COMPANY STILL WANT YOU HERE!"
> "YOU SET UP PEOPLE".
> I WALKED OFF AND DID NOT REPLY."

- Evidence-in-chief given by Mr Dymock in the hearing was to relevantly identical effect as the original file note, save for the use of an exclamation mark in the file note being replaced with a question mark in one of segment of text. That is, Mr Dymock's evidence read:

> "5. At around 10:10 am I walked out of the administration building at the terminal and saw Anthony Montana standing near the fence. As I walked past Anthony, he looked at me and said "are you still here?". I stopped walking, and said "sorry?". Anthony then said 'does the company still want you here? You set up people". I didn't respond to Anthony, and walked off."

- Mr Dymock's evidence was that he had been Mr Montana's direct supervisor and he was aware that Mr Montana had not worked at the terminal for a substantial period of time. Mr Dymock's evidence was that he did not know why Mr Montana was at the terminal on 23 August 2022.

- Reply evidence by Mr Montana was that he had not had any such contact with Mr Dymock and, to his recollection, there was "*a brief exchange of pleasantries*".

- At approximately 10.30am, Mr Eadie resumed the show cause meeting and matters around the IME were discussed.

- During a short break in the show cause meeting, Mr Eadie asked Mr Dymock what had occurred between him and Mr Montana prior to the meeting. Mr Dymock told Mr Eadie that Mr Montana had confronted him outside the office and said words to the effect of "*Are you still working here? I thought they would have gotten rid of you, you set people up*" and handed him the file note.

- When the show cause meeting resumed, Mr Eadie raised with Mr Montana the incident between him and Mr Dymock that morning. Mr Eadie put to Mr Montana the words he allegedly said to Mr Dymock, which Mr Montana denied.

[89] It is unnecessary to determine whose version of what was said (or not said) in relation to the alleged comment, which was, post-dismissal, later characterised by DPW as Mr Montana accusing Mr Dymock of "*working in an unethical way*". The reason it is unnecessary to determine whose version is to be preferred is because the comment, even accepting Mr Dymock's evidence at its highest about words said, would not - absent any other considerations - objectively and/or singularly provide a valid reason for dismissal on the basis of serious misconduct. While the categories of serious misconduct obviously are not closed, regulation 1.07 of the *Fair Work Regulations 2009* gives some indication of the style of conduct considered to have the meaning of serious misconduct. Regulation 1.07 reads:

"**Meaning of serious misconduct**

(1) For the definition of ***serious misconduct*** in section 12 of the Act, serious misconduct has its ordinary meaning.

(2) For subregulation (1), conduct that is serious misconduct includes both of the following:

(a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;

(b) conduct that causes serious and imminent risk to:

(i) the health or safety of a person; or

(ii) the reputation, viability or profitability of the employer's business.

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

(a) the employee, in the course of the employee's employment, engaging in:

(i) theft; or

(ii) fraud; or

(iii) assault; or

(iv) sexual harassment;

(b) the employee being intoxicated at work;

(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

(4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(5) For paragraph (3)(b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform."

[90] Even if Mr Dymock's evidence was taken at its highest and accepted without qualification, Mr Montana's alleged comment to Mr Dymock does not come within the style of

serious misconduct contemplated by regulation 1.07 – being a comment said here by DPW to constitute serious misconduct justifying the summary dismissal that was effected on 23 August 2022 (albeit otherwise effectively rolled-up or added-in with Allegations 1, 2 and 3, being allegations in relation to which I have already made findings).

[91] I am not satisfied that Mr Montana's alleged comment to Mr Dymock, even if he made that comment exactly as alleged by Mr Dymock, constituted a valid conduct-related reason for dismissal (here a summary dismissal for serious misconduct). A procedural fairness issue separately arises in relation to DPW's reliance on this matter about the alleged comment – as I will turn to in later in my consideration of s.387(b) of the Act.

(b) Whether the person was notified of that reason

[92] As to the question of (prior) notification of the reason/s for dismissal considered within the meaning of s.387(b) of the Act and principles of the type discussed in, for example, *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, as affirmed in *Mark Bartlett v Ingleburn Bus Services Pty Ltd t/a Interline Bus Services* [2020] FWCFB 6429, DPW notified Mr Montana about Allegations 1, 2 and 3 in Mr Eadie's correspondence dated 11 August 2022 (i.e., the "Incident – Opportunity to respond" letter) and his correspondence dated 19 August 2022 (i.e., the letter concerning the show cause meeting scheduled for 23 August 2022). That is, Mr Montana was notified of the following matters:

- Allegation 1: "*During the IME, when the Doctor allegedly touched you, that you became aggressive towards him*";
- Allegation 2: "*As a result of your conduct, the Doctor terminated the appointment, and the IME didn't not* [sic] *occur*";
- Allegation 3: "*You subsequently made a complaint to the Sutherland Police alleging the Doctor assaulted you*".

[93] Allegations 1, 2 and 3 are the only allegations that were notified to Mr Montana for the purposes of s.387(b) of the Act.

[94] There is no evidence that the alleged comment to Mr Dymock was notified to Mr Montana as being in Mr Eadie's consideration as a reason for dismissal and/or including in the context or sense that he had allegedly "*accused one of the Operations Supervisors of working in an unethical way*" - being text that was later contained in Mr Eadie's post-dismissal letter of 26 August 2022. The highest the evidence can be taken is that the alleged comment to Mr Dymock, or words to the effect of the alleged comment, were put to Mr Montana towards the end of the show cause meeting on 23 August 2022 – and Mr Montana denied having said the alleged words to Mr Dymock. As to that, it may be noted that Mr Eadie's post-dismissal letter of 26 August 2022 included text which read, specifically as to this matter:

> "Furthermore, it was raised with me in one of the meeting breaks that prior to our meeting, you allegedly accused one of the Operations Supervisors of working in an unethical way. You deny that this occurred. This subsequent event, raises concerns about your ability

> to interact with persons in a way which is consistent with our expectations and code of conduct."

[95] There was no evidence that Mr Eadie informed Mr Montana in the show cause meeting that he accepted/preferred Mr Dymock's account and/or that he rejected Mr Montana's denial. Moreover, there is nothing in the post-dismissal letter addressing Mr Eadie's acceptance/preference for Mr Dymock's account and/or that he rejected Mr Montana's denial (even though, admittedly, that is implicit and Mr Eadie's evidence about such matters was to the effect that he preferred and accepted the view that Mr Montana had made the alleged comment to Mr Dymock).

[96] There is no evidence to indicate that Mr Montana was notified that his past employment history was being considered in connection with the dismissal. I will return to this in the later discussion of the s.387(e) criterion.

[97] Last, on the topic of the criterion in s.387(b) of the Act, matters set out in Mr Eadie's post-dismissal letter read:

> "Further, your conduct:
> …
>
> - Was in breach of a lawful reasonable instruction to attend for an IME for us to determine your fitness to perform the inherent requirements of your role. Your conduct during the IME meant the consultation was terminated."

[98] Mr Montana had not been notified in Mr Eadie's correspondence of 11 August 2022 or 19 August 2022 of an allegation that Mr Montana's conduct was, relevantly, "*in breach of a lawful reasonable instruction to attend for an IME*" (as referred to in the post-dismissal letter). Had an allegation been made/notified of breach of an instruction to attend an IME, it is reasonable to suppose that Mr Montana would have highlighted that the fact of the matter was that he had attended the IME as directed/instructed; and, self-evidently, therefore complied with the direction/instruction to attend the IME as opposed to having breached that direction/instruction.

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

[99] Apart from, relevantly, (a) Allegations 1, 2 and 3, and (b) having certain alleged words to Mr Dymock canvassed towards the end of the show cause meeting (albeit without advice that the allegation about the comment was being considered as a basis for dismissal/summary dismissal for serious misconduct), Mr Montana was not given an opportunity to respond – because he was not notified of the other reason/s, as outlined in my consideration matters around s.387(b) of the Act.

(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

[100] In relation to s.387(d) of the Act, there was no unreasonable refusal by DPW to allow Mr Montana to have a support person to assist at any discussions relating to the dismissal. At the show cause meeting on 23 August 2022, Mr Montana was accompanied by Mr Dunn in the role of union representative/support person.

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

[101] This dismissal did not relate to issues concerning unsatisfactory performance. As this was a conduct-related dismissal, the question of whether there had been previous warnings about unsatisfactory performance does not (strictly) relevantly arise. I should note, for completeness, however, that Mr Eadie's post-dismissal letter read, in part: "*I have also taken into account your prior disciplinary history being Two (2) Final Warnings, three (3) Formal Warnings, Absence Management Plan (AMP) and Five (5) File notes.*" Mr Eadie's evidence-in-chief around this was as follows:

> "34. I take any decision to terminate employment extremely seriously. Before making the decision to terminate Anthony's employment, I carefully considered all relevant information, including Anthony's responses and disciplinary record.
>
> 35. Anthony's disciplinary record included the following:
>
> (a) formal warning dated 10 August 2010 for unprotected industrial action;
>
> (b) excessive unavailability dated 2 December 2010;
>
> (c) failure to report dated December 2012;
>
> (d) formal warning dated 10 January 2013 for unprotected industrial action;
>
> (e) file note dated 13 November 2014 for not wearing PPE;
>
> (f) absence management plan dated 4 September 2015 for 7 uncertified absences;
>
> (g) file note dated 13 February 2017 for a backdated medical certificate;
>
> (h) file note dated 8 October 2018 for calling in sick late and not being ready to start work at the allocated time;
>
> (i) formal warning dated 25 January 2019 for arriving late for four rostered shifts;
>
> (j) second formal warning and absence management plan dated 5 March 2019;
>
> (k) excessive unavailability dated 5 December 2019;

(l) excessive unavailability dated 3 March 2020;

(m) unauthorised exit of machinery dated 5 August 2020;

(n) final warning dated 29 January 2021 for an incident with a forklift; and

(o) reinforced final warning dated 19 May 2021 for an incident with a forklift."

[102] Mr Eadie's evidence was that he had reviewed/considered matters in Mr Montana's disciplinary history at some point in the days prior to the show cause meeting. While Mr Montana's disciplinary history was not notified to Mr Montana in the show cause letter as being under consideration in relation to dismissing him, reference to such matters was subsequently considered suitable for inclusion in the post-dismissal letter dated 26 August 2022 as having been taken into account by Mr Eadie. There is nothing in the evidence to indicate that it was flagged to Mr Montana that anything in relation to pre-IME matters was being considered in the context of showing cause why he should not be dismissed. In this case, Mr Eadie was taken in detail during cross-examination to each of the matters in the personnel records that he described as constituting a "*colourful disciplinary history*". In the course of a rather exacting cross-examination dissecting matters in Mr Montana's personnel records, the following questions were asked and answered:

> "So that's it. That's the entirety of Anthony's disciplinary history with DP World, right? ---As I understand it from his file, yes, given that most of it occurred before I started working there, Mr Bond.
>
> Okay. So to recap the disciplinary matters he received in 13 ears of employment two warnings for engaging in industrial action at the behest of his union. He received a warning for tardiness, one for excessive absences in 2019, and two final warnings in 2021 for incidents involving forklifts that he was driving. So that's the extent of the discipline that Anthony was subjected to during 13 years of employment, isn't it?---Yes, from what I can see, yes."

[103] While this is a matter that may more appropriately be grouped with the procedural fairness questions of notification in s.387(b) of the Act, rather than s.387(e) concerning previous performance-type warnings, it is clear that there was nothing in the correspondence that was sent to Mr Montana or in what comparatively little is known of the full extent of the discussions at the show cause meeting that unsatisfactory performance and/or earlier warnings were raised with Mr Montana. While it may be accepted that decisions by employers typically are not made in a vacuum concerning consideration of the overall employment history, or more recent employment history, nothing before the IME-related concerns had led DPW to actually dismiss Mr Montana for performance-related reasons.

(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*

[104] The Form F3 – *Employer response to unfair dismissal application* indicated that DPW has approximately 650 employees - a sizeable number of employees. As indicated by the job titles of some of the individuals referred to in the materials, DPW has, as in-house personnel, employees working in roles such as "*Human Resources Advisor*" and "*Human Resources Manager*". Given the size of DPW's workforce and given also that it has in-house human resources management personnel, I am somewhat surprised about the handling of aspects of matters concerning Mr Montana, including the allegations made to/about him and his summary dismissal. While I have already touched on some of these matters, I again point out the following (in no particular order):

- First, it at least appears that there was some form of administrative oversight by DPW about the forwarding of Mr Montana's signed authority to Dr Ryan. I infer that Dr Ryan did not respond to, or at least may not have responded to, DPW's request to him for medical information about his patient because Mr Pak/DPW failed to provide Mr Montana's signed release authority to Dr Ryan – in circumstances where DPW's case proceeded on the basis there had been some relevant failure/lack of cooperation by Mr Montana (i.e., DPW's submission was that "… *Mr Montana failed to provide updated medical information about his injury …*").

- Second, Mr Montana had telephoned DPW immediately after leaving Dr McGlynn's office and, when he received a return call from Mr Pak, provided information in the nature of a telephone report about what had occurred during the appointment and that it had been ended by Dr McGlynn. After a later short email from Mr Montana to Mr Pak and in connection with Mr Pak's advice to Mr Montana that the matter was being investigated, Ms Hucker-Stewart contacted Medicins Legale. No attempt was made by DPW to contact Dr McGlynn directly. It is now known from Dr McGlynn's evidence that even if DPW had contacted him he would not have spoken to DPW about matters – but that was not known to DPW at the time. A police officer was also in communication with Ms Hucker-Stewart on 9 August 2022, relevantly advising in an email that he had not identified any wrongdoing by Dr McGlynn – but, equally, the police email did not suggest that there had been any wrongdoing on the part of Mr Montana. While I have reproduced the evidence earlier about what gave rise to the allegations later to be made in Mr Eadie's letter dated 11 August 2022 about being aggressive to Dr McGlynn, Mr Eadie's evidence - such as it is - really does bear repeating:

  > "22. Due to concerns about what had transpired between Anthony [Montana] and Dr McGlynn, Karlie [Hucker-Stewart] contacted Medicins Legale, the third party that organised the independent medical examination by Dr McGlynn. Karlie spoke to Brandon Richards. Brendan [sic] told Karlie that Dr McGlynn had told him that Anthony had acted aggressively, and that Dr McGlynn had never, in his 51 years' experience in the medical profession, felt so threatened by a patient."

Thus, Ms Hucker-Stewart had told Mr Eadie that Mr Richards of Medicins Legale had told her that Dr McGlynn had told Mr Richards that Mr Montana had acted aggressively in the appointment. In an example of the difficultly in relying on second-hand information via Medicins Legale, DPW was apparently proceeding on the basis of an

understanding that the physical interaction had occurred as a result of Dr McGlynn putting his hand on Mr Montana *to stop* him getting on the scale (and Mr Montana then acted "*aggressively and angry*") – but neither the evidence of Mr Montana nor that of Dr McGlynn indicated that there was any attempt by Dr McGlynn to stop Mr Montana from getting on the weighing scale. Again in passing, Ms Hucker-Stewart's email also recorded advice to her that Mr Montana was five minutes late for the appointment (consistently, it came to pass on the evidence before the Commission, with Mr Montana's time estimate of five minutes and inconsistently with Dr McGlynn's letter of 12 August 2022 (and his later evidence) that Mr Montana was ten minutes late. As I have noted elsewhere, nothing actually turns on the exact number of minutes because it is common ground that Mr Montana was late for the appointment – but this further matter again shows the difficulty with the form of information-gathering/investigation that was undertaken by DPW's human resources personnel.

- Third, once Dr McGlynn provided his letter dated 12 August 2022 to DPW (being a date after Mr Eadie had already sent his 11 August 2022 letter which included the allegation that "*when the Doctor allegedly touched you, that you became aggressive towards him*"), Dr McGlynn wrote relevantly *only* as follows as to why he had terminated the appointment:

    - while standing beside Mr Montana, Dr McGlynn asked him to stand on the scales at the same time touching Mr Montana's right arm with his left hand near the elbow;

    - Mr Montana reacted immediately on Dr McGlynn's touch with sudden movement away from him saying he did not want to be touched and that touching him without permission was assault;

    - Mr Montana continued to escalate; Dr McGlynn felt threatened; the appointment terminated approximately three minutes after commencing.

What is set out above is the full extent of what Dr McGlynn conveyed to DPW in his letter. Absent anything in Dr McGlynn's own letter to DPW alleging that Mr Montana became aggressive to him, it is doubtful whether DPW should have pressed Allegation 1 at all. Apart from Dr McGlynn writing that Mr Montana reacted immediately "*with a sudden movement away*" from him saying that he "*did not want to be touched and that touching him without permission was assault*", DPW had no information about what was meant in Dr McGlynn writing that Mr Montana then "*continued to escalate*" and what Mr Montana allegedly did that had the result that Dr McGlynn "*felt threatened*". At the least, it seems that DPW reasonably ought to have sought clarification and/or further information about these matters of what was involved in the continued escalation and why Dr McGlynn felt threatened. DPW did not make any such further inquiries, either directly with Dr McGlynn or via Medicins Legale. It was not known to DPW at the time that no further information would have been forthcoming from Dr McGlynn anyway.

- Fourth, Dr McGlynn's letter to DPW included text in bold - with yellow highlighting - that read:

"**Private and Confidential – Addressee Only**
Not to be disclosed to Mr Montana or any third parties"

I note that the letter also contained prefatory text which included Dr McGlynn writing, with bold in the original:

> "I have set out the incident which occurred for your information. **Due to concerns for my physical safety, I request that this report not be disclosed to Mr Montana or his representatives without my express permission**."

There was nothing in the evidence to suggest that DPW sought Dr McGlynn's permission to disclose his letter to Mr Montana or his representatives or even part of the content which set out what Dr McGlynn had written about the appointment specifically. It is unclear why this was the case, in circumstances where Dr McGlynn's letter referred to seeking permission. As a matter of fairness to Mr Montana, it seems reasonable for DPW to convey to Mr Montana Dr McGlynn's concern/the content of the letter. Moreover, Mr Eadie's letter of 19 August 2022, in which he advised Mr Montana that he found the allegations to have been substantiated, did not indicate that DPW was in possession of a letter from Dr McGlynn albeit Mr Eadie otherwise advised that he had "*reviewed all of the information*". Thus, the existence of Dr McGlynn's letter/what it stated about the appointment was concealed from Mr Montana and his union representative. Mr Montana had no knowledge of what Dr McGlynn had alleged in his letter of 11 August 2022 and, thereby, no knowledge that Allegation 1 about being "*aggressive*" to Dr McGlynn did not even feature in the information the doctor himself provided to DPW.

[105] It is to be expected that some of these foregoing types of matters could have been, or should have been, dealt with in a better or more procedurally fair way given the size of DPW's operations and the fact of the involvement of human resources personnel in relation to the circumstances including Mr Montana's notification of allegation and the show cause process.

(h) Any other matters that the Commission considers relevant

[106] I propose to refer to a number of matters that I consider relevant for comment (in no particular order).

Perceptions about conduct involving physical threat/s to Dr McGlynn

[107] The highly pejorative/highly prejudicial words in Dr McGlynn's 12 August 2022 letter to DPW about concerns for his physical safety finds no objective basis whatsoever in the evidence that was before me. I observe that this part of the text in Dr McGlynn's letter seemingly informed, or may have informed, Mr Eadie's view about Mr Montana having done some physically-threatening thing or said some verbally-aggressive or threatening thing to Dr McGlynn. As to Dr McGlynn's letter, and my observation about it potentially informing Mr Eadie's view about physical safety even though it did not refer to aggressive conduct or physical threat/s by Mr Montana, I note that parts of Mr Eadie's evidence in cross-examination read as follows:

- "[Dr McGlynn's letter] *says that he felt threatened, so, and that Mr Montana continued to escalate, so I read that as there must have been some sort of trigger to make the doctor feel threatened or to have concerns for his physical safety*";

- "[Dr McGlynn is] *a very experienced doctor and I formed the view that whatever Anthony did made that doctor feel threatened for his physical security*";

- "*I concluded that Mr Montana acted in a manner and behaved in a manner that made a doctor, an experienced doctor feel physically threatened, yes*";

- "*It was conduct that led to a doctor feeling threatened, physically threatened, yes*";

- "*Any behaviour that makes a doctor feel physically threatened for his security and his safety is serious misconduct in my view*".

[108] However, it is clear from the evidence that Mr Montana had not done anything physically threatening or verbally threatening or aggressive, notwithstanding Dr McGlynn's later pejorative description in the hearing of Mr Montana having stepped backwards from the weighing scale and away from him "*violently*" and because he considered Mr Montana's comments about non-consensual touching and alleged assault to constitute aggression.

Mr Montana raising matters with the NSW Police Force and the Health Care Complaints Commission

[109] I am cognisant of the fact that Mr Montana made complaints to both the NSW Police Force and to the Health Care Complaints Commission about Dr McGlynn – and each determined not to take any further action against Dr McGlynn arising from those complaints. I am relevantly and jurisdictionally concerned with the question of whether Mr Montana's summary dismissal by DPW for serious misconduct was harsh, unjust or unreasonable.

Reluctance to attend the IME

[110] I find that Mr Montana was, however described, initially upset or annoyed, or disgruntled, about having to attend an IME under the "*direction*" or what he characterised as the "*dictate*" of DPW, because he was concerned about what he considered to be, in effect, the tone of Mr Pak's correspondence. I have commented earlier that Mr Pak's correspondence with its direction concerning attendance at an IME was objectively unremarkable; it had a quite mainstream human resources flavour to it.

[111] That said, I also note Mr Montana's evidence in cross-examination that he was "*happy*" to go to the IME itself, on the basis that he understood that he needed "*to do what he had to do*" because he was an employee of DPW. This was so even though Mr Montana could not understand why earlier material provided to DPW was not "*good enough*". Mr Montana's unchallenged evidence was that every time he had a check-up with Dr Ryan he had passed-on the relevant information to DPW (and the insurer) by email about the injury and how it was progressing. Mr Montana in fact attended the IME. But for Dr McGlynn's unilateral decision to terminate the appointment, it would have continued and a report as to fitness presumptively

would have been provided by him to DPW. Moreover, Mr Montana also indicated to DPW his willingness to attend an IME with a doctor other that Dr McGlynn – from the time of his first post-IME communication with Mr Pak almost immediately after Dr McGlynn had terminated the appointment, and consistently thereafter.

The handwritten notes concerning the show cause meeting

[112] Handwritten notes concerning the show meeting were in DPW's evidence. Those notes were put into evidence as annexure "SE-19" to Mr Eadie's witness statement as having been contemporaneous notes taken by Ms Hucker-Stewart. Mr Eadie's statement of evidence relevantly read:

> "29 … Karlie [Hucker-Stewart] also attended the meeting and took contemporaneous notes.
>
> Attached to this statement and marked "**SE-19**" is a copy of the meeting notes."

[113] Ms Hucker-Stewart did not herself give evidence in the proceedings as to having prepared the notes. Strangely, in cross-examination, Mr Eadie's oral evidence was that the handwritten notes were his own notes (rather than Ms Hucker-Stewart as the scribe/note-taker). Mr Eadie also said that he had written all the notes while there at the meeting.

[114] The status of the meeting notes is entirely unclear and unresolved; it suffices to say they are obviously not a transcript/a complete record. The notes that were put into evidence are otherwise partly redacted with the words "LEGALLY PRIVILEGED" in red over the redacted text. This asserted legal privilege was not discussed in the proceedings – and it is unclear how it came to pass that there was some asserted legal privilege about notes of a show cause meeting that had four non-lawyer participants without, for example, a ruling by me.

[115] I considered relisting the proceeding to have the parties address matters around the notes of the meeting, but, in the end, decided not to – because the notes (regardless of who penned them and their redacted/incomplete state) are not determinative in relation to my findings. But I will say this much: First, reliance was effectively placed by DPW in the decision-making on what was written in the notes of the show cause meeting as to Mr Montana allegedly having stated during the meeting that he had "*yelled*" at Dr McGlynn. Mr Montana denied he had used this descriptor in the show cause meeting (or at any time). Moreover, it was otherwise common ground on the evidence of Mr Montana and Dr McGlynn that Mr Montana did not "*yell*" during the appointment.

[116] Second, at least as recorded on the face of the notes concerning the show cause meeting, the allegation to be discussed or that was discussed appears to have been Mr Montana's allegedly "*ABUSIVE BEHAVIOUR"* and/or his "*ABUSIVE MANNER"* to Dr McGlynn (i.e., as shown in the heading of the meeting notes and in certain text about what was said to have been discussed during the meeting - upper case in original). If the notes are accurate in such respects, the allegation to be discussed in the show cause meeting changed from being "*aggressive*" to Dr McGlynn to being "*abusive*" to him. While there may be some elements of overlap concerning the two types of conduct, there nonetheless is a distinction in the meaning comprehended by the two different words "*aggressive*" and "*abusive*". In a striking coincidence

in terms of phraseology, given Mr Dymock's evidence that he was unaware of the purpose of Mr Montana's attendance at the workplace on the day of the show cause meeting, the subject-identifier in Mr Dymock's file note concerning Mr Montana's alleged comment to him, which Mr Dymock handed to Mr Eadie during a break in the show cause meeting, was also "*ABUSIVE BEHAVIOR*" (upper case in original).

[117] Last, on this topic of the alleged comment, again proceeding on the basis that Mr Dymock's evidence is taken at its highest and accepted, any such comment could not reasonably be characterised as committing a "*significant breach*" of the obligations to which the reinforced final warning letter of 19 May 2021 refers.

Remedy

[118] On a weighing of the various matters, including the absence of a valid reason for dismissal and aspects of procedural unfairness, I am satisfied that Mr Montana's dismissal was harsh, unjust and unreasonable - and therefore unfair. I turn then to the question of remedy, as I am satisfied that a remedy is appropriate. Reinstatement (with no break in service) is the principal remedy sought by Mr Montana.

[119] DPW submitted that if, contrary to its submission that the application should be dismissed, an order for reinstatement would not be appropriate given that Mr Montana has a proven track record of unacceptable workplace behaviour (including breaching policies) and has destroyed his relationship with his supervisor, Mr Dymock. Moreover, DPW has rightfully lost all trust and confidence in Mr Montana given his behaviour. For that reason alone, the submissions continued, the relationship is untenable.

[120] DPW more specifically detailed four grounds in its opposition to reinstatement in its final submissions.

[121] *Ground (a)*: DPW submitted there is no medical evidence before the Commission demonstrating that Mr Montana is currently fit to return to work, with the only evidence relevantly being that Mr Montana suffered a very serious injury, has been off from work for almost 20 months and currently remains unfit to perform his duties. In reply, the MUA submitted there is no medical evidence suggesting Mr Montana is not fit to return to work. If Mr Montana is reinstated and DPW holds concerns about his fitness to perform his job, then it is entitled to request that he attend an IME before allowing him to return.

[122] There was no evidence before the Commission as to Mr Montana's current fitness, or, on the other hand, any lack of current fitness, to return to work. What little that is known about fitness is a short reference in correspondence from Mr Pak about a medical certificate from Dr Ryan about the situation around 27 April 2022, nearly a year ago – apparently indicating there could be a return to work with light duties around that time. This application for an unfair dismissal remedy did not come before the Commission as one involving any question about, for example, a dismissal concerning capacity to perform the inherent requirements of the job, any failure to make reasonable adjustments, or the like. The application before the Commission is one concerning a summary dismissal for serious misconduct.

[123] At the time of the dismissal, Mr Montana's status was that of an employee who wished to return to work, albeit with light duties (but he was not permitted to do so by DPW because, he was informed, the injury was not a workers' compensation-related injury). Against that background, Mr Montana was not working and was in receipt of income protection payments under the enterprise agreement. The very purpose of the appointment on 8 August 2022 was so that DPW could make an informed decision about what steps it wished to consider/take, depending on current medical information arising from the IME.

[124] In conjunction with the order for reinstatement that will be made, it will be self-evidently necessary for steps to be taken for some form of report or assessment concerning Mr Montana's current medical fitness. It will be a matter for discussion between the parties whether DPW wishes to obtain such information from Dr Ryan or arrange an IME, or both. If the resulting assessment is favourable concerning a return to work, Mr Montana would be expected to return to duties. If the assessment is not favourable concerning a return to work, it will be for DPW to consider what steps it then wishes to next consider and/or take. One way or the other, the medical assessment according to specifications as determined by DPW will need to be promptly attended to and a high level of cooperation will be expected from Mr Montana without, for example, any cavilling about being "*directed*" to attend an appointment.

[125] Should the outcome be that DPW, subsequent upon the medical assessment, then decides to dismiss Mr Montana on medical fitness grounds, that will be something discrete and which stands separately from the application that has been before me. To avoid doubt, I will not be embarking on determining Mr Montana's fitness to return to work and/or determining any dispute about his fitness to work – as that is not a matter that appositely arises for determination under the auspices of this particular application for an unfair dismissal remedy in a misconduct case. The practical effect of the reinstatement order is that there will be a re-set – such that current information about Mr Montana's fitness will be required so that it can make an informed decision about steps that it then proposes to take.

[126] *Ground (b)*: DPW submitted that Mr Montana's conduct on 8 and 23 August 2022 demonstrated his complete and repeated disregard for the Code of Conduct, despite being aware of his obligation to comply with it.

[127] I have made my findings concerning Allegations 1, 2 and 3 and determined that breaches of employment-type obligations of the type adverted to in DPW's evidence and submissions as to the Code of Conduct did not occur in relation to conduct in connection with the appointment on 8 August 2022. As to the alleged comment on 23 August 2023, the utterance of four impugned words within the alleged comment, relevantly "*You set people up*", is not demonstrative of a "*complete and repeated disregard*" by Mr Montana of the Code of Conduct even proceeding on the basis of acceptance of Mr Dymock's evidence at its highest that these words were said as part of the broader comment.

[128] *Ground (c)*: DPW submitted that Mr Montana was already on a reinforced final warning, received just weeks before he ceased working. He had been warned for similar conduct in the past and told that any further breaches may result in further disciplinary action. The MUA submitted that the warning had nothing to do with alleged misconduct and it is irrelevant to the question of whether Mr Montana should be reinstated.

[129] Mr Montana's most recent warning was issued on 19 May 2021, which was not long before he ceased work due to the injury on 29 June 2021, and concerned forklift operations/failure to report a near miss. The text of the warning letter read:

> "Should you commit any other significant breach of your employment obligations under your contract of employment or DP World Policies and Procedures (including breaching the DP World Sydney Enterprise Agreement 2020, Appendix 1 Absence Management, and/or Failing to Report), this may be regarded as a breach of your Reinforced Final Warning and may result in further disciplinary action."

[130] I have considered the fact of the final reinforced warning, but that disciplinary matter in and of itself and/or when considered with other past matters would not lead me to conclude reinstatement would be inappropriate. As to that conclusion, I note that the warning referred to any "*significant breach*" of Mr Montana's employment obligations – and that is to be considered in the context of my finding in relation to Allegations 1, 2 and 3, and the alleged comment to Mr Dymock, even proceeding on an acceptance of Mr Dymock's evidence at its highest about what was said.

[131] *Ground (d):* DPW submitted that Mr Montana's conduct toward his direct supervisor, Mr Dymock, both on 23 August 2022 and during the proceedings (including because of the irreconcilable evidentiary conflict about what was said on 23 August 2022), has irretrievably destroyed the possibility of them having a viable and productive relationship moving forward. The MUA submitted that DPW's argument is "*specious*" and that neither Mr Dymock nor Mr Montana "*came off as withering flowers who would be unable to healthily tolerate working together because of a single inelegant remark in a blue-collar workplace*."

[132] As noted earlier, I have proceeded on the basis of acceptance at its highest of Mr Dymock's evidence as to the alleged comment because, regardless of whose version was accepted, the comment would not provide a valid reason for summary dismissal for serious misconduct. There was no evidence in the case to suggest that Mr Montana considered that he could not work in the future with Mr Dymock – the matter simply was not raised with him and in circumstances where he is seeking reinstatement. As for Mr Dymock, and to his absolute credit, he did not allow himself to be, for the want of a better description, baited in cross-examination with propositions put to him that he did not like Mr Montana. Mr Dymock said that he has "*no beef*" with Mr Montana, does not dislike him and has treated Mr Montana as he would any other employee - but he would not want to work with him again if he was going to make abusive or offensive remarks to him. I proceed on the basis that Mr Dymock would, following reinstatement, continue to treat Mr Montana as he would any other employee under his supervision. It may be anticipated that Mr Montana would not, or should not, make any abusive or offensive remarks to any employee following his reinstatement, let alone his supervisor. I point out that to (potentially) engage in any ill-considered behaviour would be at Mr Montana's employment peril, in circumstances where the reinforced final warning will still be in place in connection with the reinstatement. All things considered, I expect that both Mr Montana and Mr Dymock will be able to work together following reinstatement.

[133] The matters raised by DPW do not lead me to conclude that reinstatement would be inappropriate as a remedy, and nor are there any other matters that militate against that remedy. For example, DPW referred to Mr Montana having a record of unacceptable workplace

behaviour, including breaching policies, and that there had been a loss of all trust and confidence in Mr Montana given his behaviour. The submissions around loss of trust and confidence need to be considered in the context of my findings – with the finding of an absence of a valid reason for dismissal favouring reinstatement. As to matters of previous warnings, none of those matters led DPW to the view that the employment should be terminated on the basis of them – even the reinforced final warning concerning forklift operations. In such respects, I have considered principles of the type discussed in familiar authorities including *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198 and *Moszko v Simplot Australia Pty Ltd* [2021] FWCFB 6046 ("*Moszko*"). In *Moszko* there was discussion by the Full Bench about reinstatement of an employee with prior warnings, including the following extract:

> "[62] … (g) Prior to his dismissal, Mr Moszko had a disciplinary history in his employment with Simplot, including being issued with a first warning and a second final warning. It is rational for the matters the subject of these warnings to have caused Simplot to lose some trust and confidence in Mr Moszko, but the fact that Simplot did not make a decision to dismiss Mr Moszko in connection with these incidents means that there was enough trust and confidence in the relationship for it to continue. Accordingly, these past incidents could not, without more, provide a sound and rational basis for a conclusion that Simplot has lost trust and confidence in Mr Moszko to such an extent so as to make restoring the employment relationship inappropriate."

[134] The MUA's submissions indicated that the remedy sought is Mr Montana's reinstatement to his stevedore position with no break in service; and reinstatement is the primary legislative remedy. On balancing relevant matters, I am satisfied that an order for reinstatement should be made. As is typically the case, it is appropriate for the reinstatement to be effected with an associated order for continuity. An order with respect to lost pay was not sought, so it is unnecessary to consider the matters specified in s.391(3) of the Act. An order for lost pay would not, in any event, be appropriate because there was nothing by way of evidence to indicate that Mr Montana was fit to return to work (and, hence, earn pay) around the date of the dismissal and nor was there any evidence of attempts to mitigate losses and so it would not be appropriate to say anything about that.

[135] Separately, the parties will need to confer about the termination payments that were made to Mr Montana in conjunction with the dismissal and make administrative and/or repayment arrangements. Last, although not addressed by either party, I anticipate the order for reinstatement with continuity of service will have a collateral impact in relation to income protection payments under the enterprise agreement. As to that, I note that any income protection payments that may be made by an insurer are beyond the jurisdictional remit of the Commission in relation to an application made under s.394 of the Act.

Orders

[136] The disposition of the application as to remedy is as follows.

Reinstatement

[137] DPW shall reappoint Mr Montana to the position in which he was employed immediately before the dismissal (that is, at the same grade and at the same location he previously worked) by no later than 21 days after the date of this decision.

Order to maintain continuity

[138] In connection with the reappointment, I consider it is appropriate that the reappointment should be effected with continuity of Mr Montana's employment.

Conclusion

[139] The proceedings are concluded.

COMMISSIONER

Appearances:

K Bond of the Construction, Forestry, Maritime, Mining and Energy Union (The Maritime Union of Australia Division) for the applicant.

B Milne of Kingston Reid for the respondent.

Hearing details:

2023.
Sydney:
January 4.

Final written submissions:

24 February 2023.

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