

[2023] FWC 674 [Note: An appeal pursuant to s.604 (2023/1918) was lodged against this decision - refer to Full Bench decision dated 22 May 2023 [\[\[2023\] FWC 95\]](#) for result of appeal.]



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Dylan Thomas

v

Serco Australia Pty Limited
(U2022/9781)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 21 MARCH 2023

Application for relief from unfair dismissal – valid reason for dismissal – dismissal not harsh, unjust or unreasonable – application dismissed.

Introduction

[1] This is a case about one man fighting for his dog.¹

[2] Mr Dylan Thomas was employed by Serco Australia Pty Ltd (*Serco*) as a Correctional Case Officer – Dog Handler at the Clarence Correctional Centre (*CCC*), located near Grafton, New South Wales. The Correctional Centre is Australia’s largest prison, accommodating approximately 1,700 inmates across male and female minimum, maximum and remand disciplines.

[3] On 21 February 2022, Mr Thomas, who was on annual leave, was notified that one of the dogs he was training at the CCC, General Purpose Dog (*GPD*) Tauvey, had an injury to her tail and was bleeding. Mr Thomas attended the CCC and took GPD Tauvey to the vet, who treated the injury and amputated about 3.5cm from GPD Tauvey’s tail. Mr Thomas was extremely upset by the injury to GPD Tauvey. He was eager to find out what caused the injury. Mr Thomas was dissatisfied with the steps taken by Serco to investigate the cause of the injury to GPD Tauvey’s tail. Serco subsequently made a number of allegations against Mr Thomas. Following an investigation into those allegations, a decision was made, on 15 September 2022, to summarily dismiss Mr Thomas.

[4] It is contended by Mr Thomas that his dismissal was harsh, unjust and unreasonable. He further contends that he was unfairly terminated for the sole reason that he requested to see the footage of the injury to GPD Tauvey.² Mr Thomas alleges that there has been a “systemic cover up by all levels of Serco management”.³ Serco denies all the allegations made by Mr Thomas and contends that his dismissal was not unfair.

[5] I heard Mr Thomas’s unfair dismissal case against Serco, by video conference, on 21, 23 and 24 February 2023, and 6 and 8 March 2023. Mr Thomas gave evidence in support of his case. He also adduced evidence from a number of witnesses as a consequence of orders⁴ I made for those persons to attend the hearing, by video conference, to give evidence: Mr Matthew Hulett, Correctional Supervisor, Dog Squad at the CCC, Ms Tiana Johnston, Correctional Case Officer at the CCC, Mr George Sparrey, Correctional Case Officer – Dog Handler at the CCC, and Mr David White, Deputy General Manager of the CCC. Serco adduced evidence from Mr Tony Voss, General Manager of the CCC, and Mr Ignatius du Preez, People & Capability Manager at the CCC.

Initial matters to be considered

[6] Section 396 of the *Fair Work Act 2009* (Cth) (*Act*) sets out four matters which I am required to decide before I consider the merits of the application.

[7] There is no dispute between the parties and I am satisfied on the evidence that:

- (a) Mr Thomas’s application for unfair dismissal was made within the period required in s 394(2) of the Act;
- (b) Mr Thomas was a person protected from unfair dismissal;
- (c) the Small Business Fair Dismissal Code did not apply to Mr Thomas’s dismissal; and
- (d) Mr Thomas’s dismissal was not a genuine redundancy.

Was the dismissal harsh, unjust or unreasonable?

[8] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Mr Thomas’s dismissal was harsh, unjust and/or unreasonable. I will address each of these matters in turn below.

Valid reason (s 387(a))

General principles

[9] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.⁵ In order to be “valid”, the reason for the dismissal should be “sound, defensible and well founded”⁶ and should not be “capricious, fanciful, spiteful or prejudiced.”⁷

[10] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.⁸ The question the Commission must address is whether there was a valid reason for the dismissal related to the employee’s capacity or conduct (including its effect on the safety and welfare of other employees).⁹

[11] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.¹⁰ It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.¹¹

[12] The question of whether there was a valid reason must be assessed by reference to facts which existed at the time of the dismissal, even if they did not come to light until after the dismissal.¹²

[13] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.¹³ In cases such as the present where allegations of serious misconduct are made, the *Briginshaw* standard applies so that findings that an employee engaged in the misconduct alleged are not made lightly.¹⁴

[14] A reason will be ‘related to the capacity’ of the applicant where the reason is associated or connected with the ability of the employee to do his or his job.¹⁵ The appropriate test for capacity is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.¹⁶

Serco’s contentions on valid reason

[15] At the conclusion of the evidence before the Commission, I invited Serco to consider whether it intended to press and rely on each of the allegations set out in the termination letter in support of its contention that it had a valid reason to dismiss Mr Thomas. I extended that invitation to Serco because a number of the allegations of misconduct set out in the termination letter were not supported by the evidence before the Commission. Mr Brown, Serco’s solicitor, made what I consider to be a sensible decision not to press allegations 1, 2, 3, 4, 5, 6(d), and 8(b) and (c) from the termination letter.¹⁷ As a result, I will only deal with allegations 6(a), (b) and (c), 7, 8(a) and 9 from the termination letter.

[16] In addition, although Serco was not aware of the incident at the time it made the decision to dismiss Mr Thomas, it contends that Mr Thomas secretly recorded his meeting with Mr du Preez on 13 May 2022 and Mr Thomas’s conduct in this regard gave Serco another valid reason to terminate his employment. I will address this reason separately, after I have dealt with the remaining allegations from the termination letter.

Allegations 6 and 8

Allegation 6

“During the escort you attended on 8 March 2022, you engaged your fellow officers in inappropriate conversations in front of the inmate and other hospital staff. The conversations included your negative views of your Supervisor, the injuries to GPD Tauvey, and your wish to cause Serco harm.

In particular, you made the following statements and/or statements to the following effect:

- a. *"I have enough evidence and videos and photos to ruin Serco and the dog squad and crumble the empire";*
- b. *"I want to see Clarence to be taken over by a different company/CNSW";*
- c. *"I am done with dog squad. It's me vs. them now. I am ready to see the dog squad burn".*

Allegation 8

"On 8 March 2022, you threatened to damage Serco's reputation and then set out to do so. In particular:

- a. *You made a statement to CCO Johnston to the effect that you would discredit Serco so that it loses its contract with CNSW and someone else takes over."*

[17] On 8 March 2022, Mr Thomas, Ms Johnston and Mr Wilson undertook an escort of an inmate to Grafton Hospital for an operation to remove kidney stones. Mr Thomas was the only member of the dog squad assigned to this escort. Ms Johnston and Mr Wilson were, at the time, Correctional Case Officers at the CCC. Mr Wilson was inexperienced. The escort on 8 March 2022 was Mr Wilson's first escort of an inmate. Mr Thomas carried a firearm on his leg during the escort. Ms Johnston and Mr Wilson were not armed. The inmate was in handcuffs and leg restraints.

[18] Mr Thomas drove to Grafton Hospital in a separate vehicle to Ms Johnston and Mr Wilson for the escort. Ms Johnston and Mr Wilson arrived at Grafton Hospital with the inmate at about 8:45am.¹⁸ The inmate was taken out of the van and escorted by Mr Thomas into the Grafton Hospital. Mr Thomas did not have a dog with him while he was escorting the inmate into the Grafton Hospital. Ms Johnston and Mr Wilson walked behind Mr Thomas and the inmate.

[19] I accept Ms Johnston's evidence that she was worried by what she observed of Mr Thomas's behaviour during the escort on 8 March 2022. I accept Ms Johnston's evidence that after Mr Thomas left the escort on 8 March 2022 she commenced drafting an email to Mr Hulett in relation to what had happened during the escort. Ms Johnston used her personal mobile phone to write the email. She was occasionally watching the inmate (who was in surgery) while drafting the email.¹⁹ I accept Ms Johnston's evidence that she finished writing the email to Mr Hulett on 9 March 2022 and sent it to Mr Hulett at 2:50pm on 9 March 2022.²⁰ The email includes the following statements which are relevant to allegations 6(a), (b), (c) and 8(a):

- "Dylan said that he has enough evidence and videos and photos to ruin Serco and the dog squad and "crumble the empire" and that's his goal. He wants to see Clarence be taken over by a different company/CSNSW.
- He stated that he's done with dog squad. He's against them now. He believes that It's him vs them. He's ready to see dog squad burn. He's so against Matt Hulett and against everyone and he thinks the whole situation is super suspicious. He feels like his brotherhood is broken and he can't trust anyone."

[20] I accept Ms Johnston's evidence that she wrote the whole of her email to Mr Hulett. It was suggested to Ms Johnston by Mr Thomas that Mr Hulett and potentially Mr du Preez wrote part of the email. Ms Johnston denied that proposition and explained, persuasively in my view, that she had prepared the email on the basis of her recollection of what Mr Thomas had said to her during the escort on 8 March 2022 and what she observed of Mr Thomas's behaviour during the escort. For example, Ms Johnston explained in her evidence that she included in her email the statement that "all members of dog squad using pain and fear as reinforcement of 'correct behaviours' in their dogs"²¹ because Mr Thomas said words to that effect to her during the escort on 8 March 2022.

[21] Mr Thomas is suspicious of the fact that Ms Johnston sent her email to Mr Hulett on 9 March 2022, but it was not forwarded to Mr du Preez until 10 May 2022, which was the day when Mr Thomas was supposed to have his meeting with Mr du Preez. That meeting was ultimately put back to 13 May 2022. I do not consider that there is anything suspicious about the time at which the email was forwarded to Mr du Preez. The fact-finding investigation conducted by Mr du Preez took place in May 2022. He interviewed Mr Hulett on 10 May 2022, Mr Gallagher and Ms Johnston on 11 May 2022, and Mr Wilson on 12 May 2022. Ms Johnston's email was provided to Mr du Preez as part of his fact-finding investigation.

[22] I reject the speculative suggestion put to Ms Johnston (which she denied) that, as a reward for falsifying allegations against Mr Thomas, she was given her current role of seconded Audit Officer and/or she was seeking to have favours done for her brother, who had been employed by Serco. There is no evidence to support these allegations. I also reject the speculative suggestion put to Mr Hulett (which he denied) that Mr Wilson was given a role in the dog squad as a reward for helping Serco to dismiss Mr Thomas.²² There is no evidence to support this allegation. Mr Hulett did not have authority to, and did not, select Mr Wilson to join the dog squad.²³

[23] In her evidence before the Commission, Ms Johnston was asked questions by Mr Thomas about the comments he allegedly made during the escort on 8 March 2022. Ms Johnston's evidence about those matters was consistent with her email to Mr Hulett dated 9 March 2022.²⁴

[24] Mr Wilson was interviewed by Mr du Preez on 12 May 2022. Mr Wilson relevantly told Mr du Preez:²⁵

“ID: Did you have a conversation with DT about the injury to the dog?

SW: I asked him how he was, and he said fine, but it looked like he wanted to say more. He then just started talking. He said that he was really pissed off by the issue and that the dog nearly bled out. He said someone did it, but no one is interested in the truth. He was sort of blaming someone in the dog squad, but no one specific.

ID: Was it in front of the inmate? Were there others around?

DT: It was at the foot of the bed, a little way away.

ID: Did you participate in the conversation?

DT: I saw that it was not something that I wanted to be involved in and sort of tried to fade away. I wasn't comfortable with the convo and tried to disengage. You know taking interest in the inmate, you okay there mate, and move away. Most of the conversation was between DT and TJ.

...

ID: Was this what you expected a well-run escort would be?

SW: Well, no, I think the convo in front of the inmate was a bit average..."

[25] There is no dispute that the inmate was conscious when Mr Thomas made the comments alleged against him.

[26] Mr Thomas denies making the statements alleged against him in allegations 6(a), (b) and (c) and 8(a). He submits that he does not speak in the manner contended for by Serco and instead he quoted Nero from the Roman Empire by saying to Ms Johnstone, "They're playing a fiddle whilst Rome burns".²⁶ Ms Johnstone denies that Mr Thomas said this to her.²⁷

[27] I am satisfied, on the balance of probabilities and having regard to the *Briginshaw* standard, that Mr Thomas made the comments alleged against him in allegations 6(a), (b) and (c) and 8(a) during the escort on 8 March 2022. First, Ms Johnston's contemporaneous email sent to Mr Hulett on 9 March 2022 provides strong support for the allegations. Secondly, I found Ms Johnston to be a credible and reliable witness. It is clear from her evidence that she was shaken by Mr Thomas's behaviour during the escort on 8 March 2022. That is why she went to the trouble of preparing her contemporaneous email to Mr Hulett. The evidence given by Ms Johnston in the Commission was consistent with her email to Mr Hulett on 9 March 2022 and her answers to Mr du Preez in her interview on 11 May 2022.²⁸ Thirdly, Mr Wilson's interview with Mr du Preez on 12 May 2022 is consistent with a finding that Mr Thomas made comments which were critical of Serco during the escort on 8 March 2022. Fourthly, there can be no doubt that Mr Thomas was extremely upset on 8 March 2022 about what he perceived to be a failure to properly investigate the injury to GPD Tauvey's tail. Mr Thomas's strong feelings on this topic increase the likelihood that he made the comments alleged against him.

[28] I am satisfied that Mr Thomas's conduct in making the statements alleged against him in allegations 6(a), (b) and (c) and 8(a) in the presence and hearing of the inmate was inconsistent with:

- the following obligations imposed on Mr Thomas by Serco's Code of Conduct, which was electronically signed by Mr Thomas on 20 December 2019:
 - "If you work for us, or with us, we expect you to always ... apply your good judgement to every situation"
 - "We are a large company working in many parts of the world. As a result, we have a considerable impact on society, the economy and the environment. We want that impact to be beneficial. We want to make a positive difference to people's lives. That means living Our Values and living by our standards everywhere. Our business integrity depends on your integrity. We rely on you to do what's right and protect our reputation."

- “External Communications - Our reputation is affected by what people hear about us, either directly or through the media. So what any of us say really matters. That's why we don't start rumours or talk idly. And we never speak on behalf of Serco if we 're not authorised to.”
- the following Serco Values, a copy of which were electronically signed by Mr Thomas on 20 December 2019:
 - “Trust - We work hard to earn trust and respect”
 - “Care - We care deeply about the services we provide, the communities we serve, and we look after each other”.
- Mr Thomas’s obligations under clause 30 of his employment contract, electronically signed by him on 20 December 2019:

“During the course of your employment you must at all times:

 - (a) Comply with ... policies relevant to your employment;
 - (c) You must use your best endeavours to promote the Company's interests, objectives and reputation and not bring the Company into disrepute;
 - (d) You must always act ... in a manner that is consistent with your role.”
- the requirement under the Local Operating Procedure for Escorts that “Escorting staff must maintain a smart appearance and act with professionalism, discretion and in a dignified manner, which not only reflects well on Serco, but also the Centre.”
- the requirement under the Post Order for External Escorts - Security & Operations Officers to “Act always in accordance with Serco's Code of Conduct.”

[29] I am satisfied that Mr Thomas’s conduct in breach of these obligations gave Serco a sound, defensible and well-founded reason to terminate his employment.

Allegation 7

“By your conduct with respect to the statements made at allegation 6(a) to (c) above, you caused serious and imminent risk to the reputation, viability and profitability of Serco’s business, and you are therefore guilty of serious misconduct pursuant to Regulation 1.07 of the Fair Work Regulations 2009.”

[30] Serco relies on the meaning of "serious misconduct" set out in Regulation 1.07 of the *Fair Work Regulations 2009* (Cth) and specifically sub-regulation 1.07(2)(b)(ii) which states:

"(2) For subregulation (1), conduct that is serious misconduct includes:

...

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

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

[31] I do not accept that Mr Thomas’s conduct the subject of allegations 6(a), (b) and (c) and 8(a) constituted serious misconduct within the meaning of regulation 1.07 of the *Fair Work Regulations 2009* (Cth). Mr Thomas’s conduct did not cause any serious or imminent risk to the viability or profitability of its business. I accept that by making the comments the subject of allegations 6(a), (b) and (c) and 8(a) in the presence of an inmate, Mr Thomas caused a risk to Serco’s reputation. However, I would not characterise that risk as serious or imminent. The comments were made on one day in the presence of a single inmate. While it is possible that staff in the hospital may have overheard some of the comments, there was no evidence of precisely which, if any, hospital staff were present when the comments were made.

Allegation 9

“On 13 May 2022, you refused to comply with a reasonable and lawful direction from Serco to cooperate in an investigation. In particular:

- a. You refused to cooperate in an investigation when you refused to answer questions or provide information in relation to complaints that you made on 23 and 24 February 2022, and*
- b. You refused to provide any facts relevant to your participation in an escort task you undertook to Grafton Base Hospital on 8 March 2022.”*

[32] I accept that Serco gave Mr Thomas a lawful and reasonable direction to answer questions about what happened during the escort of an inmate to Grafton Hospital on 8 March 2022. That direction was given by Mr du Preez to Mr Thomas during their meeting on 13 May 2022.²⁹

[33] I also accept Mr du Preez’s evidence that during his fact-finding meeting with Mr Thomas on 13 May 2022, Mr Thomas refused to answer many of the questions put to him by Mr du Preez, particularly in relation to what happened during the escort of an inmate to the Grafton Hospital on 8 March 2022. Mr du Preez’s evidence in this regard is supported by the following answers given by Mr Thomas during cross examination before the Commission:

“... and the whole thing was just a fishing exercise, and Mr du Preez was asking me how an escort works, he was asking me, ‘Oh, what dog training do you have?’, what this, what that, because he was just looking for an excuse because he’d been directed by your company to find an excuse. But the problem is Mr du Preez sits behind a desk, doesn’t know anything about escorts, doesn’t know anything about dogs, so he just wanted to find a reason to sack me, and I wasn’t going to give him the rope to sack me. I was just like, ‘You’re the HR manager, you want to find out, you find out how an escort works, you find out what a dog does, you find out about my role’, and that was up to him. I’m not going to do his work for him. And that’s exactly what it was: one fishing exercise. And that’s all you’ve got for the whole lot.”³⁰

...

... No, Mr Brown, my tactic was to just not have to put up with this rubbish. There was no point talking to Mr du Preez because Mr du Preez wasn't on a fact-finding mission, sir, he was not doing a fact-finding mission, he was just looking for a fishing exercise to get as much information as he could to find anything...³¹

... And [I] said, 'Do you have any OIMS incidents, do you have any CCTV footage, body-worn cameras, escort logs, contemporaneous notes or officers' notebooks – that's called evidence – and if you don't have any of those, well, I suggest you go and get some, Mr du Preez, and when you present those to me, then I'll answer those questions. But you just going on a fishing expedition, no, I'm not going to entertain that.'³²

...

Again a tactical decision on your part, wasn't it?---No. I asked for evidence. He had none. I'm not going to respond to some hearsay rubbish from a man who sits behind a desk.³³

...

... My understanding of the meeting was that Mr du Preez was sent to find some misconduct on me and he would do anything he could, including changing, altering my statements and altering my words and making false statements against me to do that, and I noticed that, and I knew what he was doing, and so I don't have to entertain this individual with an answer to stuff that I know is a lie. That's why I didn't give this clown [Mr du Preez] any of the answers that he wanted so that he could write them up.³⁴

... No I answered quite a number of his questions in explicit detail. But when he started saying stuff as ridiculous as, 'You did this on an escort, or you said this on an escort', I knew that it was just him making up this rubbish, making up this rubbish so he could remove me. So I'm not going to entertain it. That was – that was the context of it. I'm not going to entertain fools. You're talking to be about an escort. I wrote the escort package, Mr Brown. I taught the escort package, Mr Brown. I'm not here to teach Mr du Preez the escort package so he can pick apart and protect my work from behind a desk pushing a pen and then sack me for it and take my life away. That's what I did, Mr Brown."³⁵

[34] Mr Thomas's refusal to comply with the lawful and reasonable direction for him to answer questions on 13 May 2022, particularly in relation to the serious question of what happened during the escort on 8 March 2022, gave Serco a sound, defensible and well-founded reason to terminate his employment.

New allegation – secret recording of meeting with Mr du Preez on 13 May 2023

[35] It became apparent during Mr Thomas's cross examination on the first day of the hearing that he had used his smart watch to record his meeting with Mr du Preez on 13 May 2022. I marked as MFI the 'transcript' typed up by Mr Thomas after the meeting. Mr Thomas prepared the 'transcript' by listening to the recording of what was said at the meeting and typing every word that was spoken.³⁶ I informed the parties that I would defer my ruling on the admissibility

of MFI1 until after I had heard evidence and made a finding as to whether consent was given to Mr Thomas to record the meeting.

[36] When the issue concerning the recording of the meeting on 13 May 2022 arose during Mr Thomas’s evidence on the first day of the hearing, I explained to Mr Thomas that he had a right to refuse to answer questions about his alleged secret recording of the meeting on the ground of self-incrimination.³⁷ I was satisfied that there was a ‘real and appreciable danger of a conviction’³⁸ against Mr Thomas under the provisions of the *Surveillance Devices Act 2007* (NSW), s 7(1) of which prohibits a person from using a listening device to record a private conversation to which a person is a party. Mr Thomas elected, initially, on the first day of the hearing, to answer questions about his recording of the meeting with Mr du Preez on 13 May 2022. Mr Thomas gave evidence that he said to Mr du Preez that he was going to “detail and record the meeting”, to which Mr du Preez said, “yes, yes, that is your right.”³⁹ Mr Thomas then decided, later on the first day of the hearing, that he had said all he was going to say on this matter and would exercise his right to refuse to answer further questions in relation to his recording of the meeting on the ground of self-incrimination.⁴⁰

[37] In the period between the first and second day of the hearing Serco filed an additional statement made by Mr du Preez on 22 February 2023. In that statement Mr du Preez:

- attached a copy of notes made by him during the meeting on 13 May 2022;
- referred to a typed-up file note made by him over the weekend following the meeting on 13 May 2022. A copy of that file note was attached to Mr du Preez’s statement dated 1 February 2023;
- stated that the following conversation took place near the beginning of the meeting on 13 May 2022:

Mr du Preez:

“This meeting will not be recorded. I will be taking notes for my own use. There will not be minutes taken of the meeting, and no minutes will be circulated afterwards. If you want to take your own notes for your own reference, Dylan, you can, but I will not be sharing my notes today with you.”

Mr Thomas:

“That’s fine. Kahla [Mr Thomas’s partner] will take notes. She is a good note taker.”

Mr du Preez:

“Let’s continue then.”

- stated that Mr Thomas made no reference at any time in Mr du Preez’s presence on 13 May 2022 to having with him any device or recording equipment; he made no reference

to any ‘smart watch’, nor did Mr du Preez observe Mr Thomas having any form of smart watch;

- stated that he did not observe either Mr Thomas or his partner touch or turn on or engage any device or equipment, including any ‘smart watch’. Further, at the conclusion of the meeting Mr du Preez did not observe Mr Thomas or his partner touch or turn off or disengage any device or equipment, including any ‘smart watch’;
- stated that during the meeting he recalls Mr Thomas’s partner taking notes with a pen on a spiral note pad which was smaller than A4 size; and
- stated that as a human resources professional, he has never permitted an employee or other person to record by any form of electronic means a conversation with him.

[38] During his cross examination on the second day of the hearing, after Mr du Preez’s additional statement had been filed and served, Mr Brown asked Mr Thomas questions about his recording of his meeting with Mr du Preez on 13 May 2022. Mr Thomas refused to answer those questions on the ground of self-incrimination, notwithstanding that he had elected to answer some questions on that topic on the first day of the hearing.

[39] I prefer the evidence given by Mr du Preez as to what was said in the meeting on 13 May 2022 about the recording of the meeting over the limited evidence given by Mr Thomas on that matter during the first day of the hearing. First, Mr du Preez was not cross examined by Mr Thomas about what was said concerning the recording of the meeting on 13 May 2022. Secondly, there is no reference in Mr du Preez’s handwritten notes or his typed-up notes from the meeting about any request by Mr Thomas to record the meeting. Had such a request been made, I am of the view that the significance of the matter would most likely have resulted in Mr du Preez making a note about it. Thirdly, I accept Mr du Preez’s unchallenged evidence that Mr Thomas’s partner took notes at the meeting on 13 May 2022. There would have been little need for Mr Thomas’s partner to take notes at the meeting if he had truly obtained Mr du Preez’s consent to record the meeting. Fourthly, there is a ring of truth to Mr du Preez’s evidence that, as a human resources professional, he has never permitted an employee or other person to record by any form of electronic means a conversation with him. Accordingly, I find, on the balance of probabilities and having regard to the *Briginshaw* standard, that Mr Thomas did not seek or obtain the consent of Mr Thomas to record the meeting on 13 May 2022. I am satisfied that Mr Thomas secretly recorded that meeting.

[40] I accept Serco’s submission that Mr Thomas’s secret recording of his meeting with Mr du Preez on 13 May 2022 was a valid reason for his dismissal. Serco did not become aware of the secret recording by Mr Thomas until he gave evidence in the proceedings before the Commission. This does not prevent Serco from relying on the evidence as a valid reason for Mr Thomas’s dismissal because it is a matter for the Commission to determine, on the evidence before it, whether there was a valid reason for the dismissal.⁴¹ I consider that, unless there is a justification, the secret recording of conversations in the workplace is highly inappropriate, irrespective of whether it constitutes an offence in the relevant jurisdiction. In this regard, I adopt the following observations made by Deputy President Colman in *Gadzikwa v Australian Government Department of Human Services*:⁴²

“The reason it is inappropriate is because it is unfair to those who are secretly recorded. They are unaware that a record of their exact words is being made. They have no opportunity to choose their words carefully, be guarded about revealing confidences or sensitive information concerning themselves or others, or to put their best foot forward in presenting an argument or a point of view. The surreptitious recorder, however, can do all of these things, and unfairly put himself at an advantage. Moreover, once it is known that a person has secretly recorded a conversation, this is apt to produce a sense of foreboding in others, an apprehension that they must be cautious and vigilant. This is potentially corrosive of a healthy and productive workplace environment. Generally speaking, the secret recording of conversations with colleagues in the workplace is to be deprecated.”

[41] Similarly, in *Schwenke v Silcar Pty Ltd*⁴³ a Full Bench of the Commission found on appeal that the member at first instance “was entitled to conclude that the Appellant had made the recording in secret and that this action was contrary to his duty of good faith and fidelity to the employer and undermined the trust and confidence required in the employment relationship. This action, in itself, was grounds for summary dismissal.”⁴⁴

[42] I do not consider that Mr Thomas had any legitimate justification for secretly recording his meeting with Mr du Preez. First, Mr Thomas had his partner present at the meeting with him. She was able to take notes of what was said during the meeting. Secondly, although Mr Thomas lacked trust in Serco at the time of his meeting with Mr du Preez, as is evident from his repeated accusations that Serco has covered up the injury to GPD Tauvey and dismissed him for insisting on seeing the footage of the injury to GPD Tauvey, I have rejected those contentions. In my view, Mr Thomas’s distrust of Serco did not justify his decision to secretly record his meeting with Mr du Preez.

[43] I am satisfied that Mr Thomas’s conduct in secretly recording the meeting was contrary to his duty of good faith and fidelity to his employer and undermined the trust and confidence required in the employment relationship. It provided Serco with a sound, defensible and well-founded reason to terminate Mr Thomas’s employment.

[44] In addition, because Mr Thomas secretly recorded his meeting with Mr du Preez, I reject the tender by Mr Thomas of his ‘transcript’⁴⁵ of that meeting.

Conclusion re valid reason

[45] I am satisfied on the evidence that Serco had valid reasons to terminate Mr Thomas’s employment.

[46] That Serco had sound, defensible and well-founded reasons to terminate Mr Thomas’s employment weighs against Mr Thomas’s contention that his dismissal was harsh, unjust and unreasonable.

Notification of reason (s 387(b))

[47] Save for the reason connected with Mr Thomas’s secret recording of his meeting with Mr du Preez on 13 May 2022, I am satisfied on the evidence that Mr Thomas was notified of

the valid reasons for his dismissal. The notification was provided in the termination letter and through the investigation process.

[48] Serco was not in a position to notify Mr Thomas of the reason connected with his secret recording of the meeting on 13 May 2022 because Serco was not aware of the secret recording until Mr Thomas gave evidence in these proceedings.

[49] On balance, this factor (s 387(b)) weighs in support of Serco's argument that Mr Thomas's dismissal was not harsh, unjust or unreasonable.

Opportunity to respond (s 387(c))

[50] As a result of concerns about Mr Thomas's behaviour at work following the injury to GPD Tauvey on 21 February 2022 and during the escort on 8 March 2022, Serco made a decision to stand Mr Thomas down on full pay pending an independent medical assessment to determine Mr Thomas's capacity and suitability to perform the inherent requirements of his job in a safe manner. Mr Thomas was notified on 11 March 2022 of the decision to stand him down on full pay for this reason. Mr Thomas objected to this decision and sought to be reinstated to his full duties. Serco did not accede to this request.

[51] Mr du Preez was charged with the task of undertaking a fact-finding investigation into the complaints made by Mr Thomas about the circumstances giving rise to the injury to GPD Tauvey on 21 February 2022 and Mr Thomas's conduct during the escort on 8 March 2022. As part of that investigation, Mr du Preez interviewed Mr Hulett, Mr Gallagher, Ms Johnston, Mr Wilson and Mr Thomas. Mr du Preez then made the following recommendations to Serco management:

- that the complaints made by Mr Thomas on 23 and 24 February 2022 be closed out as not being supported by evidence;
- that Mr Thomas be formally addressed and cautioned about the making of frivolous and vexatious allegations;
- that the direction for Mr Thomas to stand down from active duty pending an independent medical assessment be withdrawn and that instead Mr Thomas be suspended from duty pending the outcome of a disciplinary process relating to serious misconduct; and
- that Mr Thomas be asked to answer allegations in relation to misconduct as identified in Mr du Preez's investigation.

[52] Mr du Preez had no involvement in the subsequent disciplinary process which took place in relation to Mr Thomas and Mr du Preez was not involved in the decision to terminate Mr Thomas's employment.

[53] By letter dated 29 June 2022, Mr Thomas was notified of his suspension from duty on full pay while a disciplinary process took place in relation to his alleged behaviour and conduct.

[54] By a second letter dated 29 June 2022, detailed allegations were put to Mr Thomas by Serco. The letter directed Mr Thomas to attend a formal disciplinary meeting at 9am on 6 July 2022 and required Mr Thomas to make any written response to the allegations by 5pm on 9 July 2022.

[55] By written communication sent to his lawyers on 30 June 2022,⁴⁶ in respect of which Mr Thomas elected to waive legal professional privilege, Mr Thomas set out the allegations made against him by Serco and provided a detailed response to each allegation. Although many of the allegations put to Mr Thomas were expressed in broad terms, it is clear from Mr Thomas's response in his communication to his lawyers that he understood the substance of the allegations made against him and was able to respond to them in a detailed manner. The substance of Mr Thomas's response to the allegations, as set out in the communication to his lawyers on 30 June 2022, was never provided to Serco.

[56] By letter dated 4 July 2022 from Mr Thomas's lawyers, Serco was advised that Mr Thomas wished to provide a written response to the allegations rather than deal with the issues in a meeting. Mr Thomas's lawyers also requested particulars of the allegations, together with copies of documents relating to the allegations, and sought a period of four weeks from receipt of those particulars and documents to respond to the allegations.

[57] By letter dated 5 July 2022 from Serco to Mr Thomas's lawyers, he was informed that the disciplinary meeting scheduled for 6 July 2022 had been vacated and Serco was working through the request for particulars and documents.

[58] By letter dated 13 July 2022, Mr Thomas's lawyers made a further request to Serco for particulars and documents relating to the allegations.

[59] By letter dated 23 August 2022, Serco responded to the requests for particulars and documents relating to the allegations put to Mr Thomas. Serco provided Mr Thomas with an extension until 5pm on 2 September 2022 to respond to the allegations.

[60] By email sent at 5:03pm on 2 September 2022, a paralegal from the law firm engaged by Mr Thomas sent an email to Serco advising that Mr James, the partner responsible for providing advice to Mr Thomas, was on leave until 12 September 2022, and that they were obtaining their client's instructions and would bring Serco's correspondence to Mr James's attention on his return.

[61] By letter dated 6 September 2022, Serco informed Mr Thomas's lawyers that Mr Thomas had been given a reasonable opportunity to consider the allegations and particulars provided to him, and Serco would proceed to determine the matter on the information available to it.

[62] On 7 September 2022, Mr Thomas sent an "open letter" to Mr Rupert Soames, Global Chief Executive Officer of Serco, based in London, Mr Peter Welling, Chief Executive Officer for Serco Asia Pacific, as well as to a number of senior executives at the New South Wales Government Department of Justice. The "open letter" was not sent to Ms Jessica Cook, Serco People & Capability Specialist, who had been corresponding with Mr Thomas's solicitors, nor was it sent to Mr Voss. The "open letter" can be fairly described as a high-level response to the

allegations put to Mr Thomas; it does not deal with the detail contained in the allegations. The “open letter” makes a number of allegations, including that Ms Cook, Mr Voss, Mr Hulett and Mr du Preez colluded to knowingly falsify allegations against Mr Thomas in order to stop him from ascertaining footage which may contain the cause of the injury to GPD Tauvey. Mr Thomas asked Mr Soames to immediately reinstate him to his full duties.

[63] Mr Thomas gave evidence, which I accept, that he was in a desperate situation because his solicitor was on leave and Serco was about to make a decision in relation to his employment without the benefit of his detailed response to the allegations. He therefore made a decision to send his “open letter” to the most senior officers of Serco he could find.

[64] Having regard to all the circumstances, I am satisfied that Mr Thomas understood the allegations made against him and was given an opportunity to respond to the reasons for his dismissal, save for the reason related to his secret recording of the meeting with Mr du Preez on 13 May 2022. This weighs in support of Serco’s argument that Mr Thomas’s dismissal was not harsh, unjust or unreasonable.

Unreasonable refusal to allow a support person (s 387(d))

[65] There is no dispute, and I am satisfied on the evidence, that there was not any unreasonable refusal by Serco to allow Mr Thomas to have a support person present to assist in any discussions relating to his dismissal.

Warnings of unsatisfactory performance (s 387(e))

[66] Mr Thomas was not dismissed for unsatisfactory performance. This factor is not relevant to my assessment of the fairness of Mr Thomas’s dismissal.

Size of enterprise and absence of human resource specialists or expertise (s 387(f) and (g))

[67] The Respondent is a large enterprise. The Respondent has human resource management specialists and expertise. In all the circumstances, I am satisfied that neither the size of Serco’s enterprise nor any absence of human resource management specialists or expertise had any impact on the procedures followed in effecting Mr Thomas’s dismissal.

Other relevant matters

[68] Section 387(h) of the Act provides the Commission with a broad scope to consider any other matters it considers relevant.

[69] There are five other relevant matters to consider.

[70] First, I accept that Mr Thomas was employed by Serco for a period of about seven years prior to his dismissal. Other than the events which led to Mr Thomas’s dismissal and which I have found were substantiated on the evidence before the Commission, Mr Thomas had an unblemished employee record with Serco. The length and quality of his employment record weighs in support of his contention that his dismissal was harsh.

[71] Secondly, Mr Thomas contends that he was unfairly dismissed for the sole reason that he requested to see the footage of the injury to GPD Tauvey.⁴⁷ Mr Thomas also alleges that there has been a “systemic cover up by all levels of Serco management”.⁴⁸ I reject these allegations.

[72] Mr Thomas’s theory is that Mr Sparrey accidentally *slammed* a kennel door on GPD Tauvey’s tail on 19 February 2022 and failed to report the incident to anybody. Mr Thomas goes on to contend that GPD Tauvey was left to suffer in pain until the injury was noticed by the Dog Handler on duty during 21 February 2022, at which time Mr Thomas was called in to work and he took GPD Tauvey to the vet for treatment. Mr Thomas then contends that GPD Tauvey and the other Serco dogs he cared for at his home were taken away from him while he was suspended from work on full pay, as a form of punishment because he had requested to view the footage of the injury to GPD Tauvey. He contends that he was then dismissed for the same reason.

[73] Mr Thomas relies on the following comments in the final two paragraphs of Ms Johnston’s email of 9 March 2022 to support his allegation that his dismissal was effectively a “set up”:⁴⁹

“Sometime later, George Sparrey arrived to relieve Dylan. I advised him that Dylan had left multiple hours earlier and he seemed genuinely confused. A few hours later (I believe), Master Control rang to advise George to return to site. When George left, Shaun appeared to be very against George and angry at him for some reason. I asked if something had happened and Shaun went on a rant about how “they’re going to make it look like Dylan abandoned his post to get rid of him. They’re making it out like he’s fucked up when he hasn’t.””

“Shaun and I arrived back on site approximately 2030-2100. As soon as we got back, Shaun went straight to the key room to de-kit and then left straight away without talking to anyone. Approximately 15 minutes later, I was stopped by Ryan Seager and asked about Dylan “abandoning post” and I quote “they’re trying to stitch Dylan up. Apparently Dylan is really unwell and so dog squad are trying to get rid of him now”. Multiple staff from this Night Shift made comments about Dylan “abandoning post”. I have also heard it from staff today 09/03/2022. A whisper is definitely currently going around against Dog Squad and painting the whole K9 team in a really bad light.”

[74] The external vet who treated GPD Tauvey on 21 February 2022 subsequently provided a report dated 3 March 2022 in relation to his treatment of the injuries to GPD Tauvey’s tail. The report states:

“Tauvey was presented to the Riverbank After Hours service 21/02/22 at 7:30am by handler Dylan for a bleeding tail tip. A firm bandage had been placed around the tail tip to limit the bleeding (this was suggested by the on-call vet to act like a tourniquet).

On examination, Tauvey had normal heart rate, breathing rate, and mildly elevated temperature. The tail tip was swollen and red with a small open wound at the tip with central area of necrotic tissue and the end of the coccygeal bone was found protruding.

There was pus evident within the wound indicating infection. On neurological examination, Tauvey had normal tail sensation and movement.

Radiographs of the tail revealed no fractures or dislocation of the vertebrae.

These findings are consistent with a small infected wound at the tip of the tail. Minor abrasion several days before presenting to the vet clinic is the likely cause of the infection. As there is limited soft tissue between the skin and bone it was starting to protrude. The end of the tail is prone to poor blood supply also and this often results in infection. It seems likely a second mild abrasion has caused the bleeding noted on 21/02/22 and because of the swollen infected tissue is easily damaged bleeding as resulted. The expected volume of blood lost is very low however it was likely spread around the area by tail movement giving the impression of severe haemorrhage.

Tail injuries are common. I would not consider this a serious condition. Treatment to reduce the bone under the skin and resolve the infection is necessary. Healing can be complicated by constant trauma to the tip and by limited blood supply.

Due to bone exposure and evidence of infection, tail amputation was performed under general anaesthesia to prevent bone infection and to hasten healing time. Approximately 33-40mm of the top of the tail was removed to access healthy infection free tissue and to be able to close the skin over the coccygeal vertebra (bones of the tail).

Tauvey was last examined on Wednesday 02/03/2022. The amputation site was closed and showing signs of healing however the skin edges were more red and inflamed than I would like and some pus was seen around the edges. This is a sign of some ongoing irritation of the tail tip as the healing skin touches surfaces and a mild underlying infection is likely. Management consists of ongoing bandaging, antibiotics and anti-inflammatories. A full recovery is eventually expected.”

[75] Mr Sparrey was shown CCTV footage from 20 February 2022 during his evidence. At that time Mr Sparrey had less than six months experience in the dog squad at Serco. The footage shows Mr Sparrey taking GPD Tauvey from a kennel and permitting her to exercise in the run yard near the kennels. The footage shows GPD Tauvey to be excited to leave her kennel; she moves freely without any sign of obvious injury to her tail. The CCTV footage is inconsistent with Mr Thomas’s theory that Mr Sparrey *slammed* the kennel door on GPD Tauvey’s tail on 19 February 2022. The CCTV footage does not show Mr Sparrey “shaking his head in disgust”, as was suggested to him by Mr Thomas at the hearing. I accept Mr Sparrey’s evidence that he did not *slam* GPD Tauvey’s tail in the kennel door. I accept Mr Sparrey’s evidence that he does not know how GPD Tauvey’s tail was injured. I found Mr Sparrey to be a credible witness. He gave direct and responsive answers to the questions put to him by Mr Thomas. He did not speculate concerning matters about which he did not have first-hand knowledge. Mr Sparrey readily conceded when he was not able to recall particular conversations or details of events which took place some time ago.

[76] Mr Hulett gave evidence that he watched CCTV footage from 21 February 2022, at which time Mr Shane Gallagher, Correctional Case Officer – Dog Handler, was working in the kennels at the CCC. There is no dispute that the CCTV footage does not show exactly how

GPD Tauvey's tail was injured on 21 February 2022. Mr Hulett says the footage shows Mr Gallagher taking GPD Tauvey out of her kennel, at which time GPD Tauvey looks to be in good health, with no visible blood on or around her tail. Mr Hulett says that the footage goes on to show GPD Tauvey running in the run yard and being led by Mr Gallagher back into her kennel, at which time there is clearly blood coming from her tail. Mr Gallagher sees the blood and attempts to provide first aid to GPD Tauvey. Having reviewed the CCTV footage, Mr Hulett formed the view that it was self-evident how GPD Tauvey injured her tail – she must have injured it while exercising in the run yard on 21 February 2022, which Mr Hulett says in his opinion can happen if a dog's tail bangs against, or runs along, the wire fence in the run yard while exercising. In light of his assessment that the injury which led to the bleeding of GPD Tauvey's tail took place in the run yard on 21 February 2022, Mr Hulett did not see any point in reviewing CCTV footage from 19 February 2022 or any other time prior to 20 or 21 February 2022. Mr White also reviewed the CCTV footage and came to the same conclusion as Mr Hulett.

[77] I have reviewed the CCTV footage viewed by Mr Hulett and Mr White. I agree that it shows the information described by Mr Hulett. I also agree that, on the balance of probabilities and on the basis of what is shown in the CCTV footage from 20 and 21 February 2022 together with the content of the vet report, GPD Tauvey's tail was most likely injured while she exercised in the run yard on 21 February 2022. It was found by the vet who treated GPD Tauvey on 21 February 2022 that her tail suffered a "minor abrasion several days before presenting to the vet clinic" on 21 February 2022, which caused an infection, and "a second mild abrasion has caused the bleeding on 21/02/22".⁵⁰ The "second mild abrasion" is more likely than not to have happened while GPD Tauvey was exercising in the run yard on 21 February 2022, at which time she could easily have banged her tail on the wire fence or run her tail along the fence as she exercised in the run yard. The fact that the CCTV footage clearly shows blood coming from GPD Tauvey's tail after her time exercising in the run yard on 21 February 2022, but not before leaving the kennel in order to exercise, is compelling evidence in support of the analysis conducted by Mr Hulett and Mr White, with which I agree.

[78] In my view, Mr Hulett and Mr White acted reasonably by viewing the CCTV footage from 20 and 21 February 2022 and concluding that GPD Tauvey must have injured her tail while exercising in the run yard on 21 February 2022. I also consider that Mr Hulett and Mr White made a reasonable decision not to view, or have viewed, the CCTV footage from days prior to 20 or 21 February 2022. There would have been little point in doing so in circumstances where the bleeding obviously commenced on 21 February 2022 as a result of a "mild abrasion" on that day, and the "minor abrasion" which took place "several days" before was not the direct cause of the bleeding on 21 February 2022. The earlier "minor abrasion" could have happened over a period of many days in many different ways, including whilst GPD Tauvey was in the kennel or the run yard, much of which is not visible from the CCTV footage. As the vet stated in his report, "tail injuries are common. I would not consider this a serious condition... A full recovery is eventually expected."⁵¹ It is not known how the earlier "minor abrasion" happened. But given the absence of any visible injury to GPD Tauvey in the CCTV footage from 20 February 2022 and before she is led into the run yard on 21 February 2022, the earlier "minor abrasion" could not have been the result of Mr Sparrey, or anyone else, *slamming* a kennel door on GPD Tauvey's tail, as Mr Thomas speculatively suggests was the case.

[79] In accordance with the usual practice at the CCC, the CCTV footage of the kennel area of the days prior to 20 and 21 February 2022 was automatically written over, and thereby deleted, 28 days after the footage was first recorded. That is why the footage from those earlier days is no longer available to be viewed.

[80] Mr Voss was the Serco employee who made the decision to terminate Mr Thomas's employment. I accept Mr Voss's evidence that he made the decision to terminate Mr Thomas's employment for the reasons set out in the termination letter and not for any other reason. Serco showed Mr Thomas some footage of the kennel area from 20 and 21 February 2022. Serco also considered Mr Thomas's request to view CCTV footage from the days leading up to 20 and 21 February 2022, but rejected that request for the reasons I have explained. The decision to reject Mr Thomas's request to view the earlier CCTV footage was reasonable in the circumstances. The evidence does not disclose or establish a "cover up" of anything by Serco management. The evidence establishes that reasonable steps were taken to discover the cause of the bleeding to GPD Tauvey's tail on 21 February 2022. The CCTV footage from 21 February 2022 led Mr Hulett and Mr White to conclude, reasonably in my view, that GPD Tauvey's tail was injured and commenced bleeding as a result of something which happened on 21 February 2022 while GPD Tauvey was exercising in the run yard; most likely the "mild abrasion" which caused GPD Tauvey's tail to bleed happened when her tail banged against, or ran along, the wire fencing in the run yard. GPD Tauvey was given immediate treatment by Mr Gallagher and was then taken by Mr Thomas to the vet for further treatment. On the basis of the evidence before the Commission, there is no substance to the allegation that GPD Tauvey was poorly treated or left to suffer after being injured in the kennels. There was nothing for Serco to "cover up".

[81] I reject the allegations made by Mr Thomas that various Serco employees colluded, including Mr Hulett, Mr Sparrey, Mr Voss, to:

- ensure that Mr Thomas was not able to view the earlier CCTV footage and find out what caused the injury to GPD Tauvey's tail; and/or
- get rid of Mr Thomas from the dog squad and terminate his employment.

[82] Mr Thomas's care and concern for GPD Tauvey, and all other dogs in his care, is not in dispute. The extent of his feelings for GPD Tauvey led Mr Thomas to disagree in strong terms with the steps taken by Serco management to investigate the cause of the injury to GPD Tauvey. Mr Thomas would not let the issue go and became obsessive about it. This is what ultimately led to the sequence of events which resulted in the termination of Mr Thomas's employment.

[83] Thirdly, Mr Thomas's personal and economic circumstances are relevant to his contention that his dismissal was harsh. I accept that Mr Thomas's dismissal from his employment with Serco has been devastating for him on a personal and economic level. He no longer works in a position which he loved and which gave him an immense amount of personal pride and satisfaction. Further, he has had to sell his house near Grafton and move with his partner to Western Australia to obtain alternative employment. The costs in doing so were considerable. In addition, Mr Thomas was unemployed for a period of about three months before he secured employment in Western Australia, earning approximately the same remuneration as he earned during his employment with Serco. These matters support Mr Thomas's argument that his dismissal was harsh, but must be balanced against all other relevant circumstances, including the gravity of his conduct.

[84] Fourthly, Mr Thomas has not shown any remorse for any of his conduct in the period leading up to his dismissal. His lack of remorse is relevant to my overall assessment as to whether his dismissal was harsh in all the circumstances.

[85] Fifthly, it is relevant that I have regard to the fact that Mr Thomas was summarily dismissed as part of my overall assessment concerning the harshness of his dismissal. The proportionality of the summary nature of Mr Thomas's dismissal must be weighed against the gravity of his misconduct.⁵²

[86] In *Sharp v BCS Infrastructure Support Pty Ltd*,⁵³ a Full Bench of the Commission discussed the question of whether particular conduct by an employee warranted their summary dismissal as an "other relevant matter" within the meaning of s 387(h) of the Act (references omitted):

"[33] The relevance of the definition of "serious misconduct" in reg.1.07 to the matter is also, with respect, obscure. Section 12 of the Act contains a definition of "serious misconduct" for the purposes of the Act which simply cross-refers to reg.1.07. Apart from s.12 itself, the expression "serious misconduct" is used in only three places in the Act. In s.123(1)(b), a dismissal for serious misconduct is a circumstance in which the notice and redundancy entitlement provisions of Pt 2-2 Div 11 are not applicable; in s.534(1)(b) a dismissal for serious misconduct is one to which the requirements for notification and consultation in Pt 3-6 Div 2 do not apply; and in s.789(1)(b) a dismissal for serious misconduct is one in relation to which the requirements established by Pt 6-4 Div 3 for notification and consultation do not apply. The expression "serious misconduct" is not used anywhere in Pt 3-2, Unfair Dismissal, of the Act. Section 392(3) requires the Commission, in relation to the award of compensation for an unfair dismissal, to reduce the amount that it would otherwise order by an appropriate amount where it is "satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person". However, it is clear that conduct may constitute "misconduct" for the purpose of s.392(3) without necessarily being "serious misconduct". The expression is used in the Small Business Fair Dismissal Code, but that had no application in this case (and it is at least highly doubtful in any event whether the reg.1.07 definition applies to the Small Business Fair Dismissal Code). Reg.1.07 therefore had no work to do in the application of the provisions of Pt 3-2 to the circumstances of this case.

[34] It may be accepted that an assessment of the degree of seriousness of misconduct which has been found to constitute a valid reason for dismissal for the purposes of s.387(a) is a relevant matter to be taken into account under s.387(h). In that context, a conclusion that the misconduct was of such a nature as to have justified summary dismissal may also be relevant. Even so, it is unclear that this requires a consideration of whether an employee's conduct met a postulated standard of "serious misconduct". In *Rankin v Marine Power International Pty Ltd* Gillard J stated that "There is no rule of law that defines the degree of misconduct which would justify dismissal without notice" and identified the touchstone as being whether the conduct was of such a grave nature as to be repugnant to the employment relationship. "Serious misconduct" is sometimes used as a rubric for conduct of this nature, but to adopt it as a fixed standard

for the consideration of misconduct for the purpose of s.387(h) may be confusing or misleading because the expression, and other expressions of a similar nature, have been considered and applied in a variety of contexts in ways which are influenced by those contexts. In *McDonald v Parnell Laboratories (Aust) Pty Ltd* Buchanan J said:

“[48] The terms ‘misconduct’, ‘serious misconduct’ and ‘serious and wilful misconduct’ are often the subject of judicial and administrative attention as applied to the facts of particular cases but there is relatively little judicial discussion about their content and meaning. Naturally enough, when the term ‘serious misconduct’ is under consideration an evaluation of what conduct represents ‘serious’ misconduct is influenced by the (usually statutory) setting in which the phrase must be given meaning and applied. Frequently, for example, the question at issue is whether an employee is disentitled by reason of his or her conduct to a statutory entitlement (eg. in New South Wales, where Ms McDonald was employed, see Long Service Leave Act 1955(NSW) s 4(2)(a)(iii); Workers Compensation Act 1987(NSW) s 14(2).”

[35] In the Decision, the Vice President, correctly, did not attempt to address the parties’ submission concerning “serious misconduct” in the context of his consideration of whether there was a valid reason for the dismissal, but only as a relevant matter under s.387(h). His findings at paragraph [55] and [56] that Mr Sharp’s conduct was “serious misconduct” was, we consider, responsive to the submission of BCS noted in the first sentence of paragraph [52] that “the Applicant’s conduct constituted serious misconduct justifying immediate dismissal”. That is, “serious misconduct” was used as a shorthand expression to described misconduct of a nature that justified summary dismissal. A finding of that nature was a matter which was open to be taken into account as relevant under s.387(h) because it involved an assessment of the seriousness of the conduct in question.”

[87] I will now consider whether Mr Thomas’s conduct warranted his summary dismissal.

[88] Considered in isolation, I would not regard the comments made by Mr Thomas during the escort on 8 March 2022 as being sufficiently serious to warrant his summary dismissal. However, when those matters are considered along with Mr Thomas’s refusal to co-operate during Mr du Preez’s fact-finding investigation into what happened on 8 March 2022 and Mr Thomas’s secret recording of his meeting with Mr du Preez on 13 May 2022, I consider that Mr Thomas’s overall conduct was of such a grave nature as to be repugnant to the employment relationship. His conduct demonstrated that he had no trust and confidence in Serco and he could not be trusted to conduct himself in an appropriate manner in circumstances where he disagreed with reasonable managerial decisions made by Serco. In short, Mr Thomas’s conduct was incompatible with the employment in which he had been engaged by Serco. His conduct warranted his summary dismissal.

Conclusion

[89] After considering each of the matters specified in section 387 of the Act, my evaluative assessment is that Serco’s dismissal of Mr Thomas was not harsh, unjust or unreasonable in all the circumstances.

[90] Serco had valid reasons for Mr Thomas's dismissal and it afforded procedural fairness to him prior to making a decision to bring his employment to an end. The gravity of Mr Thomas's conduct outweighs the matters I have identified above as supporting his contention that his dismissal was harsh, unjust and unreasonable.

[91] I therefore find that Serco's dismissal of Mr Thomas was not unfair. Mr Thomas's application for an unfair dismissal remedy is dismissed.



DEPUTY PRESIDENT

Appearances:

Mr D Thomas, for the Applicant

Mr P Brown, Solicitor, for the Respondent

Hearing details:

2023

Newcastle

21, 23 and 24 February and 6 and 8 March (by videoconference)

Printed by authority of the Commonwealth Government Printer

<PR760461>

¹ Mr Thomas made this submission in his closing oral submissions in reply on 8 March 2023

² Mr Thomas's affidavit made on 12 December 2022 at [4]

³ Mr Thomas's affidavit made on 12 December 2022 at [5]-[6]

⁴ *Thomas v Serco Australia Pty Ltd* [2023] FWC 386

⁵ *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8

⁶ *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

⁷ *Ibid*

⁸ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

⁹ *Ibid*

¹⁰ *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24]

¹¹ *Ibid*

¹² *Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457 at [99]

¹³ *Ibid*

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- ¹⁴ *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J
- ¹⁵ *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031 at [14]
- ¹⁶ *Crozie v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* (2000) 98 IR 137 at [62]
- ¹⁷ Ex R5
- ¹⁸ Ex A38
- ¹⁹ PN2887-2892
- ²⁰ Court Book at pages 752-755
- ²¹ Court Book at p 754
- ²² PN2034
- ²³ PN2027-2029
- ²⁴ PN3087-3097
- ²⁵ Court Book at p 773
- ²⁶ PN3082
- ²⁷ PN3087-3097
- ²⁸ Court Book at pp 769-771
- ²⁹ Ex R2 at [31]
- ³⁰ PN720
- ³¹ PN724
- ³² PN729
- ³³ PN730
- ³⁴ PN1181
- ³⁵ PN1184
- ³⁶ PN248-260
- ³⁷ PN416-422
- ³⁸ *Sorby v Commonwealth* (1983) 152 CLR 281
- ³⁹ PN253; PN404-5; PN445-453
- ⁴⁰ PN454-7
- ⁴¹ *Lane v Arrowcrest Group Ltd* (1990) 27 FCR 427 at 456); *Byrne and Frew v Australian Airlines Limited* [1995] 185 CLR 410 at 467
- ⁴² [\[2018\] FWC 4878](#) at [83]
- ⁴³ [\[2013\] FWCFB 9842](#) at [33]
- ⁴⁴ See, too, *Chandler v Bed Bath N' Table* [\[2020\] FWC 3706](#) at [100]-[101] and *Coles v Scale Supermarkets Australia Pty Ltd* [\[2022\] FWC 1593](#) at [28]-[30]
- ⁴⁵ MF11
- ⁴⁶ Ex A6 at Court Book pp 201-226
- ⁴⁷ Mr Thomas's affidavit made on 12 December 2022 at [4]
- ⁴⁸ Mr Thomas's affidavit made on 12 December 2022 at [5]-[6]
- ⁴⁹ Court Book at p 755
- ⁵⁰ Ex A21 – vet report
- ⁵¹ Ex A21 – vet report
- ⁵² *Johnson v Northwest Supermarkets Pty Ltd* [\[2017\] FWCFB 4453](#) at [5]; *Sharp v BCS Infrastructure Support Pty Ltd* [\[2015\] FWCFB 1033](#) at [34]
- ⁵³ [\[2015\] FWCFB 1033](#)