DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Adam Thompson
v
Ventia Australia Pty Ltd T/A Ventia
(U2022/9649)

COMMISSIONER RIORDAN SYDNEY, 18 APRIL 2023

Application for unfair dismissal remedy

[1] On 29 September 2022, Mr Adam Thompson (**the Applicant**) filed an application with the Fair Work Commission (**the Commission**) seeking a remedy for an alleged unfair dismissal pursuant to section 394 of the *Fair Work Act 2009* (**the FW Act**). The Applicant was dismissed by Ventia Australia Pty Ltd T/A Ventia (**Ventia/the Respondent**) on 20 September 2022 on the basis of engaging in misconduct.

[2] The Applicant was employed by the Respondent from 11 November 2014 until his dismissal on 20 September 2022. At the time of his dismissal, the Applicant was employed by the Respondent as a Qualified Leading Firefighter (**QLFF**), based at HMAS Albatross, Nowra. At the date of his dismissal, the Applicant's employment with the Respondent was covered by the *Ventia and UFU VIC and NSW Fire and Rescue Enterprise Agreement 2022* (**the Agreement**).

[3] The Applicant seeks reinstatement to his position as fire fighter with the Respondent. However, he has also given an undertaking that, if reinstated, he will not accept the role as a delegate of the United Firefighters Union of Australia (**UWU**). The Applicant also seeks backpay.

Background

[4] The Respondent issued a Show Cause letter to the Applicant on 12 September 2022 which provides a detailed history of the events which the Respondent has relied upon in reaching its decision to terminate the Applicant:

> "Private and confidential
>
> 12 September 2022
>
> Adam Thompson
> [redacted]

By email

Dear Adam

YOUR EMPLOYEMENT WITH VENTIA

Further to the allegations meeting on 6 September 2022, this letter is to seek your responses to the matters raised with you, which have cause Ventia to form a preliminary view that your employment should be terminated.

The allegations raised against you are:

1. Creating, accessing, posting, and sharing offensive content within a private Facebook group named Sickos Video Sharing Group (Facebook Group 1) and Punters Events Only (Facebook Group 2).

2. Active on Facebook Group 1, sharing and posting offensive and inappropriate material.

3. On 26 May 2020 at 5.28pm you posted and shared commentary and images on Facebook Group 1.

4. On 23 March at 10.05am you posted and shared commentary and images on Facebook Group 1.

5. On 9 April at 7.56pm you forwarded and shared images on Facebook Group 1.

6. On 24 February at 9.49am you forwarded and shared images on Facebook Group 1.

7. On 28 August 2020 at 6.46pm you posted and shared commentary on Facebook Group 1.

8. You posted and shared and commentary on Facebook Group 1.

9. On or around 26 March 2022 a post was shared with commentary on Facebook Group 1 from a training session paid by Ventia with the image showing Mitchell Pakes, Regional Manager.

10. You posted and shared and commentary on Facebook Group 1.

11. You posted was shared your text exchange with Mitchell Evans on Facebook Group 1 and further shared and identified a person and their mobile number.

12. You posted and shared and commentary on Facebook Group 1.

(together, referred to as ‘the Allegations’)

On the balance of probability, we confirm that allegations have been substantiated.

The allegations represent on going concern regarding your performance and behaviour.

The conduct described above is considered to breach the following policies that apply to your employment with Ventia:

1. Bullying and Harassment Policy, specifically:

   (a) 4. Unacceptable workplace conduct (Reference policy dated year, 2019 to current)
   (b) 5. Objectives and strategies (Reference policy dated year, 2019 to current)

2. Code of Conduct, specifically:

   (a) Conduct Principle 1. Maintaining a safe and healthy workplace (Reference policy dated year, 2020 to current)
      i. (Reference policy dated year, 2019 refer to Respecting and upholding human rights in business_2019 to 2020)
      ii. (Reference policy dated year, 2019 refer to Preserving company value_2019 to 2020)

   (b) Conduct Principle 3. Compliance with laws and regulations (Reference policy dated year, 2020 to current)
      i. (Reference policy dated year, 2019 refer to Observing laws and regulations_2019 to 2020)

   (c) Conduct Principle 12. Using company assets and technology responsibly (Reference policy dated year, 2020 to current)
      i. (Reference policy dated year, 2019 refer to Using company assets and technology responsibly_2019 to 2020)

   (d) Conduct Principle 15. Promoting workplace equality and diversity (Reference policy dated year, 2020 to current)
      i. (Reference policy dated year, 2019 refer to Promoting workplace equality and diversity_2019 to 2020)

   (e) Conduct Principle 16. Preventing bullying and harassment (Reference policy dated year, 2020 to current)
      i. (Reference policy dated year, 2019 refer to Preventing harassment_2019 to 2020)

3. Social Media Standard (current), specifically:

   (a) 4.5 Employees' responsibilities_2021 to current
      i. (Reference policy dated year, 2019 refer to Internal social media interaction_2019 to 2021)
      ii. (Reference policy dated year, 2019 refer to External social media interaction_2019 to 2021)

iii. (Reference policy dated year, 2019 refer to External social media participation on behalf of the company_2019 to 2021)

4. Contract of Employment, specifically:

(a) Company policies and procedures

Ventia takes the above matters seriously and considers your conduct well below the require (sic) level that is necessary of an employee in your position. Accordingly, Ventia is considering termination of your employment. Prior to any decision being made, Ventia seeks your response to the matters outlined above and the proposed termination and asks you to show cause as to why your employment should not be terminated, this includes any mitigating factors you wish to put forward.

To that end, you are requested to attend a meeting with Colin Anderson, National Manager, Fire & Rescue and Training and company witness Valeria Olmos, P&C Manager to discuss the allegations.

The meeting will be held on:

Date and time: Wednesday, 14 September 2022 at 5.30pm AEST

Location: Fire Station Regional Managers Office, HMAS Albatross, Albatross Road, Nowra Hill NSW

We request that any written responses are presented and provided at the meeting for consideration.

Following the meeting your responses will be considered and an outcome will be provided to you in writing by close of business Friday, 16 September 2022.

We consider it appropriate, in all the circumstances, that you remain suspended with pay from your employment until further notice.

If you fail to attend the abovementioned mentioned meeting, Ventia may proceed to make a decision in relation to the future of your employment based on the information currently available, which will likely involve the termination of your employment.

You are reminded that this letter and its contents are strictly confidential.

Confidentiality

It is important to note that whilst an investigation is carried out, that you that you do not make contact by means of verbal, written, on any social media platform or application with other members of your team, other employees directly or indirectly employed by Ventia, or any of our contractors, suppliers and clients, unless you have written approval from Colin Anderson.

You are not permitted to make contact or attempt to identify other parties to this investigation. Failure to maintain confidentiality could result in further allegations of misconduct being investigated.

Victimisation

You are reminded that it is unlawful for a person to victimise or retaliate against another person who is involved in this workplace investigation. This means that you must not victimise or retaliate against any person named or otherwise involved in this matter.

A complaint of victimisation or reprisal may be investigated and, if substantiated, could result in disciplinary action with sanctions up to and including termination.

Support

You are advised that you are entitled to have a support person in attendance at the interview. The support person must not speak on your behalf or otherwise interfere with or disrupt proceedings.

Please ensure that your support person is not a potential witness in this matter.

Finally, we take this opportunity to remind you that you are entitled and encouraged to contact our employee assistance program on [redacted] for confidential professional counselling and
support.

If you have any questions, please do not hesitate to contact myself on [redacted].

Yours sincerely

Colin Anderson
National Manager, Fire & Rescue and Training"

[5] The Applicant's written response to the Show Cause letter provided as follows:

"Dear Colin,

In response to the letter you sent me on 12 September, I would like the opportunity to reply as to why Ventia should retain my employment with the company.

Firstly, I am a dedicated and loyal employee to the company. I have been with them since the start of contract in 2014.

I was started as a level 3 fire fighter, since them I have progressed through the ranks, obtaining all qualifications and training to qualified leading fire fighter. Recently, I also completed my certificate 4 training and assessment, putting myself forward to deliver training and sharing my knowledge to our customer defence personnel and within station ranks.

I am always the first person within the station to put my hand up to join a Committee, head up station performance or improvement or just to add constructive advice on ways to improve the station or the image portrayed by us to defence personnel. I am an active member of the station Consultative Committee, always looking to improve station amenities and safety.

I was instrumental in instigating the line marking of the station engine bay, ensuring all staff and visitors are aware of the dangers and kept safe during vehicle movements.

I have been the driving force to work hard at getting the station gym up to date, helping the staff so they are able to go in there with a can-do attitude with the equipment available now knowing that they have the resources to keep them fit and active.

Over recent years, I have gone out of my way to support new starters, ensuring they are across what is required to start re uniforms, clothing, starting dates, times, platoons, station familiarity, training and specific training personnel contacts etc.

I am union delegate for the station, I took this role on so that I was able to ensure all station personnel were kept up to date with and the correct information from the company and union hoping to assist in achieving cooperative working relationships.

I have always had a great professional working relationship with management, I am often working closely with Mitchell, Colin and Misty. Always respectful to any person whom I interact with, respecting their position in the company.

I take a lot of pride in my job, always putting my most professional foot forward when it comes to representing the company to defence. I am embarrassed to think that my actions in relation to what I understood to be private social media use have given the impression that I have painted Ventia in a bad light.

I am always early for work, ensuring that my day is ready to start well before I need to. My years of experience, knowledge on this base, expertise and dedication to the fire industry I believe make me a valuable resource to assist Ventia in securing the next contract. I am absolutely committed to working towards that objective with Ventia including doing everything necessary to maintain and, if necessary, restore my good name and reputation and that of Ventia.

I have on many occasions, stayed back and worked double shifts to ensure that we have coverage for defence so that there is no impact on them. I always go above and beyond to make sure any vacant positions are filled. I will drop everything and do what I can to get to work asap so there is little to no impact to our customer if I am needed to fill a shortfall or relive a work colleague if they are sick and need to leave. I remain committed to doing that.

In my time of employment, I have never - apart from after an injury caused by a motorcycle accident that was no fault of my own - taken a single sick day. I consider

myself a healthy, active and fit person who looks after himself, an achievement that I am very proud of.

I have plans to continue working with the company through to retirement. I have no plans to move away having grown to love my role and my team at Ventia. I hope to continue progressing through the ranks and see through my working career as a Ventia employee, doing my best to do what I can to help advance Ventia s interests including helping to secure the new contract into the future.

My record is very clean. I have never previously been spoken to on any level, station or management. I truly do believe that anyone is capable of making mistakes as I have done but I also believe that everyone deserves a second chance to show how remorseful they truly are with their actions, because actions speak louder than words. I feel that I deserve that second chance to show you this.

I am extremely remorseful for the trouble I have created. Not appreciating that creating and posting on a private group may actually still be against company policy was a massive oversight on my behalf. I have had access to company policies but hadn't taken away from them a full understanding of the risks and of my obligations. Had I done so, I would have never created the group in the first instance, eliminating any chance for this to happen at all.

I have taken active steps to delete all groups. I will never create groups like this, nor will I share any form of inappropriate content ever again. I have already begun my re-education program to training in this field by joining in training on-line provided by the company on the 13th September, respect at work. I am also more than willing to participate in any future or additional training necessary or appropriate for me.

I also, if given any opportunity to, am prepared to use my training skills at Ventia s request to help the company share these and other training materials to educate employees about this type of conduct from my first-hand experience, so Ventia hopefully won't have to deal with these types of problems moving forward. This process - which I acknowledge is a result of my own stupidity and naivety has caused me humiliation, embarrassment and distress. Despite this, if Ventia believes it may be of assistance, I am happy to put myself forward in training environments at Ventia to speak of my own experience and the lessons I have learned through this process. I hope that rather than punishing me beyond what I have endured to date, we can agree to work together so that I can give back to Ventia and Defence rather than my experiences being lost.

Finally, I want to reiterate that I love my job, I love the company, my platoon, the people who I work with, I work for and representing myself in the best possible way I can for myself and the company.

I have learnt a very harsh but valuable lesson. The past month being stood down has brought me embarrassment, sorrow, remorse and a very clear understanding of how fragile my employment really is and a situation that I never want to, nor will, put myself in again.

Also, I have come to the realisation that I should not share and material on any platform that I wouldn't be happy to show my mother or grandparents, something that really bought this into perspective for me.

The mental stress, the anxiety, the raw emotion, the emotional isolation felt, the embarrassment, the fear of potentially losing my job and career over this has already punished me for my actions. I do believe that this is punishment in itself and that there is no need for termination to punish me further. Instead, I am prepared to cooperate fully with Ventia to undergo further training and supervision and to operate under a first and final warning with the knowledge that I be will terminated if there is any cause for Ventia to be concerned about my conduct in the future. Also, as stated above, I am prepared to help Ventia in providing a real-life training example of the risks of being careless in out-of-hours activities.

Finally, considering my age and the dedication I have devoted to the fire industry over the past 25 years, this has limited any other skill set so finding another suitable job for my qualifications would be tricky. I am extremely anxious about the economic impact termination will have. I am concerned that, given both my age and location, I will find it very hard to continue to be able to support myself and family financially, forcing us into an extremely vulnerable situation.

Please consider leniency to the situation and I ask that you consider all of the above and see that I am an important asset to Ventia and Defence and that I want to continue to be part of it into the future.

This will never happen again, you have my word.

Thank you for allowing me the right of reply.

Remorsefully yours,

Adam Thompson."

[6] The Respondent issued the Applicant a termination letter on 20 September 2022 as follows:

"Private and confidential

20 September 2022

Adam Thompson
[redacted]

By email

Dear Adam

TERMINATION OF EMPLOYMENT

On 14 September 2022 you met with Colin Anderson, National manager, Fire & Rescue and Training and Valeria Olmos, P&C Manager. Georgia Barendse, UFU and Michael Sayers, Slater & Gordon were also present as your support.

The purpose of the meeting was to provide you the opportunity to respond to the matters outlined in your show cause letter dated 12 September 2022 and the proposed termination as to why your employment should not be terminated, this included any mitigating factors you wished to put forward.

The allegations raised against you are:

1. Creating, accessing, posting, and sharing offensive content within a private Facebook group named Sickos Video Sharing Group (Facebook Group 1) and Punters Events Only (Facebook Group 2).

2. Active on Facebook Group 1, sharing and posting offensive and inappropriate material.

3. On 26 May 2020 at 5.28pm you posted and shared commentary and images on Facebook Group 1.

4. On 23 March at 10.05am you posted and shared commentary and images on Facebook Group 1.

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10. You posted and shared and commentary on Facebook Group 1.

11. You posted was shared your text exchange with Mitchell Evans on Facebook Group 1 and further shared and identified a person and their mobile number.

12. You posted and shared and commentary on Facebook Group 1.

(together, referred to as ‘the Allegations’)

The conduct described above is considered to breach the following policies that apply to your employment with Ventia:

1. Bullying and Harassment Policy, specifically:

   (a) 4. Unacceptable workplace conduct (Reference policy dated year, 2019 to current)
   (b) 5. Objectives and strategies (Reference policy dated year, 2019 to current)

2. Code of Conduct, specifically:

   (a) Conduct Principle 1. Maintaining a safe and healthy workplace (Reference policy dated year, 2020 to current)
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      ii. (Reference policy dated year, 2019 refer to Preserving company value_2019 to 2020)
   (b) Conduct Principle 3. Compliance with laws and regulations (Reference policy dated year, 2020 to current)
      i. (Reference policy dated year, 2019 refer to Observing laws and regulations_2019 to 2020)
   (c) Conduct Principle 12. Using company assets and technology responsibly (Reference policy dated year, 2020 to current)
      i. (Reference policy dated year, 2019 refer to Using company assets and technology responsibly_2019 to 2020)
   (d) Conduct Principle 15. Promoting workplace equality and diversity (Reference policy dated year, 2020 to current)
      i. (Reference policy dated year, 2019 refer to Promoting workplace equality and diversity_2019 to 2020)
   (e) Conduct Principle 16. Preventing bullying and harassment (Reference policy dated year, 2020 to current)
      i. (Reference policy dated year, 2019 refer to Preventing harassment_2019 to 2020)

3. Social Media Standard (current), specifically:

   (a) 4.5 Employees' responsibilities_2021 to current
      i. (Reference policy dated year, 2019 refer to Internal social media interaction_2019 to 2021)
      ii. (Reference policy dated year, 2019 refer to External social media interaction_2019 to 2021)
      iii. (Reference policy dated year, 2019 refer to External social media participation on behalf of the company_2019 to 2021)

4. Contract of Employment, specifically:

   (a) Company policies and procedures

You were also given an opportunity to provide your response before we made a decision in relation to whether our concerns were substantiated and if so, what, if any, disciplinary action was appropriate in all the circumstances.

Outcome

We have considered your response, length of service, work record and the personal circumstances you raised during the meeting and following such consideration, Ventia has decided to terminate your employment on the basis of performance and misconduct. Accordingly, your employment will end effective immediately.

You will be paid any outstanding pay and accrued statutory entitlements calculated up to the termination date. These amounts will be subject to taxation and will be paid into your bank account. Your final superannuation payments will also be paid into your superannuation fund.

We remind you of your post-employment obligations to return any company property, including intellectual property, and to maintain confidentiality. Please arrange the return of any property with Colin Anderson.

We also take this opportunity to remind you our employee assistance program continues to be available to you for one month from the termination date. You can access the service by calling [redacted].

If you have any questions, please do not hesitate to contact myself on [redacted].

We wish you well in your future endeavours.

Yours sincerely

Colin Anderson
National Manager, Fire & Rescue and Training"

[7] The matter was heard by Video via Microsoft Teams on 6 and 7 February 2023. This matter was heard concurrently with the application in U2022/9654. Leave was granted pursuant to s.596 of the Act for the Applicants to be represented by Mr Jim McKenna of Counsel and for the Respondent to be represented by Mr Brendan Avallone of Counsel.

[8] The Applicant gave evidence on his own behalf at the Hearing. The following persons also gave evidence for the Applicant:

- Mr Martin Pelly, concurrent applicant and former employee of the Respondent.
- Mr Jeremy Murphy, Industrial Officer for the United Fire Fighters Union of Australia.

[9] The following persons gave evidence for the Respondent at the Hearing:

- Ms Hanli Pretorius, General Manager People and Culture – Defence and Social Infrastructure.

- Mr Colin Anderson, National Manager for Fire and Rescue and Training.
- Mr Mitchell Pakes, Regional Manager for Fire and Rescue in New South Wales, Queensland and Northern Territory.
- Ms Valeria Olmos, Acting People and Capability Manager – Defence.

[10] While the applications in U2022/9649 and U2022/9654 were heard concurrently, they are determined separately. This Decision determines the application for unfair dismissal remedy by the Applicant only.

Statutory Provisions

[11] The relevant sections of the FW Act relating to an unfair dismissal application are:

> **"396 Initial matters to be considered before merits**
> The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
> (a) whether the application was made within the period required in subsection 394(2);
> (b) whether the person was protected from unfair dismissal;
> (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
> (d) whether the dismissal was a case of genuine redundancy.
>
> **381 Object of this Part**
> (1) The object of this Part is:
> (a) to establish a framework for dealing with unfair dismissal that balances:
> (i) the needs of business (including small business); and
> (ii) the needs of employees; and
> (b) to establish procedures for dealing with unfair dismissal that:
> (i) are quick, flexible and informal; and
> (ii) address the needs of employers and employees; and
> (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
> (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.
> Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.
>
> **382 When a person is protected from unfair dismissal**
> A person is protected from unfair dismissal at a time if, at that time:
> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
> (b) one or more of the following apply:
> (i) a modern award covers the person;
> (ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

384 Period of employment

(1) An employee's *period of employment* with an employer at a particular time is the period of continuous service the employee has completed with the employer atthat time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised; the period of service with the old employer does not count towards the employee's period of employment with the new employer.

385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

see section 388.

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

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

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

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

> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
> (h) any other matters that the FWC considers relevant."

Applicant's Submissions

Valid reason

[12] The Applicant submitted that a reason for dismissal must be 'sound, defensible or well founded.'[1] The Applicant submitted that a reason which is 'capricious, fanciful, spiteful or prejudiced' cannot be a valid reason.[2] The Applicant submitted that the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts, and that it will not be enough for an employer to say that they acted in the belief that the termination was for a valid reason.[3]

[13] The Applicant submitted that the reason given to the Applicant for his termination was that his conduct was considered to breach various policies applying to his employment. It was also alleged that he failed to comply with a contractual obligation to comply with company policies. The Applicant submitted that while some specific clauses of those policies have been identified, the Respondent does not particularise how it is said that the alleged conduct amounted a breach of those particular clauses. Specifically, the Applicant submitted that the Respondent fails to explain how it is said that allegations:

> "*(a) related to "workplace conduct" for the purpose of the Bullying and Harassment Policy; or:*
>
> *(b) involved the use of company assets or technology or otherwise contravened any specific requirement of the Code of Conduct: or*
>
> *(c) amounted to a breach of the Social Media Standard which apparently commenced in November 2021 and generally did not apply at the relevant time.*"

[14] The Applicant further submitted that he was provided little or no training about the application of these policies.

[15] The Applicant submitted that he has addressed each of the factual allegations in his witness statement. However, in summary, the Applicant submitted that he shared images, memes and comments in a private group of friends via Facebook Messenger. The Applicant submitted that he did so on the understanding that it was a personal and private forum. Despite this, the Applicant acknowledged that some of the material should not have been shared and submitted that he would not do so again.

[16] The Applicant submitted that having regard to these and other matters addressed in his witness statement, there was no valid reason for the dismissal, including for the following reasons:

"*(a) The Applicant's conduct was not within the scope of the Applicant's employment. It was not "workplace conduct" as identified in various policies.*

(b) The Applicant's conduct does not meet the threshold of a "sound, defensible, or well-founded" reason for dismissal.

(c) Dismissal was a disproportionate response to the Applicant's conduct.

(d) The Applicant's conduct did not breach the policies of the Respondent."

Whether the person was notified of that reason and whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[17] The Applicant submitted that the requirement to "notify" an employee of their dismissal for the purpose of s.387(b) is a requirement to notify them before making a decision to terminate their employment.[4] Further, an "opportunity to respond" in accordance with s.387(c) entails more than a chance to rebut the specific allegations of misconduct by the employer, and involves the employee being made aware of the precise nature of the employer's concern[5] and the employer doing more than simply going through the motions.[6]

[18] As to an opportunity to respond, the Applicant accepted that he had an opportunity to respond to certain factual allegations, however, submitted that it was not made clear to him how those matters amounted to a breach of the Respondent's policies or the Applicant's employment contract.

[19] Further, the Applicant submitted that he faced a range of other procedural fairness obstacles in the course of seeking to respond to the allegations in good faith. The Applicant submitted that these included the refusal by the Respondent to provide the "complaint" (which apparently triggered the investigation) despite numerous requests and multiple failures to recognise and properly address attempts made by the Applicant's Union – including via the disputes process in the Agreement – to reach agreement regarding a procedurally fair process.

[20] The Applicant submitted that on 23 August 2022, his representative wrote to Mr Colin Anderson, National Manager Fire Rescue and Training, requesting that the Applicant be provided with additional information relevant to the allegations. The Applicant submitted that information was not provided.

[21] The Applicant submitted that on 30 August 2022, his representative wrote to Mr Anderson requesting copies of relevant policies in place at the time of the alleged conduct and confirmation of what training was provided in relation to those policies.

[22] Further, on 31 August 2022, the Applicant's representative notified Mr Anderson of a dispute with respect to the Respondent's approach to the investigation, including with respect to whether the Applicant could provide a written response to allegations. The Applicant submitted that notably, the dispute resolution clause under the Agreement relates to "…*all matters pertaining to the employment relationship, all matters arising under this agreement or under the National Employment Standards*". The Applicant submitted that by this email of 31

August 2022 to Mr Anderson, the Applicant's representative invoked clause 12.2 of the Agreement to the effect that:

> "*While the above procedures are being followed, including the resolution of any dispute by FWC pursuant to Step 5, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring….*".

[23] The Applicant submitted that later that day, Ms Valeria Olmos, People and Capability Manager – Defence, wrote to his representative, agreeing to an extension of time to allow the Applicant to respond in writing but failing to acknowledge the operation of clause 12.2 of the Agreement.

[24] The Applicant submitted that on 2 September 2022, Ms Olmos wrote by email to his representative, denying the existence of a dispute. The Applicant submitted that also on 2 September 2022, a letter was sent to him, "*without notice to his representative*", inviting him to a meeting related to the investigation.

[25] The Applicant submitted that on 5 September 2022, his representative wrote by email to Ms Olmos, taking issue with the Respondent's position that a dispute regarding this issue had been raised.

[26] The Applicant submitted that on 6 September 2022, his representative wrote by email to Mr Anderson, raising concern that a meeting between the Applicant and the Respondent was to proceed, despite the matter being in dispute.

[27] The Applicant submitted that on 12 September 2022, Mr Anderson wrote to his representative:

> "*(a) denying the existence of a dispute under the Ventia Enterprise Agreement; and*
>
> *(b) denying that cl 12.2 of the Ventia Enterprise Agreement would operate to prevent the Respondent from proceeding with and determining its investigation of the Applicant.*"

[28] The Applicant submitted that consistent with this position, the Respondent proceeded to terminate the Applicant's employment on 20 September 2022, despite the dispute remaining on foot.

Support person

[29] The Applicant made no submissions as to this criterion.

Unsatisfactory performance

[30] The Applicant submitted that prior to his dismissal, he had not been warned about any unsatisfactory performance whatsoever over the nearly 8 years of his employment.

Size of the employer's enterprise and dedicated human resource management specialists or expertise

[31] The Applicant submitted that the Respondent is a large employer and has dedicated HR management, therefore, its procedures should be of a high standard.

Any other matters

[32] The Applicant submitted that, as identified above, the Respondent acted contrary to the Agreement by failing to maintain the status quo despite the existence of a dispute under the Agreement having been notified about the investigation. The Applicant submitted that this is an aggravating factor adding to the harshness of the dismissal.

[33] Further, the Applicant submitted that on about 14 September 2022, he wrote to Mr Anderson setting out his very personal reasons why his employment ought not have been terminated. As identified in that letter, those reasons include that he:

> "*(a) Has a significant length of service with the Respondent. The applicant worked for the Respondent from the commencement of the Respondent's contract at HMAS Albatross. Prior to that time, he had served the Respondent's predecessor since 2011;*
>
> *(b) Was a hard working and loyal employee of the Respondent;*
>
> *(c) Had enjoyed a great professional working relationship with the Respondent's management;*
>
> *(d) Had an impeccable work record prior to this matter. He has never had any disciplinary action taken against him by the Respondent.*
>
> *(e) Planned to continue working with the Respondent through to his retirement;*
>
> *(f) Was a committed, hard-working and high achieving employee of the Respondent;*
>
> *(g) Has not been the subject of any complaints from the Respondent's employees; and*
>
> *(h) Has devoted himself to the firefighting industry over 25 years and, as a result, has few other skill sets such that finding other suitable employment will be difficult*."

[34] The Applicant submitted that these issues are equally significant as other relevant matters to the harshness of the dismissal.

[35] Further, the Applicant reiterated that he was not provided sufficient training to allow him to have a clear understanding about the Respondent's expectations in relation to private social media communications and how they may be perceived to be conduct that is relevant to the employment relationship. The Applicant understood that recent training had been provided to staff, only after the investigation had commenced and that such training continued after the termination took effect. **To this end, the Applicant submitted that he did not have the**

benefit of clearly articulated policies and expectations at the time of the alleged misconduct.

(My emphasis)

[36] The Applicant submitted that the Respondent had other disciplinary options available to it, such as warnings and targeted training requirements. The Applicant submitted that the decision to terminate him was harsh, unjust and unreasonable, particularly in light of those alternatives.

[37] The Applicant submitted that he moved his family to Nowra to be employed as a firefighter at HMAS Albatross. He submitted that his ability to continue to pursue his vocation in the area in which he lives is now greatly limited.

[38] For all of the above reasons, the Applicant submitted that his dismissal was unfair and he has not been afforded a fair go all round.

Remedy

[39] The Applicant noted that reinstatement is the primary remedy under the Act and submitted that reinstatement and backpay is the appropriate remedy in this matter.

Respondent's Submissions

[40] While the Respondent filed submissions which jointly responded to the applications in U2022/9649 (the present matter) and U2022/9654, for the purposes of this Decision, the Respondent's submissions have been summarised only in relation to matters pertaining to Mr Thompson's dismissal.

[41] The Respondent submitted that the Applicant's application for unfair dismissal remedy should be dismissed. The Respondent submitted that there should be no order for reinstatement, backpay, or any payment in lieu of reinstatement. The Respondent relied on the following reasons.

Sickos Video Sharing Group[7]

[42] The Respondent submitted that the Applicant primarily relies on his assertion that there was no valid reason for dismissal in seeking findings and remedies from the Commission. The Respondent submitted that the Applicant states his conduct occurred in private, and that it was either in jest or "*light hearted banter*" or a "*joke*".[8]

[43] However, the Respondent submitted that the Applicant's submissions are to be considered in circumstances including that:

> "*(a) Mr Thompson established and participated in the "Sickos Video Sharing Group", which consisted of 15 current or former employees employed by Ventia at HMAS Albatross, and a handful of others (Sickos Video Sharing Group);*

(b) the membership of the Sickos Video Sharing Group is to be considered in the context of the workplace culture amongst firefighters employed on Defence bases, which is described as "cliquey", and one is either part of the clique, or excluded;

(c) in the Sickos Video Sharing Group, Mr Thompson posted content related to work-related matters, including:

i. *Thompson asserting in a post that he was a Leading Firefighter (which he was not, and although he misspelled it "leeeding"), and that he was "pretty much the union" (he was a UFU delegate), in an apparent attempt to win an argument or exert pressure;*
ii. *Thompson asserting, referring to the Regional Manager, "I will blackmail pakes, he will do anything I say";*
iii. *a comment by Thompson stating that referring to another ex-employee as "FART" (Fat Arse Rebecca Thompson) was "inappropriate";*
iv. *Thompson posting a photo of the crew board for Ventia Firefighters at HMAS Albatross; and*
v. *Thompson commenting that members of C platoon were "soft cocks" and "pussies";*

(d) when a fellow firefighter employed by Ventia at HMAS Albatross (Mitch Evans) withdrew from the Sickos Video Sharing Group:

i. *Thompson shared to the Sickos Video Sharing Group a text message calling each of Evans, and three other work colleagues who had also chosen to leave the group ("Doc" Craig Gillespi, "Gilbo" Gary Gilbert, and "Mitch" Mitchell Pakes) "soft";*
ii. *in Thompson's post sharing the text message between him and Evans, Thompson wrote to the other members of the Sickos Video Sharing Group "Soft as butter… call him powder puff";*
iii. *Thompson followed up on that post by writing "Fuckin C platoon soft cocks … First Gilbo, now Evans … hope you are harder than these pussies Timmy", which it is apparent was a message directed to Tim Thistelton (another firefighter employed by Ventia at HMAS Albatross member of C platoon);*

(e) objectively construed, the effect of Mr Thompson's posts would be to discourage his workmates from leaving the Sickos Video Sharing Group, lest they also be called "Soft as butter", "powder puff", "Fuckin C platoon soft cocks" or "pussies" by their work colleagues behind their backs;

(f) firefighting is historically a male-dominated industry, with particular challenges in relation to the recruitment and retention of female firefighters, made more difficult by a "boys club" culture;

(g) Mr Thompson, while holding a substantive position as a Firefighter, was qualified to act as a Leading Firefighter, and was (until dismissed) a potential future leader of Ventia's firefighting operations at HMAS Albatross;

(h) Mr Thompson posted to the Sickos Video Sharing Group explicit content including:

i. On 24 February, Thompson posted at least 24 photos of a woman in various states of undress and from various angles, including close up photos of her naked vagina, anus and breasts;

*ii. On 9 April (2022)26 at 19:56, **a date and time when Thompson was on shift**, Thompson posted 18 photos of a woman in various states of undress and from various angles, including close up photos of her naked vagina, anus and breasts,*

iii. on 23 March (year unknown), Thompson replied to the posting of a 1 minute 18 second video showing a man and woman having sex with the comment "Good Girl",

*iv. on 26 May 2020 at 5:28pm, **a date and time when Thompson was on shift**, Thompson posted a close up photo of two women rubbing their vaginas together, with the comment "Keep this nice pussy wave going! Send it to all friends … I know ull like this…" and*

v. *on a Thursday at 8:41pm (date unknown), Thompson posted a video of 4 minutes 12 seconds duration from the OnlyFans website.*"

(My emphasis)

[44] The Respondent noted here that OnlyFans is an internet content subscription service, used primarily by sex workers who produce pornography for subscribers.[9]

[45] The Respondent submitted that content of the kind described in (h) above, which was of a sexual nature that objectifies, and which may be considered to be demeaning of, women, is capable of contributing to a hostile environment for women, which exacerbates barriers to entry for females into firefighting.

[46] The Respondent submitted that Mr Thompson also posted racist material in the Sickos Video Sharing Group including a meme which read "*Everyone is so politically correct these days you can't even say "black paint"! You have to say "Tyrone, can you please paint that wall*".

[47] The Respondent submitted that posts by the Applicant of the kind described in paragraphs (c)(ii) and d (*above*) amount to bullying of work colleagues, which itself is a work-related matter. Further, the Respondent submitted that employees who were excluded from the Sickos Video Sharing Group nevertheless became aware of it and, in one case, made a complaint about its content to Ventia.

[48] The Respondent submitted that in addition to the matters raised above, the Applicant also accessed and posted in the Sickos Video Sharing Group while he was on shift, including:

"*on 30 August 2020 at 2:15pm, a date and time when Thompson was on shift, Thompson posted a meme with two images, the first is of a young female with the caption "I am 25 years old and still not married" and the second is of a young male with the caption*

"Should I buy legos or RC car from my next salary?" Mr Thompson wrote "Guesses for who I am aiming this at !!"".

[49] The Respondent submitted that the Applicant has asserted in his responses as part of Ventia's investigation, his evidence, and his submissions, that based on his training, he was not aware that sharing sexually explicit content with work colleagues, and other conduct of a kind summarised above, could be considered to be work-related. However, the Respondent submitted that the Applicant's professed subjective state of mind is irrelevant. The Respondent submitted that what is to be assessed is whether, in all the circumstances, there was a valid reason for the Applicant's dismissal and whether (taking into account all of the circumstances) the dismissal was harsh, unjust or unreasonable.

[50] The Respondent submitted that it followed a comprehensive process as outlined below:

"*(a) on about 1 June 2022, in the context of dealing with disciplinary issues with another employee at HMAS Albatross, Hayley Dun, Ventia received a complaint from Ms Dun containing a series of screenshots and a video from the Sickos Video Sharing Group – it appears that Ms Dun herself was not a member of the Sickos Video Sharing Group but her father John Dun, another ex-employee of Ventia at HMAS Albatross, was;*

(b) Ventia received only a few screenshots from the Sickos Video Sharing Group – there may be a lot more of which Ventia remained unaware at the time of the dismissal, which has not been disclosed by the Applicant as the video provided by Ms Dun shows that there were over 100 media files posted in the Sickos Video Sharing Group, the majority of which appear to be pornographic;

(c) Ventia put to the Applicant the screenshots portraying content posted by him, and provided opportunities to respond;

(d) Ventia responded to a request from the UFU for further information, to the extent that it could based on the limited information available to Ventia;

(e) Ventia provided the Applicant further notice of its concerns and invited him to attend a meeting with his representatives;

(f) the Applicant sent a written response on 5 September 2022;

(g) Ventia provided the Applicant a further opportunity to respond, in a meeting (also attended by his union and legal representatives) on 6 September 2022;

(h) on 12 September 2022, Ventia sent a show cause notice to the Applicant, notifying each of Ventia's findings, indicating that Ventia was considering the termination of his employment, and offering an opportunity to respond;

(i) on 14 September 2022, Ventia met with the Applicant and his representatives, to provide another opportunity to respond;

(j) the Applicant sent a written response to the show cause letter on 14 September 2022; and

(k) ultimately, Ventia decided to terminate the Applicant's employment based on the information available to Ventia at the time. Ventia informed the Applicant of this decision, in writing, on 20 September 2022."

[51] The Respondent submitted that the Applicant's conduct, being the posting of sexually explicit content, racist content and the bullying of work colleagues on the Sickos Video Sharing Group, was a valid reason for the Applicant's dismissal. The Respondent submitted that there were ample opportunities provided for the Applicant to respond to the allegations against him and that dismissal was within the range of proportionate responses.

[52] The Respondent submitted that taking account of all of the factors set out in s.387 of the Act, the Applicant's dismissal was not harsh, unjust or unreasonable.

Valid reason

[53] The Respondent submitted that when considering in a misconduct case whether there was a valid reason for termination, the questions for the Commission to determine are:

"*(a) whether, on the evidence before it, the Commission is satisfied that conduct occurred;*

(b) in the case of out of hours conduct, whether the conduct was sufficiently connected to the employee's employment so as to warrant disciplinary action; and

(c) whether the conduct which the Commission is satisfied occurred constituted 'sound, defensible or well-founded' reasons for dismissal within the meaning of Selvachandran v Peteron Plastics Pty Ltd (1995) 62 IR 371 at 373."

[54] The Respondent submitted that there can be no disputing that the Applicant's conduct, as described at paragraph [43] above, occurred and was engaged in by the Applicant. The Respondent submitted that further, there can be no serious controversy about whether the Applicant's conduct was work-related. The Respondent submitted that, viewed objectively, the Applicant conduct caused serious damage to the relationship between the employer and employee, damaged Ventia's interests, and was incompatible with the Applicant's duties as an employee.

[55] The Respondent submitted that although only one of those three criteria would be sufficient to establish a sufficient connection with their employment, all three are satisfied in this matter.

[56] The Respondent noted that, as outlined above, at least some of the Applicant's conduct was engaged in while at work. The Respondent submitted that in any event, given the 24/7 nature of coverage by Ventia's firefighters at HMAS Albatross, and the fact that such a large number of Ventia's firefighters at HMAS Albatross were added to the Sickos Video Sharing Group, it stands to reason that even if the Applicant posted material out of their own working hours, the recipients would include firefighters who were on shift at work.

(My emphasis)

[57] Further, the Respondent submitted that even if some of the Applicant's conduct was engaged in outside of his own working hours, it was engaged in on an online medium which was predominantly made up of work colleagues, in which they discussed work issues and posted other work-related content (such as a photo of a roster), and in circumstances where those work colleagues who dared to leave the Sickos Video Sharing Group were labelled as "*Soft as butter*", "*powder puff*", "*Fuckin C platoon soft cocks*" and "*pussies*". The Respondent submitted that objectively, "*this was likely to reinforce a culture of work colleagues remaining in the Sickos Video Sharing Group – like it or not – and continuing to be exposed to [the Applicant's] sexist, misogynist and racist posts, lest they be labelled in similar ways if they were to leave*".

[58] The Respondent submitted that conduct by the Applicant was in breach of:

"*a. Ventia's Bullying and Harassment policy:*

i. Clause 4 - Unacceptable workplace conduct, in particular:

1. Clause 1 – Purpose;
2. Clause 3 – Principles; and
3. Clause 4.1 - What is harassment;

ii. Clause 5 - Objectives and strategies, in particular:

iii. Clause 5.1 – Maintaining a workplace free of harassment and bullying; and

iv. Clause 5.5 – Disciplinary Action.

b. Code of Conduct:

i. Principle 1 – Maintaining a safe and healthy workplace;

ii. Principle 3 – Compliance with laws and regulations";

iii. Principle 15 – Promoting workplace equality and diversity; and

iv. Principle 16 – Preventing bullying and harassment.

c. Social Media Standard:

i. Clause 1 – Purpose;

ii. Clause 4.4 – Company responsibilities; and

iii. Clause 4.5 – Employees' responsibilities.

d. The Applicant's contract of employment: Policies and Procedures."

[59] The Respondent submitted that the Applicant's assertion that dismissal was a disproportionate response to his conduct fails to acknowledge the importance of providing a safe working environment for all employees, including women. The Respondent submitted that female firefighters are entitled to work in an environment where their colleagues are not sharing multiple close-up photos of women's vaginas, anuses and breasts, pictures of women rubbing their vaginas together whilst encouraging others to keep the "*pussy wave*" going. The Respondent submitted that in the same way, all employees are entitled to work in an environment where people are not added into inappropriate and offensive Facebook group chats without their permission and shamed and called names if they leave this group at a later date.

[60] The Respondent submitted that it is an important matter to take firm action to improve the culture of workplaces – and to take strong action when such inappropriate behaviour is detected – so as to make the workplace safe and welcoming for all. The Respondent submitted that this is all the more important given the challenges of firefighting with its historical cultural difficulties with recruitment and retention of female employees.

[61] However, the Respondent submitted that in determining if a reason is valid:

> "*It is not the court's function to stand in the shoes of the employer and determine whether or not the decision made by the employer was a decision that would be made by the court but rather it is for the court to assess whether the employer had a valid reason connected with the employee's capacity or conduct…*".[10]

[62] The Respondent submitted that dismissal was within the range of available outcomes which Ventia could reasonably have fixed upon, and it is not the place of the Commission to say that some lesser, but also available, remedy should have been preferred.

[63] The Respondent submitted that in all the circumstances, and when the Applicant's posts are objectively construed and considered in their context, the conduct of the Applicant constituted 'sound, defensible or well-founded' reasons for dismissal within the meaning of *Selvachandran v Peteron Plastics Pty Ltd*.[11] The Respondent submitted that the criterion in s.387(a) of the FW Act is strongly in favour of a finding that the dismissals were not harsh, unjust or unreasonable.

After acquired information / Notification of the reason for the termination

[64] The Respondent submitted that the Applicant's assertion that he was not notified of the reasons for his dismissal cannot be taken seriously. The Respondent submitted that the reasons for the Applicant's dismissal were his posts on the Sickos Video Sharing Group, which were set out in the attachments to, and described in, the multiple letters to the Applicant providing him with an opportunity to respond.

[65] The Respondent submitted that the Applicant asserts that he should have been provided with Ms Dun's complaint. However, the Respondent submitted this assertion should be rejected. The Respondent submitted that one person's subjective description of the Applicant's posts on the Sickos Video Sharing Group is irrelevant, and what is relevant is the posts themselves. The Respondent submitted that having the benefit of how Ms Dun described them would not change the fact that the Applicant posted multiple close-up photos of women's vaginas, anuses and breasts, and a picture of women rubbing their vaginas together encouraging others to keep the "*pussy wave*" going.

[66] The Respondent submitted that the Applicant had access to these posts, and more, when he was given an opportunity to respond.

[67] While the Applicant argues that the dismissal was in contravention of the Agreement, the Respondent disputed such an interpretation of the Agreement. However, it submitted this is not a matter before the Commission and is a matter for the Court.

[68] The Respondent submitted that the Applicant had received, on multiple occasions, notice (and copies) of the posts of which Ventia relied upon in deciding whether to terminate his employment. The Respondent submitted that the criterion in s.387(b) of the FW Act is in favour of a finding that the dismissal was not harsh, unjust or unreasonable.

Opportunity to respond and support person

[69] The Respondent submitted that the Applicant was given opportunities to respond, and did so, both in writing and at meetings. The Respondent submitted that the Applicant was represented by his union and legal representatives throughout the process leading to his termination.

[70] The Respondent submitted that there were no failings of procedural fairness, and the criterion in s.387(c) and (d) of the FW Act are in favour of a finding that the dismissal was not harsh, unjust or unreasonable.

Unsatisfactory performance

[71] The Respondent submitted that this criterion is not applicable in this case, as it relates to misconduct and not unsatisfactory performance by the Applicant.

Size of the employer's enterprise and dedicated human resource management specialists or expertise

[72] The Respondent submitted that in the circumstances of the case, its size and the existence of a people & culture team did not impact upon the procedures followed in effecting the dismissal. The Respondent submitted that the Applicant was given opportunities to respond, and when his responses did not satisfy Ventia, he was dismissed and paid his entitlements. The Respondent submitted that the criterion in s.387(f) and (g) of the FW Act are neutral considerations.

Any other matters

[73] The Respondent acknowledged that the Applicant has relied on his work history and the fact that his former workplace HMAS Albatross is isolated from other paid firefighting workplaces as factors in favour of a finding that his dismissal was harsh, unjust or unreasonable. The Respondent submitted that these are factors to be taken into account. However, the Respondent submitted that, weighed against those factors, are the seriousness of the Applicant's misconduct, the fact that it went on undetected for so long, the impact that conduct of the kind engaged in by him has on workplace culture (particularly due to his leadership and influence at HMAS Albatross) and the importance of providing a safe workplace – free of sexism, racism, discrimination and misogyny – for all employees.

[74] The Respondent submitted that the Applicant attended Mandatory Annual Awareness Training (MAAT) and Code of Business Conduct training, which involves an e-learning theory training package that includes questions to verify understanding of the content.[12] The Respondent submitted that the Applicant could also access Ventia's policies on Ventia's intranet.

[75] The Respondent acknowledged that a key object of Part 3-2 of the FW Act is to provide a "*fair go all round*". In this respect, the Respondent submitted that the Applicant has received a fair go all round in the multiple opportunities that he was given to respond to Ventia's concerns about his conduct and the proposed dismissal. Further, the Respondent submitted that those to whom a "*fair go all round*" should be afforded include employees who would prefer not to be exposed to sexually explicit and vulgar, racist, or bullying posts on social media, and who might be induced to remain in a Facebook group lest they be labelled "*Soft as butter*", *"powder puff*", "*Fuckin C platoon soft cocks*" or "*pussies*" by their work colleagues behind their backs. The Respondent submitted that the Applicant's work colleagues should not have been exposed to his misconduct, and those colleagues deserve protection by the taking of strong action to ensure that it does not happen again.

[76] The Respondent submitted that providing a workplace that is safe and free from misogyny is an important objective and should not be cast aside because the perpetrator has seniority or lengthy service.

[77] The Respondent submitted that the Applicant is not prevented by his dismissal from pursuing a career as a firefighter elsewhere, whether in private or government-run services. The Respondent submitted that it may be that he needs to move elsewhere in order to do so. If so, the Respondent submitted that such an outcome is a consequence of his conduct and of the choices that he made to expose his work colleagues at Ventia to sexist, vulgar, misogynistic, racist, and bullying material.

[78] The Respondent submitted that for all of the above reasons, the Applicant's application for unfair dismissal remedy should be dismissed.

Remedy

[79] The Respondent submitted that if the Commission finds, contrary to the submissions above, that the Applicant's dismissal was unfair, reinstatement is inappropriate and should not be ordered. The Respondent submitted that the nature of the Applicant's conduct – and the

destructive impact it has on the culture of the workplace – is such as to make reinstatement inappropriate.

[80] Further, the Respondent submitted that the Applicant's lack of insight, as demonstrated by his "*(unguarded) statement after it became apparent [his] employment was to be terminated*" should be taken into account.[13]

[81] The Respondent submitted that neither reinstatement nor reinstatement with backpay should be ordered. The Respondent also submitted that no payment should be made in lieu of reinstatement, noting that any deductions of 100% should be made under s.392(3) of the FW Act.

Applicant's Submissions in Reply

[82] The Applicant submitted that the Respondent has asserted there can be no serious controversy about whether the conduct of the Applicant was work related and relied on the decision in *Rose v Telstra*[14] in support of that proposition. The Applicant submitted that in *Rose v Telstra*, the Commission relevantly determined that:

> "*It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:*
>
> *• the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or*
> *• the conduct damages the employer's interests; or*
> *• the conduct is incompatible with the employee's duty as an employee.*
>
> *In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.*
>
> *Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct. In this regard I agree with the following observation of Finn J in McManus v Scott-Charlton:*
>
> > *'I am mindful of the caution that should be exercised when any extension is made to the supervision allowed an employer over the private activities of an employee. It needs to be carefully contained and fully justified.* "'

[83] The Applicant submitted that His Honour also went on to state that the applicant's behaviour in that proceeding (including being involved in an afterhours altercation with a fellow Telstra employee whilst being paid a travelling allowance and thrusting his fist through window of a hotel room where he was known by the hotel owner to be a Telstra employee) was foolish and an error of judgment. However:

> "*... an employee is entitled to a private life. The circumstances in which an employee may be validly terminated because of their conduct outside work are limited. The facts of this case do not fall within those limited circumstances.*"

[84] The Applicant submitted that the test from *Rose v Telstra* has been endorsed by the Commission on multiple occasions, most recently by a Full Bench in *Sydney Trains v Bobrenitsky* [2022] FWCFB 32 at [48].

[85] The Applicant submitted the Respondent has submitted his conduct:

> (a) viewed objectively, was likely to cause serious damage to the relationship between the employer and employee; or
> (b) damaged the employer's interests; or
> (c) was incompatible with the employee's duty as an employee.

[86] The Applicant submitted that his conduct is not of such gravity or importance as to indicate a rejection or repudiation of his employment contract with the Respondent.

[87] The Applicant submitted that the relevant conduct related to posts to a private messenger group. In this respect, the Applicant submitted that his conduct is distinguishable from other proceedings in the Commission in which publishing social media posts was found to support a valid reason for termination.[15] The Applicant submitted that he did not make public posts or public comments. To his knowledge, the material complained of is not currently in the public domain, rather, it came to the Respondent's attention by way of a response to a show cause letter from a former employee, Ms Dun.

[88] The Applicant submitted that Ms Dun raised this issue as apparent context to an allegation that she sent a cake in the shape of male genitalia together with the photo to an employee of Ventia. The Applicant submitted that Ms Dun's reference to the private messenger groups is described in Mr Anderson's witness statement as a 'complaint' by her. However, the Applicant submitted that the nature of the complaint by Ms Dun appears to be the different treatment by Ventia of employees involved in that group chat. The Applicant submitted that Ms Dun did not say that she was offended by the material, nor did she identify how she obtained this material. The Applicant submitted that in circumstances where her father, Mr John Dun, was formerly employed by Ventia as a Station Officer and was member of the relevant private messenger groups, it may be inferred that she obtained the images and video from her father. The Applicant submitted that assuming this to be accurate, it is not clear whether she did this with, or without, her father's consent.

[89] The Applicant submitted that to the best of his knowledge, the relevant posts continue not to be in the public domain. He submitted that, but for his termination and these proceedings, there is no basis to believe that they would ever be placed in the public domain.

[90] The Applicant submitted that the Respondent's submissions do not elaborate upon how his conduct is said to have "*caused serious damage to the relationship between the employer and employee*" nor how this has damaged the employer's interests. However, the Applicant noted that the Respondent continues to assert that his conduct was in breach of Ventia's:

> (a) Bullying and Harassment Policy;
> (b) Code of Conduct;
> (c) Social Media Statement; and
> (d) The Applicant's contract of employment.

Bullying and Harassment Policy

[91] The Applicant submitted that the Respondent has alleged breaches of various clauses of its Bullying and Harassment Policy by him. The Applicant submitted that Mr Anderson asserts that the Applicant has received training on Ventia's policies on an annual basis and relied upon Ventia's Training Records. The Applicant submitted that the training records produced by Mr Anderson do not indicate that he undertook any training with respect to the Bullying and Harassment Policy.

[92] The Applicant submitted that in any event, to amount to 'harassment', conduct must be directed towards a person. To the extent that it may involve conduct that a reasonable person would find unwelcome, humiliating, intimidating or offensive – that test must be applied in the context in which the conduct occurred. The Applicant submitted that the context was a private group of consenting men. The Applicant submitted that there is no evidence that any of the people with whom the material was shared found this unwelcome, humiliating or intimidating.

Code of Conduct

[93] The Applicant submitted that the Respondent appears to allege that on-line training on the Code of Conduct was provided to him on 19 November 2020 and 29 October 2021. However, the Applicant submitted that the Respondent has not gone into evidence about the nature of that alleged training. By contrast, the Applicant submitted that he has filed evidence about the way in which training is conducted by Ventia. The Applicant submitted that his evidence is to the effect that in respect of the code of conduct policy, the extent of the training was very minimal, consisting of either giving him the policy document at a toolbox meeting to sign there and then, or doing a very brief online training module.

[94] The Applicant submitted that to the extent that on-line Code of Conduct training was provided to him, the Respondent has elected not to put the nature of this training before the Commission. The Respondent now relies upon aspects of the Code of Conduct at principle 1, 3, 15 and 16. The Applicant submitted that these principles operate at a high level of generality and say nothing directly relevant to the facts of this case.

Social Media Standard and Policy

[95] The Applicant submitted that he has no recollection of any training with respect to the Respondent's Social Media Policy or Standard. The Applicant submitted that he has no recollection of ever seeing that policy before the current events. He submitted that this is consistent with the fact that the training records produced by Mr Anderson do not indicate that he ever undertook any training with respect to the Social Media Standard or Social Media Policy. In this respect, the Applicant submitted that the current matter stands in stark contrast to previous cases where an employer made sustained efforts over a number of years to make employees aware of its policy and the consequences of breaching the policy.[16]

[96] The Applicant submitted that, in any event, the Respondent's Social Media Standard and Policy did not address the type of conduct involved in this proceeding.

Contracts of employment

[97] The Applicant submitted that to the extent that it is alleged that he acted in breach of his employment contract, it is understood that the Respondent relies upon his contractual obligation to comply with the policies and procedures of the Respondent. The Applicant submitted, therefore, this ground can rise no higher than the alleged breaches of polices discussed above.

Workplace culture

[98] While the Respondent has alleged that it is important to take firm action to improve the culture of workplaces, including so as to make the workplace safe and welcoming for all, the Applicant submitted this may be accepted as a general proposition. However, the Applicant submitted that, as of some years ago, Ventia was on notice of the private messenger groups, including through a senior manager who was (for a short time at least) a member of both groups and who was aware that this may put him (and possibly others) in a compromising position.[17] The Applicant submitted that, despite this, Ventia took no steps to inform relevant employees that this should not continue or to provide training on the use of social media and/or workplace equality, prior to the relevant events occurring.

Alleged conduct whilst on shift

[99] The Applicant submitted that with respect to the allegations that certain posts were made to the private messenger group whilst he was on shift:

> "*(a) Firstly, it is a matter for the respondent to make good the assertions that the applicant was on shift at the time material was posted or shared to the private messenger groups;*
>
> *(b) Secondly, the evidence of the applicant will be that at no time did he use the Respondent's equipment to access the private messenger groups. This does not appear to be in issue on the evidence;*
>
> *(c) Thirdly, as is identified in the witness statement of Ms Pretorius, firefighters spend a lot of downtime during shift while they wait for emergencies to arise. During downtime, they would be entitled to engage in private communications.*
>
> *(d) Fourthly, the conduct identified at paragraph [7] of the Respondent's submissions:*
>
> "7 In addition to the posts identified at paragraphs 6(iii) and 6(v) above, Thompson and Pelly accessed and posted in the Sickos Video Sharing Group while they were on shift, including:
>
> a. …
>
> b. on 30 August 2020 at 2:15pm, a date and time when Thompson was on shift, Thompson posted a meme with two images, the first is of a young female with the caption "I am 25 years old and still not married" and the second is of a young male with the caption "Should I buy legos or RC car from my next salary?" Mr Thompson wrote "Guesses for who I am aiming this at !!"

could not, on any reasonable measure, amount to misconduct."

Inconsistent treatment

[100] The Applicant submitted that, if in the alternative the Commission finds that there did exist a valid reason for dismissal, it is submitted that the dismissal was nevertheless harsh, unjust or unreasonable because of inconsistent treatment by the Respondent.

[101] The Applicant submitted that it is a well-established principle that the circumstances bearing upon whether a dismissal for misconduct is harsh, unjust or unreasonable will include the broader context in the workplace in which those acts or omissions occurred. The Applicant submitted that this may include such matters as a history of toleration or condonation of the misconduct by the employer or inconsistent treatment of other employees guilty of the same misconduct.[18] The Applicant submitted that it is also a settled principle that differential treatment of comparable cases can be a relevant matter under s.387(h) of the FW Act. However, the Applicant submitted that the Commission must take care to ensure that it is comparing "*apples with apples*".[19]

Relevance and admissibility of aspects of the Respondent's evidence

[102] The Applicant submitted that in accordance with s.591 of the FW Act, the Commission is not bound by the rules of evidence. However, the Applicant noted that the Commission tends to follow the rules of evidence as a general guide to good procedure.[20]

[103] The Applicant submitted that significant aspects of the Respondent's evidence do not comply with the rules of evidence and/or are irrelevant. These include:

(a) That the evidence of Ms Pretorius contains evidence which is "*clearly opinion*" and not based on specialised knowledge for the purpose of s.79 of the Evidence Act; and

(b) That where Mr Anderson addresses the "*Significance of the posts made in the Facebook groups*", his evidence strays into his opinion about the nature of the conduct; whether he considered this to offensive or inappropriate; what the posts show or suggest; and whether conduct may amount to a breach of policy. The Applicant submitted this evidence does not comply does not comply with ss.78 or 79 of the Evidence Act and is irrelevant and unhelpful to the Commission's task.

[104] The Applicant submitted that evidence of this nature should be given no weight.

Consideration

[105] I have taken into account all of the submissions that have been provided by the parties and I have attached the appropriate weight to the evidence of the witnesses.

[106] It is not in dispute and I find that the Applicant is protected from unfair dismissal, submitted his application within the statutory timeframe, was not made genuinely redundant and did not work for a Small Business.

[107] When considering whether a termination of an employee was harsh, unjust or unreasonable, the oft-quoted joint judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines* (*Byrne*)[21] is of significance:

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

[108] In analysing Byrne, a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan* (*AMH*)[22] held:

> "*The above extract is authority for the proposition that a termination of employment may be:*
>
> - *unjust, because the employee was not guilty of the misconduct on which the employer acted;*
> - *unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or*
> - *harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct*".

[109] Further, a Full Bench of the AIRC in *King v Freshmore (Vic) Pty Ltd*[23] said:

> "*[24] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination*".

.

[110] I now turn to the criteria for considering harshness as provided in s.387 of the Act.

Section 387(a) – valid reason

[111] The meaning of the phrase "valid reason" has been universally drawn from the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*:[24]

> "*In broad terms, the right is limited to cases where the employer is able to satisfy the Court of a valid reason or valid reasons for terminating the employment connected with the employee's capacity or performance or based on the operational requirements of the employer. ...*

In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly…".

[112] In *Rode v Burwood Mitsubishi*,[25] a Full Bench of the Australian Industrial Relations Commission held:

"*… the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason*."

[113] In *Qantas Airways Ltd v Cornwall* (*Cornwall*)[26] the Full Court of the Federal Court of Australia said:

"*The question is whether there was a valid reason. In general, conduct of that kind would plainly provide a valid reason.* ***However, conduct is not committed in a vacuum, but in the course of the interaction of persons and circumstances, and the events which lead up to an action and those which accompany it may qualify or characterize the nature of the conduct involved.***"

(My emphasis)

[114] It is not the role of the Commission to make judgment, or cast dispersion, upon the morality of Mr Thompson's conduct. Mr Thompson has not been charged with any offence nor has there been any suggestion that his conduct is illegal in any manner. I have no reason to doubt the testimony of the Applicant that he is a normal law-abiding citizen.

[115] In relation to the Applicant's out of hours conduct in viewing and distributing pornographic and racist material, the Respondent is required to find the nexus to the Applicant's employment. In *Rose v Telstra*,[27] Ross VP (as he then was) said:-

"*It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:*

- *the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or*
- *the conduct damages the employer's interests; or*
- *the conduct is incompatible with the employee's duty as an employee.*

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.

Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct. In this regard I agree with the following observation of Finn J in McManus v Scott-Charlton:

> *'I am mindful of the caution that should be exercised when any extension is made to the supervision allowed an employer over the private activities of an employee. It needs to be carefully contained and fully justified.* "'

…

"*… an employee is entitled to a private life. The circumstances in which an employee may be validly terminated because of their conduct outside work are limited. The facts of this case do not fall within those limited circumstances.*"

[116] Relevantly, the Full Bench in *Sydney Trains v Bobrenitsky* further refined the test from *Rose v Telstra*:

"***[141]*** *… It is axiomatic that for conduct to indicate a rejection or repudiation of the employment contract, the out of hours conduct must be sufficiently connected to the employee's employment. Not every connection between out of hours conduct and employment, will constitute a valid reason for dismissal.*

[142] *… What is clear is that to determine whether conduct engaged in privately, out of hours or outside work has a relevant connection with employment to constitute a valid reason for dismissal, it is necessary to consider the entire factual matrix. This will include matters such as: the nature of the out of hours conduct and what it involved; where the out of hours conduct occurred; the circumstances in which the out of hours conduct occurred; the nature of the employment; the role and duties of the employee concerned; the principal purpose of the employee's employment; the nature of the employer's business; express and implied terms of the contract of employment; the effect of the conduct on the employer's business; and the effect of the conduct on other employees of the employer*."

[117] Mr Thompson set up a Facebook Messenger chat called Sickos Video Sharing Group. That is not in dispute. It is not in dispute that of the 18 members of this group, 11 were current Ventia employees. It is not in dispute that the content shared throughout this group chat involved a diversity of topics including, but not limited to, pornographic photos and videos. I have taken this into account.

[118] It is not in dispute that employees would regularly have a "*quiet shift*" on a Saturday night due to the normal operation of the facility. During this time, with the support of their Supervisor, the employees were able to occupy themselves however they wanted as long as they did not go to sleep before 11pm. There was no limitation on whether the employees went to the in-house gym, watched TV, watched a movie or used their personal electronic device – as long as they were ready and able to respond to a call. There is no supervision or stated

restriction as to the type of material which was being viewed by the employee. I have taken this into account.

[119] The fact that Mr Thompson is more friendly with 10 of his colleagues than the other 20 is not unique or special. The fact that they are also in a punters club, to the exclusion of others, is not unique or special. I agree with the proposition that employees are entitled to a private life, which may include socialising and conversing with some, but not all, of their colleagues. I have taken this into account.

[120] I am satisfied that the post by Mr Thompson about him being the Union and that Mr Pakes would do whatever he said is also nothing more than a 'tongue in cheek' joke. I accept that the Applicant was simply trying to big note himself but there is an air of arrogance about the post, which was in reply to a post by Matthew (Oldham). I have taken this into account.

[121] The post identifying a number of colleagues who had left the chat as "*soft cock*s" or "*pussies*" are nothing more than examples of how male blue-collar employees talk to each other. In isolation, or, viewed through the prism of a prim and proper setting, the verbiage may appear to be gross and inappropriate, however, amongst male friends it is commonplace and accepted. It may say something about my putting, but I would be a millionaire if I was given a dollar every time I have been called a "*soft cock*" for leaving a putt short whilst playing golf. The terms translate to the individual being "*soft*". There is no malice involved. I do not accept that, in this context, this commentary is bullying or harassment. It is simply friends "*taking the piss"* out of each other. I have taken this into account.

[122] I also note that there is no suggestion that the Applicant used any of the Respondent's equipment for his chat. He used his own device. Further, the chat was a private chat. It did not name the Respondent. The chat was not accessible by the public and was only brought to the Respondent's attention when a disgruntled former employee was given access by her father, who was a member of the chat. I have taken this into account.

[123] I am satisfied that the Respondent did not have a valid reason to terminate the Applicant due to his out of hours conduct.

[124] However, not all of the conduct of Mr Thompson was 'out of hours' conduct. I am satisfied that Mr Thompson distributed pornography on 9 April 2022 during work hours. I am satisfied that there is a significant difference between an employee watching a video or a movie which may be pornographic compared to the act of actually distributing pornography. Mr Thompson is employed to be a firefighter – not a distributor of pornographic videos whilst on shift. I have taken this into account.

[125] If the Applicant, or any of his colleagues, had been dismissed for privately viewing pornography on their own electronic device whilst at work on a single occasion then, following the obiter in *B, C and D v Australian Postal Corporation*, that would be a compelling argument that their dismissal was harsh. However, the actions of the Applicant in distributing pornography is conduct which is much more serious. I am convinced that the Applicant's conduct satisfies the definition of serious misconduct in Regulation 1.07. Therefore, this single indiscretion in an otherwise highly credentialled career, diminishes any argument that the Applicant's termination was harsh. I have taken this into account.

[126] Relevantly, regulation 1.07 of the *Fair Work Regulations 2009* states:-

> "*1.07 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***."
>
> (My emphasis)

[127] I am satisfied and find that the Respondent's client (Defence) would be concerned and upset if they knew that they were paying for a contractor's employee to participate in this type of behaviour. I am in no doubt that this behaviour of Mr Thompson will cause serious damage to the reputation of the Respondent with Defence.

[128] The conduct of the Applicant in his termination interview with Mr Anderson was unfortunate and inappropriate. The Applicant's behaviour on this occasion was abusive and cannot be condoned. The Applicant's comments were arrogant and unnecessary and highlights his belief that he was "untouchable", as highlighted in one of his posts. I have taken this into account.

[129] Whilst I don't agree with the majority of the evidence of Ms Pretorius, especially in relation to the employer having any capacity or right to regulate friendship or alleged 'cliques' at work, I do agree that an employer is entitled to expect a level of common decency from its employees without the need for a specific training course:

> "*So you would expect to be able to point to training that was provided to Mr Pelly and Mr Thompson and say, 'Well, that makes it clear that what you were doing was wrong'?---**Well, I would kind of trust in the common decency of individuals to know between right and wrong as well**, but the individuals are involved when they join, they are given a number of policies and standards that are relevant, that they have to be across. Then, yes, I'm sure there must be some records of Code of Conduct training that has been done in the past*."[28]
>
> (My emphasis)

[130] I am satisfied and find that the Respondent was entitled to expect this level of decency from Mr Thompson. It is not credible that any employee would think that it was appropriate to distribute pornography whilst they were at work and being paid.

[131] As a result of the Applicant's conduct at work in distributing pornographic material, I am satisfied and find that the Respondent had a valid reason to terminate Mr Thompson.

Section 387(b) – Notified of the reason

[132] Whilst I am satisfied that the Applicant eventually received all of the necessary information from the Respondent, I am of the view that the process was haphazard and unsatisfactory. The Applicant should have been provided with the content of the offending material when requested. Further, the Applicant should have been provided with the specific provisions of the Respondent's policies and the training records associated with these policies. I have taken this into account.

Section 387(c) – Opportunity to respond

[133] It is not in dispute that the Applicant was provided opportunities to respond to the reasons for his termination, however the timeframes that were initially provided were inadequate. I have taken this into account.

Section 387(d) – Refusal of a support person

[134] The Applicant was allowed a support person at relevant meetings, and availed himself of this opportunity, including support of his union and legal representation. I have taken this into account.

Section 387(e) – Unsatisfactory performance

[135] The Applicant was not dismissed for unsatisfactory performance. Therefore, this is not a relevant factor.

Section 387 (f) and (g) – Size of Enterprise and HR Staff – procedures followed

[136] I note that the Respondent is a large employer with dedicated human resource management specialists or expertise. I have taken this into account.

Section 387(h) – Any other matters

[137] I do not accept the proposition that an Applicant can simply stall a dismissal process by invoking a status quo provision of a dispute procedure. This is not the intent of that provision. Section 387 of the Act details the process which must be followed by employers in terminating an employee in a manner which is not harsh, unjust or unreasonable.

[138] I have taken into account that the Applicant did not receive any training in relation to the Respondent's Social Media and Standards Policy before he was terminated. Further, the training practices of the employer appear to be along the lines of self-taught, tick and flick approach – which is simply not appropriate and lacks the educational rigour and outcomes of face-to-face training.

[139] It is evident that the training program of the Respondent is, at best, unnecessarily haphazard. It is difficult to understand why this is the case on the basis that the rotating Saturday night shift appears to have plenty of "*free time*". There is no reason why a small portion of this shift could not be spent undertaking training on a weekly basis. I have taken this into account.

[140] It is evident that some employees don't understand the meaning of appropriate workplace behaviour. I was extremely disappointed with the racist joke posted by the Applicant. There was an additional unidentified post with a supposedly humorous comment attached to a photo of a starving young African child with his plate held up waiting for food: "*No thanks kid, I got my own plate*". Perhaps every member of the group should foster a child through World Vision as a way of an apology for condoning this type of behaviour.

[141] I have taken into account the Applicant's assertion that he was treated inconsistently compared to Mr Oldham and Mr Gregory. I don't agree. There is no evidence that either Mr Oldham or Mr Gregory distributed pornographic material whilst they were on shift.

[142] I have taken into account the testimony of the Applicant in relation to whether pornography objectifies women. I have never heard of the OnlyFans website before this case. I took Mr Avallone advice and looked at Wikipedia. An interview in the Good Weekend was also recently published with the CEO of OnlyFans. I accept the evidence of the Applicant that the women who sell their photos on that site are all volunteers and businesswomen. It appears that these women can earn small fortunes on that site. However, the Applicant struggled with the concept and understanding of women being objectified through pornography and the inappropriateness of this scenario in today's society.

[143] I have taken into account the Respondent's Code of Conduct. I note that page 1 of the Code identifies the values of the Respondent. Relevantly, the Group CEO provides the following message:-

> "*Our Code of Conduct sets a clear and consistent standard of behaviour that is expected from all our people, including employees of our subsidiaries, joint ventures, contractors and suppliers. It provides a single reference point to ensure we work safely, behave ethically, and abide by laws and regulations with every work decision, task and interaction.*
>
> *Our Code of Conduct guides what we value and how we work - with each other as well as our clients, service providers, suppliers and the communities in which we operate. It strengthens our relationships, inspires confidence in what we do and how we do it, and it protects our company and reputation.*
>
> *Our Code of Conduct is a global standard that is fully endorsed and adhered to by our Board. Irrespective of where we work, or the tasks we perform, everyone is required to read, be familiar with and apply the Code to everything we do at Ventia.*
>
> *If you are ever in any doubt about any aspect of the Code of Conduct, ask your manager, supervisor or other contacts listed in this document.*
>
> *Thank you for your commitment and support to Ventia.*

Dean Banks
Group CEO"

[144] I note that one of the 'Values' on the page is 'integrity' with the words "*do what's right*" underneath. It is not in dispute that the Applicant was trained on this Code.

[145] The Good Weekend article also mentioned a section of OnlyFans which was called "*Safe for Work*", where the content was obviously not as risqué. The content posted by the Applicant whilst he was at work does not fit into this category. I have taken this into account.

[146] I have taken into account that the Applicant had been an exemplary employee of the Respondent for 14 years.

[147] I accept that the Applicant may have to move away from the Shoalhaven area to pursue his career as a firefighter. That scenario is not unusual for any employee who works in a field where there are limited employment opportunities. Firefighting is just one of these types of occupations. I have taken this into account.

Conclusion

[148] By adopting the obiter in *Rose v Telstra* and *Sydney Trains v Bobrenitsky*, I am satisfied and find that the out of hours conduct by the Applicant is not related or relevant to the Respondent. However, the sending of a pornographic post containing a number of explicit photos of a woman whilst the Applicant was on duty is inappropriate conduct which creates a valid reason for the Applicant's termination.

[149] Whilst society in the 2020's is more liberal than the 1960's in relation to pornography, the concept of every employee acting in a decent and appropriate manner whilst at work is not in question. The sending of pornographic materials to anyone, whilst at work, is not an appropriate action for any employee. The Applicant should not have needed a training course to know that distributing pornography during his shift was not appropriate conduct.

[150] I am satisfied that the Applicant has received his statutory entitlement to a 'fair go'.

[151] I am satisfied and find that the Applicant has not been unfairly dismissed.

[152] The application is dismissed.

[153] I so Order.

COMMISSIONER

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

[2] Ibid.

[3] *Rode v Burwood Mitsubishi* (AIRCFB, Ross VP, Polites SDP, Foggo C, 11 May 1999) Print R4471 at [19].

[4] *Crozier v Palazzo Corporation Pty Limited* (2000) 98 IR 137 at [64]-[76].

[5] *RMIT v Ashis* (2010) 194 IR 1 at 14–15.

[6] *Wadey v YMCA Canberra* [1996] IRCA 568; cited in *Dover-Ray v Real Insurance Pty* (2010) 204 IR 399 at [85].

[7] "Sickos Video Sharing Group" is the title of the Facebook group established by Mr Thompson.

[8] Witness Statement of Mr Thompson at [56].

[9] https://en.wikipedia.org/wiki/OnlyFans.

[10] *Walton v Mermaid* (1996) 142 ALR 681 at 685.

[11] (1995) 62 IR 371 at 373.

[12] Witness Statement of Mr Anderson at [16]-[24] and Exhibits CA-7 and CA-8.

[13] Witness Statement of Mr Anderson at [85]; Witness Statement of Mr Pakes at [41]-[42].

[14] (Print Q9292) of Ross VP (as his Honour then was).

[15] The Applicant referred here to: *Cameron Little v Credit Cord Group Limited* [2013] FWC 9642; *O'Keefe v William Muirs* [2011] FWA 5311; *Fitzgerald v Dianna Smith.* See also *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186; *Fitzgerald v Dianna Smith t/as Escape Hair Design* [2010] FWA 7358.

[16] *Queensland Rail v Wake* (2006) 156 IR 393 at [27].

[17] Witness Statement of Mr Pakes at [26].

[18] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 at [42].

[19] *Fagan v Department of Human Services* [2012] FWA 3043; *Sexton v Pacific National (ACT) Pty Ltd* PR931440; *Darvell v Australian Postal Corporation* [2010] FWAFB 4082.

[20] *Thompson v John Holland Group Pty Ltd* [2012] FWA 1063 at [30].

[21] (1995) 185 CLR 410.

[22] (1998) 84 IR 1.

[23] [2000] AIRC 1019.

[24] (1995) 62 IR 371.

[25] PR4471.

[26] (1998) 84 FCR 483.

[27] Dec 1444/98 N Print Q9292.

[28] Transcript at PN1305.