[2023] FWC 907 [Note: An appeal pursuant to s.604 (C2023/2498) was lodged against this decision - refer to Full Bench decision dated 1 November 2023 [[2023] FWCFB 201] for result of appeal.]

DECISION

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

Mr Martin Pelly

v

Ventia Australia Pty Ltd T/A Ventia
(U2022/9654)

COMMISSIONER RIORDAN SYDNEY, 18 APRIL 2023

Application for unfair dismissal remedy

[1] On 29 September 2022, Mr Martin Pelly (**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 31 July 2017 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 and 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
>
> Martin Pelly
> [redacted]
>
> By hand

Dear Martin

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. 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). We further note that your alias on the Facebook Group 1 & Facebook Group 2 is "Keithy George".

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

3. On 10 February (year unknown) at 7.29am you replied on the Facebook Group 1 to a video containing offensive images posted by Stuart.

4. On 15 Feb (year unknown) at 7.41am you shared a meme on the Facebook Group 1:

5. On 18 June 2020 at 6.54pm you posted and shared commentary on Facebook Group 1.

6. On 28 August 2020 at 6.46pm a meme was posted on the Facebook Group 1:

7. On 8 October (year unknown) at 4.25pm you shared a meme on the Facebook Group 1 in response to a post from Andrew regarding Rebecca Thompson who is known as FART:

(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 5.00pm 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, to suspend you 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,

Firstly, I'd like to apologise for my actions and how they have been viewed by the company. It was never my intention to offend or harass anyone in or outside of the private group. Upon reflection I can understand the position that I have put the company in and there was never any intent to harm or potentially harm the Ventia brand, its employees or its values. Having got to this situation I find myself in today, I understand the company is deeply concerned about it, however, I don't want to be terminated and I don't believe that termination would be a fair or necessary outcome in all of the circumstances.

I love being a firefighter and have enjoyed working for the company from the beginning. I set my eyes firmly on the prize of gaining employment years before I was successful and worked towards that goal. When I was accepted in 2017, I couldn't have been happier. I moved my family here so that I could fully commit to the role and knew that I was going to succeed.

I have been offered many opportunities during my time with the company which I have been very grateful for. These have helped me grow personally and professionally and made me better all round. I was recently awarded 5 years of service and I felt a sense of pride and accomplishment. I take my career seriously and always look at how I can grow and better the company.

I have never had any marks on my name, or ever been addressed for bad behaviour or disciplinary measures. I am the first to help with staff shortages and have over 300 hours sick in the bank as I take work seriously and never want to let the team down.

Throughout my entire employment, I have continued to provide good service to the company. I started as a level 1 Fire Fighter back in July 2017 and progressed through to my current rank of Qualified Leading Fire Fighter. This was all obtained by personally funding my progression of modules required by conducting external studies through registered training organisations. In November 2017, I forfeited my annual leave block to be permanently shifted to another platoon due to roster vacancies and shortfalls.

I have never been late to work, missed a shift and have actively assisted other staff members with shift swaps to assist in a healthy work/life balance. While acknowledging remuneration is received for working overtime and on my days off, I do it to be a team player. I have volunteered numerous times to assist with short-term vacancies at no extra cost to the company at other bases such as Creswell when our platoon at Albatross is above strength with staff, and again in January this year, I shifted platoons to fill a short-term vacancy on D platoon. All these actions demonstrate I am thinking of Venita's position in meeting customer obligations.

In 2019/2020 I provided extensive fire coverage by attending work on my days off as HMAS Albatross came under severe fire attack, in particular on new year's eve/day 2019 as the bushfires consumed the base. For months after the fires, we had defence dignitaries, local MP's, Ventia management and even the Prime Minister attend the station and acknowledge our efforts which gave the workforce and I a great sense of pride that our customers and company image was so highly regarded.

I have also volunteered my services to be a part of the Albatross Consultative committee where I participate in the role of the secretary to the Regional Manager who is the chair. This is all to make our workplace better and be a better team member. The diverse workforce we have at Ventia is amazing. Every person I work with is like my second family, a family away from my real family. A lot of the people in this workplace are close friends that when times are tough or I just need to chat, I confide in and trust.

I am no longer involved in the group in question; I have always been cautious about what I post on the public social media platforms, and I am genuinely sorry people outside the closed chat group were exposed to the material sent. I understand that this whole process has had an impact on all involved and I can only apologise. I also am the first to put my hand up and say that I am open to further training, courses or whatever is required to help me fully understand the policies and procedures so that I can meet what is required.

Despite having access to the policies referred to in your letter and being required to confirm that I have read them, I don't recall ever receiving structured, formal training from Broadspectrum or Ventia about the use of social media and the potential implications. At the time, I genuinely didn't see my involvement in the group as impacting on or potentially impacting on the workplace. I am old enough to take responsibility for my own actions and what I post, access or send but am also old enough

to be a bit green when it comes to fully understanding the reach of social media and the technical aspects of it. In this regard, the lessons of this process leave me in no uncertainty about the potential pitfalls including the risk that private activity can potentially impact upon the workplace. I have learnt a valuable lesson and feel that, on top of the distress of this process, a warning including being directed to submit to further training and supervision would be a strong enough sanction. I think that the sanction of termination would be too harsh. It would deny me the opportunity to grow into a better person and an even better contributor to Ventia, to Defence, and to my family. It would also deny Ventia and Defence and the community more broadly access to my positive contribution to their operations. Even during this torturous process, I have done my best to protect the Venita brand, my colleagues and my workplace by having meetings at my home instead of the requested location of the Regional manager's office at work. I cleared this with the National Manager and explained it was private and confidential and eliminated unnecessary discussions from the on-shift crews as to my attendance at work for short periods when I wasn't on shift. Throughout the entire process I have been open and honest with all of my responses and shown respect to the process and the team around me.

To think this profession, which I have worked so hard for and strived for since I was 9, is about to be ripped from right out underneath me, makes me feel absolutely gutted. For this company, which I have worked so hard for, that wants to terminate my employment and have nothing to do with me makes me feel empty. From being successful in the recruitment process back in July 2017, to moving my young family up here to Nowra from Melbourne where we knew no one and very much had to start at the bottom of the pile in the workplace, is heartbreaking. My wife and two boys have had to start over because this is the career I chose and so desperately wanted. I don't want to lose my job and have everything I have worked for, ripped away and I would very much like a second chance to right the wrong that has been done.

I've volunteered with the Country Fire Authority in Victoria for over 25 years and remain a member of the brigade I started with. I received the National Emergency Medal for my efforts during the Victorian Black Saturday bushfires in 2009 which is awarded to persons who render sustained or significant service during nationally significant emergencies in Australia. I've also received the National Medal, which recognizes prolonged exposure to hazards in servicing the community.

I also have secondary employment as an On Call retained Fire Fighter with Fire Rescue New South Wales at Nowra 405 station. Just because I am distinguished amongst others, doesn't make excuses for what has occurred while I have been a Ventia employee, but I am trying to show I am here to help others and be of service. I genuinely believe that the way I conduct myself in the workplace reflects positively on Ventia and its brand and will continue to do so should I be allowed to continue in my role. With my unblemished work record, I would like to think I deserve a second chance.

Arriving home from work on Monday night after receiving my termination letter from my Regional Manager, being greeted by my nine and six-year-old boys asking how my day was hit hard. They idolise me and what I do and having to put on a brave face for them and act like it was just another day wasn't easy. The last thing I want for them is

to worry about me, as it's my responsibility to provide and look out for them. I remember idolising my father as he would race off to fire calls all those years ago, so I know what my boys see in me. Being terminated from this job and company is categorically not what I want.

To be completely honest, I'm an embarrassed, shattered man. I am sincerely hoping that I am given a second chance to show Ventia how much I value being an employee and do whatever it takes to right this wrong.

Yours sincerely,

Martin Pelly"

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

"Private and confidential

20 September 2022

Martin Pelly
[redacted]

By email

Dear Martin

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. 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). We further note that your alias on the Facebook Group 1 & Facebook Group 2 is "Keithy George".

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

3. On 10 February (year unknown) at 7.29am you replied on the Facebook Group 1 to a video containing offensive images posted by Stuart.

4. On 15 Feb (year unknown) at 7.41am you shared a meme on the Facebook Group 1:

5. On 18 June 2020 at 6.54pm you posted and shared commentary on Facebook Group 1.

6. On 28 August 2020 at 6.46pm a meme was posted on the Facebook Group 1:

7. On 8 October (year unknown) at 4.25pm you shared a meme on the Facebook Group 1 in response to a post from Andrew regarding Rebecca Thompson who is known as FART:

(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)
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(c) Conduct Principle 12. Using company assets and technology responsibly (Reference policy dated year, 2020 to current)
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(d) Conduct Principle 15. Promoting workplace equality and diversity (Reference policy dated year, 2020 to current)

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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 Adam Thompson, 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. 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 during his approximately 5 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 worked for the Respondent for 5 years.*

(b) Uprooted his family to move from Melbourne to Nowra to work for the Respondent.

(c) Always went above and beyond in the service of the Respondent.

(d) Had enjoyed a great professional working relationship with the Respondent's management.

(e) Had an impeccable work record prior to this matter. He has never had any disciplinary action taken against him by the Respondent.

(f) Planned to continue working with the Respondent through to his retirement;

(g) Was a committed, hard-working and high achieving employee of the Respondent.

(h) Has not been the subject of any complaints from the Respondent's employees.

(i) Has devoted himself to a career in the firefighting industry."

[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 and U2022/9654 (the present matter), for the purposes of this Decision, the Respondent's submissions have been summarised only in relation to matters pertaining to Mr Pelly'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, and his work history as a firefighter, 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 Pelly 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 Pelly posted content related to work-related matters, including:*
>
> *i. Pelly (who posted under the pseudonym "Keithy George") posting comments about the ordering of firefighting equipment by Ventia's NSW Regional Manager, Mitchell Pakes;*
> *ii. Pelly posting a photo taken on base at HMAS Albatross of a fellow Ventia employee returning from a period of leave;*
>
> *(d) when a fellow firefighter employed by Ventia at HMAS Albatross (Mitch Evans) withdrew from the Sickos Video Sharing Group:*
>
> *In response to posts by Mr Thompson calling former members of the Sickos Video Sharing Group "soft", "powder puff" and "soft cocks":-*
>
> *i. Pelly responded to Thompson's posts about Evans and other members of C platoon choosing to leave the Sickos Video Sharing Group with a meme which reads "Typical"; and*
>
> *(e) objectively construed, the cumulative effect of Mr Thompson and Mr Pelly'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 Pelly, 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 Pelly posted to the Sickos Video Sharing Group explicit content including:

i. On 28 August 2020, Pelly posted a photo of the naked rear ends of three women, with the comment "The difference between new, used and worn shock absorbers"".

[44] 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.

[45] The Respondent submitted that posts by the Applicant of the kind described in paragraphs (c)(i) 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.

[46] 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 15 February 2021 at 8:37am, a date and time when Pelly was on shift, Pelly posted "Regional Manager has done well securing our new Panther S"*".

[47] 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.

[48] The Respondent submitted that the process it followed was to put to the Applicant the material which it had available to it at the time, and its concerns about those materials, provide the Applicant with an opportunity to respond (including responding in writing and attending meetings with the legal and union representatives present) and, having considered those responses, deciding whether to take disciplinary action which, ultimately, was dismissal. The Respondent outlined the process it followed as 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) The Applicant sent a further piece of material as part of his response, being a screenshot from the Sickos Video Sharing Group which he considered put things in a better context, on 7 September 2022;

(i) 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;

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

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

(l) 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."

[49] The Respondent submitted that the Applicant's conduct, being the posting of sexually explicit content and 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 dismissal was within the range of proportionate responses.

[50] 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

[51] 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*."

[52] 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.

[53] 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 here.

[54] 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)

[55] Further, the Respondent submitted that even if some of the Applicant's conduct was engaged in out 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*".

[56] 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."

[57] 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 photos of three naked women from behind comparing them to "*new, used and worn shock absorbers*". 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 a Sickos Video Sharing Group.

[58] 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.

[59] 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…*".[9] 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.

[60] 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*.[10] 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

[61] 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.

[62] 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 a photo of three women's naked behinds comparing them to "*new, used and worn shock absorbers*".

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

[64] 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.

[65] The Respondent submitted that the Applicant had received on multiple occasions notice (and copies) of the posts of which Ventia was aware, that it 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

[66] 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 permitted to be, and was, represented by his union and legal representatives throughout the process leading to his termination.

[67] 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

[68] 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

[69] 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

[70] The Respondent submitted 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 acknowledged 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.

[71] 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.[11] The Respondent submitted that the Applicant could also access Ventia's policies on Ventia's intranet.

[72] 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 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.

[73] 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.

[74] 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 is a consequence of his conduct, and of the choices that he made to expose his work colleagues at Ventia to sexist, vulgar, misogynistic, and bullying material.

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

Remedy

[76] 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.

[77] 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

[78] 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*[12] 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."*"

[79] 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.*"

[80] 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].

[81] 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.

[82] 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.

[83] 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.[13] 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.

[84] 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 of 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.

[85] 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.

[86] 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

[87] 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.

[88] 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. Here, 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

[89] The Applicant submitted that the Respondent appears to allege that on-line training on the Code of Conduct was provided to him on 18 October 2020 and 14 November 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 he received Code of Conduct online training yearly via the intranet which took about an hour but does not recall anything in the training being about using social media or specifically 'PMGs'.

[90] 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

[91] The Applicant submitted that he has no recollection of any training with respect to the Respondent's social media policy or standard. The Applicant noted 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.[14]

[92] 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

[93] 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 his employer. The Applicant submitted, therefore, this ground can rise no higher than the alleged breaches of polices discussed above.

Workplace culture

[94] 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) member of both groups and who was aware that this may put him (and possibly others) in a compromising position.[15] 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

[95] 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. on 15 February 2021 at 8:37am, a date and time when Pelly was on shift, Pelly posted "Regional Manager has done well securing our new Panther S" 36; and

b. …"

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

Inconsistent treatment

[96] 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.

[97] 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.[16] 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*".[17]

[98] The Applicant submitted that the principle of inconsistent treatment is of particular relevance when contrasting the treatment by the Respondent of him when compared with the treatment of:

(a) Mr Matthew Oldham; and

(b) Stuart Gregory.

[99] The Applicant submitted that a comparison of "*apples with apples*" is here possible where each of these men participated in the relevant private group chat as invited participants. The Applicant submitted that like him, Mr Gregory is a Qualified Leading Firefighter. Mr Oldham is a Qualified Firefighter.

[100] The Applicant submitted that Mr Anderson's evidence identifies the nature of the investigation process undertaken with respect to Mr Oldham. The Applicant submitted that comparing those allegations to those made against him, he received differential treatment (being dismissed) from Mr Oldham (who received a warning).[18] The Applicant submitted that Mr Anderson's evidence does not address whether he considered any disciplinary action against Mr Gregory and, if he did not, why this was the case.

[101] The Applicant submitted that Mr Gregory is identified by Mr Anderson as responsible for posts or comments in "CA-18", "CA-20" and "CA-29". The Applicant submitted that comparing these allegations to those made against him, he received differential treatment (being dismissed) from Mr Gregory, who was not the subject of an investigation.

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.[19]

[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*)[20] 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*)[21] 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*[22] 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*:[23]

> "*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*,[24] 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*)[25] 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 judgement or provide commentary on the morality of the Applicant's conduct. The Applicant has not been charged by the NSW Police for any illegal activity nor has there been any suggestion by the Respondent that the Applicant's conduct is illegal. The question at hand is whether the Applicant's conduct was appropriate and in breach of the Respondent's policies?

[115] In relation to the Applicant's out of hours conduct in viewing and distributing pornographic material, the Respondent is required to find the nexus to the Applicant's employment. In *Rose v Telstra*,[26] 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] The Applicant was a member of the Sickos Video Sharing Group (the Group) that was set up by Mr Thompson. It is not in dispute that 11 of the Applicant's colleagues were also members of the Group, along with 3 individuals who were former employees of the Respondent and 3 individuals who were not associated with the Respondent. It is not in dispute that the material posted in the Group was a combination of pornographic videos, racist memes and idle chat, some of which was related to the workplace.

[118] It is not in dispute that the Applicant published a post into the Group during work hours on 15 February 2022. This post was of an old bicycle with a fire extinguisher placed on each side of the bike rack behind the seat. It is also not in dispute that the Applicant published other posts into the Group. One was a photo of three naked women with their back to the camera with a caption of "*new, used and worn shock absorbers*". The second post was a screenshot of a

video of a woman in a bikini top which the Applicant admitted was a pornographic video. The third post was a post of Homer Simpson hiding in the bushes. The Applicant also posted the word "*Typical*" in response to a derogatory comment about C platoon and finally a photo of a colleague returning from a lengthy period of sick leave in the Respondent's carpark.

[119] Under cross examination, the Applicant accepted that his post of the three women was inappropriate and in breach of the Respondent's policies. The Applicant also accepted that the posting of the screenshot of the pornographic video was also inappropriate and that he did not need training to know that it was inappropriate to publish that post.

[120] I agree with the obiter in *Rose v Telstra* and *Bobrenitsky v Sydney Trains*, that employees are entitled to an after hours private life. The majority of the Applicant's posts were conducted after hours except for the post about the new fire truck being an old bicycle. I agree with the comments of Mr Anderson that this post could be regarded as being disrespectful and offensive to management and the hard work being undertaken by Mr Pakes in accessing the new vehicle. This post therefore breaches the Bullying and Harassment Policy, which provides:

> "*4.1 What is harassment?*
>
> *Harassment is any unacceptable action, conduct or behaviour that* ***a reasonable person would find unwelcome, humiliating, intimidating or offensive.*** *Harassment can range from subtle intimidation to more obvious aggressive actions and can arise from a single incident, or repeated incidents.*"
>
> (My emphasis)

Further, whilst the photo of Mr Oldham returning to work is unidentifiable as to the location of the photo, it is not in dispute that the photo was taken in the carpark of HMAS Albatross. The Respondent's policy clearly states that photos of the base cannot be published without approval of Defence. It is not in dispute that the Applicant did not have the requisite approval to publish this photo.

[121] On the basis of the two breaches of the Respondent's policies, I am satisfied that the Respondent had a valid reason to terminate the Applicant. I have taken this into account.

Section 387(b) – Notified of the reason

[122] 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

[123] 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

[124] 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

[125] 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

[126] 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

[127] In response to a question from me, the Applicant testified that members of the Group calling each other "*soft cocks and pussies*" is just banter and a joke:

> "*THE COMMISSIONER: Well, that wasn't the question, Mr Pelly. The question was along the lines of you were saying that people who were leaving the group could be described as soft cocks and pussies, basically, and you say it's visually?---Okay, yes.*
>
> *What did you mean?---Visually, as they've spoken, yes, okay, I understand that's the way it can be viewed, yes.*
>
> *What was the context of it?---The context of it, it was just banter, it was just joking with guys. Like it doesn't have the value that they're putting on it.*"[27]

[128] The Applicant then went on to say:

> "*THE COMMISSIONER: Hold on. I'm a sparky by trade, albeit many years ago, it may be that Mr Avallone and Mr McKenna have never been blue collar workers, what could you tell me about the way that firefighters interact with each other in the workplace?---I'd say it's a lot like your previous profession, Commissioner, where we are quite jovial. We spend a lot of time together, like we sleep together, it's the second family, so it's like your brother. The guys are our brothers. We're tight as, you rely on people if you need a hand, if you're in trouble. You've got that real camaraderie and that real bond.*
>
> *So, if I can use the Australian vernacular, is it common place for you to take the piss out of your work colleagues?---You could say that, yes, Commissioner.*

> *Do you believe that any of these - any of your colleagues here, Gilbo, Evans or Timmy, would take offence to what was said to them, in this chat?---Hand on my heart, Commissioner, I'd say they wouldn't.*"[28]

I have taken this into account.

[129] I have taken into account that the Applicant has been a model employee who has been fast tracked through the classification structure due to his exceptional work ethic and the additional training that he has undertaken and paid for himself.

[130] I have taken into account the substantial changes that Mr Anderson made to his witness statement at the start of his testimony. These changes resulted in the allegations against the Applicant being modified and reduced. Relevantly, Mr Anderson advised the Commission that he made his decision to dismiss the Applicant based on the full list of posts attributed to the Applicant in his original witness statement.

> "*You have made a lot of changes to your witness statement this morning. Did you make those changes of your own volition or did somebody tell you to make those changes?---No, I made those - I made those changes myself.*
>
> *I need to find out about your state of mind at the time you've made the decision to terminate Mr Pelly and Mr Thompson. Was it based on the material in your witness statement as was, I assume, approved by you and sent to the Commission or was it based on the information of the witness statement as it now stands?---No, it was based on the information as sent to the Commission.*"[29]

[131] I have taken into account the evidence of Mr Anderson in answering questions from Mr McKenna in relation to the video posted by Mr Gregory:

> "*MR McKENNA: So you wrote this out, you wrote out your comments about the pornographic video shared by Mr Gregory being highly offensive and inappropriate?---Yes.*
>
> *That was done at a time at or before 24 January?---Correct.*
>
> *I suggest to you that that's the view that you held at the time when you were making decisions about disciplinary action to take against employees?---No. This statement was written after we had terminated the employees. However, we had looked at the evidence prior to that and did not believe that those other people needed to be investigated.*
>
> *If I can just get the chronology right then, you say at the time of making the decision about Mr Gregory, you did not consider this post to be highly offensive?---Correct.*
>
> *Then, when you wrote this statement - you typed this statement our yourself - you did consider it to be highly offensive?---Again, the evidence was - when I was putting the witness statement together, there was obviously lots and lots of photos and, you know, I*

- there were some areas where, you know, I was looking a wrong photo, so that's why my statement has been changed, and I don't believe that this particular photo was inappropriate.

I don't understand what you're saying there. Are you suggesting that when you wrote the first sentence in 42, you were looking at the wrong screenshot?---Well, not the wrong screenshot, but basically I was trying to get all of the information down and then trying to match the photos to the screenshots and I've just made an incorrect statement, but I do believe we made - but I do believe we made the right decision with Mr Gregory.

I suggest to you that you put in the words in paragraph 42 that it was 'pornographic' and that it was 'highly offensive and inappropriate' because you believed that that would assist Ventia's case in defending this unfair dismissal?---No, that's not true.

I suggest that, in fact, all of your opinion that appears in paragraphs 40 through to 60 can be taken the same way. It is opinion that you have given because you believed it will assist Ventia's case before the Commission?---No, that's not true. No, that's not true, that's not the case."[30]

[132] In *Sexton v Pacific National (ACT) Pty Ltd*,[31] Vice President Lawler stated as follows regarding differential treatment:

"*[36]* ***In my opinion the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable within the meaning of s.170CE(1) or in determining whether there has been a "fair go all round" within the meaning of s.170CA(2). In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing "apples with apples".*** *There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made. Obviously, where, as in National Jet Systems, there is differential treatment between persons involved in the same incident the Commission can more readily conclude that the cases are properly comparable. However, even then the Commission must approach the matter with caution. Specifically, the Commission must be conscious that there may be considerations subjective to the circumstances of an individual that caused an employer to take a more lenient approach in an allegedly comparable case. For example, a worker guilty of particular misconduct justifying termination might be shown leniency because of extreme need or stress arising from the serious illness of a close dependent. Another worker guilty of the same misconduct could not necessarily rely upon the leniency shown to the first worker as a basis for demonstrating that his or her termination was harsh, unjust or unreasonable. Many other examples could be constructed.*"

(My emphasis)

[133] I have taken into account the differential treatment handed out between the Applicant and Mr Gregory. Mr Gregory was not the subject of an investigation, allegedly due to understaffing in the HR department following the employees transitioning from Broadspectrum

to Ventia, but also because Mr Anderson did not identify Mr Gregory's post as being offensive. However, in my opinion, Mr Gregory's posts to the Group were similar to the refined list of the Applicant. Mr Gregory posted a video of a scantily clothed woman with large breasts, a very tight shirt and panties, compared to the Applicant's post of a video of a woman in a bikini top. Mr Anderson did not know if the Applicant's or Mr Gregory's videos were pornographic from these screenshots. Secondly, Mr Gregory submitted the following post:

> "*Call a girl beautiful one thousand times and she won't notice. Call her fat once and she'll never forget. That's because elephants never forget.*"

Compared to the Applicant's post of the three women and the shock absorber comment, this post is an outrageous slur against overweight women. I am very surprised that Mr Anderson would suggest that this post is not offensive towards women. Personally, I am of the view that Mr Gregory's post was more offensive than the Applicant's. The photo of the nude bottoms, whilst some would argue is pornography, are images that can be seen on any beach around the world except for a thin piece of fabric approximately 1cm in width. Mr Gregory's third post was that of a man asleep with his head on a rock and a derogatory comment about D platoon and the Watch Room compared to the Applicant's "*Typical*" comment in relation to C platoon. I am satisfied and find that the posts of Mr Gregory were equally offensive as those of the Applicant in these three circumstances. However, Mr Anderson could not reach that conclusion because he made significant errors in allocating posts to the Applicant incorrectly. I have taken this into account.

[134] I accept the photo in the carpark should not have been posted, however, it is a photo of a carpark with grass behind it. Having played golf at Nowra Golf Club in January, I am of the view that the photo could almost pass for the golf course carpark. I am satisfied that such a misdemeanour does not warrant dismissal.

[135] In relation to the post by the Applicant related to the old bike, I thought the post was quite humorous and note that Mr Pakes did not take offence to it:

> "*If Mr Pelly made this comment to you at a Chippers and Punters Club - what is it, the Punters and Chippers Club event, you'd understand that to be a joke, wouldn't you?---I wouldn't take any offence, you know, if it was referred to. My view is that the guys - or when I say 'the guys', the station understands that I'm doing everything in my power to secure a new appliance for the station. So I personally wouldn't take offence to it.*"[32]

Relevantly, the Respondent has been working towards getting a new vehicle for 3 years. Mr Anderson testified:

> "*All right. Would it surprise you if I thought it was funny?---No, I guess some people could take it as being funny, but, you know, if you're in the industry and from within the workplace, if you knew how hard Mitch Pakes had worked to try and get another vehicle for them…*"[33]

If Mr Pakes didn't take offence to the post then I struggle to see how Mr Anderson could take offence on Mr Pakes' behalf. I have taken this into account.

[136] Mr Anderson stated that the Applicant involved himself in a bullying conversation by posting a Homer Simpson meme in response to 'FART' references, which was one of the reasons relied upon by the Respondent for the Applicant's dismissal. I am advised that the Homer Simpson meme is a gif of him sliding back into a hedge, commonly used by people to indicate they are hiding from a topic or thing, or otherwise removing themselves. Mr Anderson has misunderstood the Applicant's use of this meme, and incorrectly interpreted it as the Applicant involving himself in the bullying conversation when it appears that he was instead indicating his removal from it. I have taken this into account.

[137] I have taken into account that the Applicant was not trained in the Respondent's social media policy. I have taken into account that the Applicant's training regime is delivered via online learning which in many respects, in my view, does not deliver the same educational outcomes as face-to-face tuition, especially when the training module contains 100 slides.

[138] In relation to the test in *Rose v Telstra*, I am satisfied that the conduct of the Applicant does not cause serious or irretrievable damage to the employment relationship. The Applicant's actions do not damage the Respondent's interests except for some possible minor embarrassment with Defence. I do not regard participation in a private chat, amongst friends and almost exclusively out of hours, to indicate a repudiation by the Applicant of his contract of employment. I have taken this into account.

Conclusion

[139] The Applicant has made a mistake. Based on his conduct during the investigation and his evidence, I am satisfied that the Applicant has learnt his lesson, was truly sorry for his actions, and will not be undertaking any activity which may be regarded as demeaning towards women, or which is contrary to the Respondent's policies in the future.

[140] I have previously found that the Respondent had a valid reason to terminate the Applicant based on its investigation and the application of its policies.

[141] However, the decision of Mr Anderson to terminate the Applicant was based on Mr Anderson's misunderstanding of the evidence. Mr Anderson failed to pay close attention to the identity of who posted what video, photo or meme. As a result, the Applicant was attributed to more posts than he actually posted.

[142] The Applicant was thoroughly investigated and ultimately dismissed on inaccurate information and dealt with substantially differently than Mr Gregory for similar misdemeanours. As a result, I find that the Applicant's termination was unjust and unreasonable.

[143] I have adopted the obiter in *Rose v Telstra* and *Bobrenitsky v Sydney Trains*.

[144] I am satisfied that the Respondent has not established the nexus between the out of hours posts of the Applicant and his employment. I do not accept that the occasional post about a work situation into the Group where 39% of its participants are non-Respondent employees creates sufficient connection to the workplace to sustain the Respondent's argument that the Group is work-related. Further, the Applicant had no control over when the other employees in

the Group would view his posts. As a result, I find that the Respondent cannot rely on their findings in relation to these posts.

[145] Relevantly, the majority of the Applicant's posts were made outside of work hours. The Applicant is entitled to a private life and the Commission does not sit in moral judgement of the Applicant's conduct in his private life.

[146] However, the Applicant did send one post whilst at work on day shift. I am surprised that the Applicant had time to send this post but the Respondent did not raise this as an issue. No offense was taken by Mr Pakes in relation to this post. In the context of the employees, including Mr Pakes, regularly having a humorous shot at one another, this post is funny. The post certainly doesn't warrant the penalty of termination.

[147] The Applicant posted a photo of a colleague taken in the carpark of the workplace and posted a photo of a bike which, in context, was humorous and unoffensive. Neither misdemeanour warrants the Applicant being terminated.

[148] Adopting the reasoning in *Byrne v Australian Airlines*:

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

I am satisfied and find, for the reasons stated above, that the Applicant's termination was harsh, unjust and unreasonable.

[149] I find that the Applicant was unfairly dismissed.

Remedy

[150] Having found that the Applicant has been unfairly dismissed, I now turn to the issue of an appropriate remedy.

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

[152] The Applicant seeks to be reinstated. The Respondent submitted that reinstatement would be inappropriate.

[153] The relevant provisions of the Act in relation to a remedy for an unfair dismissal are:

"**390 When the FWC may order remedy for unfair dismissal**

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies."

"**391 Remedy—reinstatement etc.**

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;
the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement."

"**392 Remedy—compensation**

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

[154] In *Perkins v Grace Worldwide (Aust) Pty Ltd (Perkins)*,[34] the Full Court of the Industrial Court said:

"Trust and confidence is a necessary ingredient in any employment relationship. ... So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.

At the same time, it must be recognised that, where an employer, or a senior officer of an employer, accuses an employee of wrongdoing justifying the summary termination of the employee's employment, the accuser will often be reluctant to shift from the view that such wrongdoing has occurred, irrespective of the Court's finding on that question in the resolution of an application under Di 3 of Pt VIA of the Act.

If the Court were to adopt a general attitude that such a reluctance destroyed the relationship of trust and confidence between employer and employee, and so made reinstatement impracticable, an employee who was terminated after an accusation of wrongdoing but later succeeded in an application under the Division would be denied access to the primary remedy provided by the legislation. Compensation, which is subject to a statutory limit, would be the only available remedy. Consequently, it is important that the Court carefully scrutinise any claim by an employer that reinstatement is impracticable because of a loss of confidence in the employee.

... It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.

It may be difficult or embarrassing for an employer to be required to re-employ a person the employer believed to have been guilty of wrongdoing. The requirement may cause inconvenience to the employer. But if there is such a requirement, it will be because the employee's employment was earlier terminated

> **without a valid reason or without extending procedural fairness to the employee. The problems will be of the employer's own making. If the employer is of even average fair-mindedness, they are likely to prove short-lived. Problems such as this do not necessarily indicate such a loss of confidence as to make the restoration of the employment relationship impracticable.**"
>
> (My emphasis)

Consideration

[155] I have taken into account the evidence of Mr Pakes in relation to the possible reinstatement of the Applicant:

> "*You don't suggest, do you, that you couldn't work with Mr Pelly in the future?---I've worked closely with Mr Pelly as a firefighter and also as the regional manager, and in my honest view and opinion, if that was to occur, I believe that Mr Pelly would be very professional, and I would also be professional returning him back to the workplace. I don't see any issues with that, no*."[35]

I regard Mr Pakes as a witness of credit, who gave his evidence without fear or favour and who clearly has a good relationship with his employees.

[156] I have taken into account that the Applicant moved his family from Victoria five years ago to join the Respondent and that he would have to move once again if he wishes to continue his fire fighting career on a full time basis.

[157] Further, on the basis that Mr Gregory remains employed and my earlier finding in relation to differential treatment, the unfairness to the Applicant would be further exacerbated if the Applicant was not reinstated. I have taken this into account.

Conclusion

[158] Based on the evidence of Mr Pakes, I am satisfied that the employment relationship can be re-established between the Applicant and the Respondent. As a result, the Applicant is entitled to the primary remedy under the Act.

[159] I hereby Order that the Applicant be reinstated to his former role of Qualified Leading Firefighter at HMAS Albatross in accordance with s.391(1)(a).

[160] I hereby Order that the Applicant maintain his continuity of service from the date of his termination in accordance with s.391(2).

[161] The Applicant breached two policies of the Respondent. These actions cannot be condoned, especially in relation to the publication of the photo in the carpark. The photo itself was innocuous, but it may not have been. In accordance with s.391(3), I hereby Order that the Applicant be backpaid to the date of his termination, minus one months' pay for the breach of policy and any monies earned by the Applicant since his termination. If the parties are unable

to agree as to the quantum, either party can make application to the Commission to assist in resolving the matter.

[162] 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] The Respondent cited here: Witness Statement of Mr Thompson at [56].

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

[10] (1995) 62 IR 371 at 373.

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

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

[13] 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 Smit*h. See also S*ingh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186; *Fitzgerald v Dianna Smith t/as Escape Hair Design* [2010] FWA 7358.

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

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

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

[17] *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.

[18] Witness Statement of Mr Anderson at [107].

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

[20] (1995) 185 CLR 410.

[21] (1998) 84 IR 1.

[22] [2000] AIRC 1019.

[23] (1995) 62 IR 371.

[24] PR4471.

[25] (1998) 84 FCR 483.

[26] Dec 1444/98 N Print Q9292.

[27] Transcript at PN345-347.

[28] Transcript at PN350-352.

[29] Transcript at PN1473-1474.

[30] Transcript at PN1652-1659.

[31] PR931440.

[32] Transcript at PN2135.

[33] Transcript at PN1841.

[34] (1997) 72 IR 186.

[35] Transcript at PN2153.