DECISION

Fair Work Act 2009
s.604—Appeal of decision

Brett Steed
v
Active Crane Hire Pty Ltd
(C2023/557)

VICE PRESIDENT ASBURY
COMMISSIONER BISSETT
COMMISSIONER JOHNS

BRISBANE, 1 SEPTEMBER 2023

Appeal against decision [2023] FWC 15 of Deputy President Boyce at Sydney on 25 January 2023 in matter number U2022/4290.

Overview

[1] Mr Brett Steed (the Appellant) has lodged an appeal under s. 604 of the *Fair Work Act 2009* (the Act), for which permission is required, against a Decision of Deputy President Boyce issued on 25 January 2023[1] (Merits Decision). In the Merits Decision, the Deputy President determined that the Appellant had been unfairly dismissed, notwithstanding that the Respondent was found to have a valid reason for dismissing the Appellant.

[2] The Deputy President reached this conclusion based on a finding that the Respondent's failure to give the Appellant an opportunity to respond or raise issues of mitigation before the Respondent decided to dismiss the Appellant, weighed in favour of the dismissal being harsh, unjust and unreasonable. The Deputy President also concluded that reinstatement was inappropriate, finding that the Appellant had shown no contrition or remorse for his conduct, and that there was clear animosity between the Appellant and the Respondent's management. On this basis the Deputy President considered that an award of compensation to the Appellant would be an appropriate remedy for his unfair dismissal.

[3] After setting out the legislative provisions relevant to an award of compensation, the Deputy President noted that evidence was not tendered during the hearing in relation to the matters required to be considered in the calculation of compensation and decided to issue further directions for the filing of evidence and written submissions prior to any order for compensation being made.

[4] The appeal was lodged on 22 February 2023 and was listed for hearing before the Full Bench on 9 March 2023. At the request of the parties, the hearing of the appeal was deferred until the Deputy President handed down his decision on compensation on the basis that this

would enable the matter to be finally resolved by the Full Bench in the event that permission was granted, and the appeal succeeded on one or more grounds.

[5] On 3 March 2023, the Deputy President issued a further decision[2] ordering the Respondent to pay the Appellant compensation in the amount of $6,043.92 (Compensation Decision), pending the resolution of this appeal. The Appellant pressed the appeal, and it was listed for hearing on 24 May 2023 in relation to both permission to appeal and the merits of the appeal. The Appellant was granted permission to be legally represented on the basis that we were satisfied that the appeal raised issues of complexity and that legal representation would enable the matter to be dealt with more efficiently. The Appellant was represented by Mr P Boncardo of Counsel in the appeal and by the Transport Workers Union of Australia at the first instance hearing. The Respondent was represented by its Director, Mr H Buchberger.

Permission to appeal

[6] The Merits Decision subject to appeal was made under Part 3-2 – Unfair Dismissal of the Act. Section 400(1) of the Act provides that permission to appeal must not be granted from a decision made under Part 3-2 unless the Commission considers that it is in the public interest to do so. Further, in unfair dismissal matters, appeals on a question of fact can only be made on the ground that the decision involved a 'significant error of fact' (s. 400(2)). Section 400 of the Act manifests an intention that the threshold for a grant of permission to appeal is higher in respect of unfair dismissal appeals than the threshold pertaining to appeals generally.

[7] The task of assessing whether the public interest test is met is discretionary and involves a broad value judgment.[3] The public interest might be attracted where:

- a matter raises issues of importance and general application;
- there is a diversity of decisions at first instance so that guidance from an appellate court is required;
- the decision at first instance manifests an injustice;
- the result is counter intuitive; or
- the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[4]

[8] The test set out in s. 400 has been described as "*a stringent one*".[5] To be characterised as significant, a factual error must vitiate the ultimate exercise of discretion.[6] In a misconduct case, a significant fact is foundational to a conclusion in relation to whether misconduct took place.[7]

[9] For the reasons which follow, we have decided it is in the public interest to grant Mr Steed's application for permission to appeal and to uphold the appeal.

Decision under Appeal

[10] At paragraphs [9] – [15] of the Merits Decision, the Deputy President summarised his findings based on the evidence relied upon by both parties at the hearing as follows:

> "**[9]** The Applicant commenced employment with the Respondent on 8 December 2020.
>
> **[10]** The Applicant was employed by the Respondent as a Truck Driver and General Yard Hand (there was roughly a 50/50 split between these two roles).
>
> **[11]** The Applicant's 2021 Performance Review was unexceptional. He received both positive and negative feedback in respect of same.
>
> **[12]** By way of letter dated 8 April 2022, the Applicant was dismissed by the Respondent for unsatisfactory work performance, more specifically, sleeping on duty (Termination Letter). The Applicant's term of employment with the Respondent was around 16 months.
>
> **[13]** I accept the evidence of Mr Fuller and Mr Hagerty that they witnessed the Applicant asleep in a truck in the Respondent's truck yard on 7 April 2022 between 2.30pm and 3.00pm.
>
> **[14]** I reject the evidence of Mr Hunt, Mr Fuller, Mr Buchberger, and Mr Hagerty to the extent that they assert that the Applicant was stood down (by Mr Hagerty) on 7 April 2022 pending arrangements being made for a meeting or discussion to occur in relation to the Applicant sleeping on duty and/or his dismissal.
>
> **[15]** I accept the evidence of the Applicant that he was dismissed (verbally) by Mr Hagerty at or around 3.00pm on 7 April 2022 (i.e. shortly after he was witnessed sleeping on duty). This was subsequently confirmed in the Termination Letter dated 8 April 2022."

[11] At paragraphs [25] – [27] of the Decision, in relation to whether there was a valid reason for dismissal, the Deputy President accepted the evidence of Mr Fuller and Mr Hagerty that they each witnessed the Appellant lying down asleep in the bed of the truck cabin. However, the Deputy President concluded that the real issue was that the Appellant had no reason to be resting up or escaping the rain in the truck. In this regard, the Deputy President found that:

- the Appellant's conduct (in taking shelter in the truck from rain) was contrary to the Respondent's inclement weather procedures;
- there is always work to do indoors if work in the yard cannot be performed due to bad or unsavoury weather;
- there was an undercover table and chairs where employees can rest if they were not working in the yard; and
- the Appellant did not notify his supervisor or any other employee working that day that he was removing himself to the truck.

[12] The Deputy President rejected both parties' evidence as to rainfall data, concluding that such evidence was unreliable and that he was not in a position to make a positive finding either way. Taking into account the evidence before him, the Deputy President concluded there was a valid reason for the Appellant's dismissal, and that this weighed in favour of a finding that the dismissal was not harsh, unjust or unreasonable.

[13] The Deputy President at paragraph [32] concluded that whilst the Appellant was advised of the reason for his dismissal (i.e. sleeping on duty), he was not given an opportunity to respond or raise issues of mitigation before the decision was made to dismiss him. The Deputy President

considered this factor weighed in favour of a finding that the Appellant's dismissal was harsh, unjust and unreasonable.

[14] With respect to whether there was any unreasonable refusal by the Respondent to allow the Appellant to have a support person present to assist at any discussions relating to dismissal in accordance with s. 387(d) of the Act, the Deputy President considered this criterion to be a neutral consideration as there were no substantive or relevant submissions made by either party.

[15] At paragraphs [35] – [37] of the Merits Decision, the Deputy President set out s. 387(e) of the Act and noted that the Appellant was dismissed for reasons of conduct (i.e. sleeping on duty). Taking into account the reference to the Appellant's unsatisfactory work performance in the termination letter, the Deputy President considered this matter to be a neutral consideration.

[16] The Deputy President noted that there was no evidence to suggest that the size of the Respondent's enterprise likely impacted upon the procedures it followed in effecting the Appellant's dismissal and the absence of a dedicated human resources management specialist did not relieve an employer of extending an appropriate degree of courtesy "*even when implementing something as difficult and unpleasant as the termination of a person's employment*".[8] Absent the parties putting forward any substantive or relevant submissions in this regard, the Deputy President concluded that the matters in ss. 387(f) and (g) of the Act were neutral considerations.

[17] In relation to any other relevant matters in determining whether the dismissal was harsh, unjust or unreasonable, the Deputy President considered procedural fairness. In that regard, the Deputy President noted at paragraphs [41] – [43] that procedural fairness concerns the decision-making process followed or steps taken by a decision maker, rather than the actual decision itself.[9]

[18] The Deputy President rejected the Respondent's witness evidence that sought to portray the Appellant's dismissal as a stand down and the evidence that the use of the words "*finish up*" meant finish the shift that day, not finish the employment relationship. To that end, the Deputy President concluded that it was wholly contrary to the words of the termination letter, and the contemporaneous objective documentary and other evidence that was unchallenged during the proceedings. Having regard to the fact that the Appellant was dismissed shortly after he was found to be sleeping on duty, the Deputy President concluded that the Appellant's dismissal evinced a total absence of procedural fairness. This weighed towards a finding that the Appellant's dismissal was harsh, unjust and unreasonable.

[19] Critically for this appeal, the Deputy President concluded that:

> "**[48]** I am satisfied that reinstatement of the Applicant to the Respondent's employ is inappropriate. The Applicant has denied that he was asleep on duty on 7 April 2022. Despite these denials, I have found that he was asleep. The Applicant has shown no contrition or remorse for his conduct. There is clear animosity between the Applicant and the Respondent's management. Had the Respondent effected the Applicant's dismissal in a procedurally fair manner, it is unlikely that I would have found his dismissal unfair. The issue of remedy therefore turns to whether compensation should be awarded, and if so, its quantum."

[20] As we have stated, after a further hearing, the Deputy President issued the Compensation Decision on 3 March 2023 determining that the Respondent pay the Appellant compensation in

the amount $6,043.92 less applicable taxation. An Order[10] to that effect was issued and compliance with the Order was ordered by the Deputy President to be subject to the outcome of this appeal.

Appeal Grounds

[21] The Appellant initially filed a Notice of Appeal on 3 February 2023 advancing five grounds of appeal and later, on 20 February 2023, filed an amended Notice of Appeal including a sixth ground. The Appellant sought, and was granted, permission to rely on the amended Notice of Appeal.[11] The grounds of appeal set out in the amended Notice of Appeal are as follows:

> "1. The Deputy President failed to address a substantial component of the appellant's case on remedy, namely, that reinstatement should be ordered as there had been no loss of trust and confidence as between the appellant and respondent and that there could be a sufficient level of trust and confidence to make the employment relationship viable and productive.
>
> 2. In the alternative to ground 1, the Deputy President failed to take into account a relevant consideration in determining whether to order the appellant's reinstatement, namely, whether there had been a loss of trust and confidence as between the appellant and respondent.
>
> 3. The Deputy President denied the appellant procedural fairness by finding, as a reason for determining not to order reinstatement, that there was 'clear animosity between the appellant and respondent'.
>
> 4. In the alternative to ground 3, the Deputy President made a serious made a significant error of fact in holding that there was clear animosity between the appellant and respondent.
>
> 5. The Deputy President erred in taking into account as a matter militating against reinstatement that had the respondent effected the appellant's case in a procedurally fair way that he would have found the dismissal unfair in circumstances where:
>
> a. the Deputy President failed to address substantial components of the appellant's case on whether his dismissal was unfair, namely:
> i. that the sanction of dismissal was disproportionate to the conduct engaged in by the appellant;
> ii. that the dismissal had had adverse financial impact on the appellant;
>
> b. the Deputy President erred in failing to find that there had not been compliance with s 387(b) by failing to take into account a relevant consideration, namely, that the appellant was not notified of the reason for his dismissal before he was dismissed.
>
> 6. The Deputy President made significant errors of fact in determining that:
>
> a. the appellant had no reason to be resting up or escaping the rain in the truck; and/or
>
> b. the appellant was asleep while on duty."

[22] The Appellant submits that it is in the public interest for the Commission to grant permission to appeal on the basis that:

- the Deputy President constructively failed to exercise his jurisdiction by failing to respond to a substantial and clearly articulated argument[12] that reinstatement would

not be inappropriate because the Respondent had failed to establish that there had been a breakdown of trust and confidence;

- in the alternate, the Deputy President otherwise failed to take into account a relevant consideration as to whether there had been a loss of trust and confidence and the employment relationship could not be viable and productive.[13] This was a matter in which the Respondent bore the persuasive onus and which it made no attempt to discharge;[14]

- the Deputy President made material findings of fact which had not been agitated for by the Respondent without notice to the Appellant;

- the Deputy President's analysis of the unfairness of the dismissal (to the extent these impacted his exercise of the discretion under s. 390 of the Act) was infected by error going to jurisdiction, as he failed to respond to a substantial component of the Appellant's case. Further, the Deputy President misconstrued and misapplied s. 387(b) of the Act and otherwise made significant errors of fact.

[23] Further, the Appellant submits that the Decision manifests an injustice as important aspects of his case were ignored by the Deputy President, and he was otherwise denied procedural fairness. The Appellant contends that the Decision is also disharmonious with decisions of the Full Bench which stress that the issue of "*trust and confidence*" is a relevant (and often determinative) consideration in determining whether reinstatement should be ordered.

[24] In its submissions on the merits of the appeal, the Appellant principally submits that the Deputy President failed to consider a substantial component of the Appellant's case on reinstatement. In relation to ground 1, the Appellant submits that where an administrative decision maker does not respond to a substantial and clearly articulated argument raised by a party, the decision will be attended by jurisdictional error in the form of a constructive failure to exercise jurisdiction.[15] A mere failure, however, to consider evidence or submissions made by a party will not result in jurisdictional error unless the evidence or submissions were "*clearly material*" to the party's claim.[16]

[25] The Appellant contends that reinstatement was not inappropriate and should be ordered on the basis that there was no evidence (or suggestion) that the relationship of trust and confidence between the parties had broken down such that if reinstatement were ordered the employment relationship would not be viable and productive. The Appellant also contends that this was a "*clearly material*" argument and while the question of "*trust and confidence*" is not definitive of whether the Commission should exercise the power to order reinstatement, it will most often be an important criterion bearing on that question.[17]

[26] The totality of the Deputy President's consideration of whether reinstatement was inappropriate was said by the Appellant to be in paragraph [48] of the Merits Decision, where the Deputy President found that the Appellant had been asleep, had shown no contrition or remorse and that there was "*clear animosity*" between the parties. This latter conclusion, which was not the subject of evidence or submissions, is the subject of ground 3 of the appeal. The Deputy President also said that but for the procedural deficiencies in the Respondent effecting the dismissal, he would have found the dismissal to be fair.

[27] It is submitted that no mention is made at paragraph [48] or anywhere else in the Merits Decision of the Appellant's submission about trust and confidence, nor the evidence elicited from Mr Buchberger which was relied on in support of it. Nor is any mention made of the fact that it was the Respondent who bore the onus of establishing that there were sound and rational reasons to assert that the relationship of trust and confidence was irretrievably broken.

[28] Further, the Appellant submits that while it is elementary that the reasons for decision of members of the Commission are not to be parsed with an eye keenly attuned to discerning error,[18] the eyes of the Full Bench on appeal should not be so blinkered as to avoid discerning reasons which fail to consider a submission central to a party's case.[19]

[29] In oral submissions, the Appellant also referred the Full Bench to paragraph [55] of the decision of the Federal Court in *Soliman v University of Technology, Sydney and Another*[20] where it was stated that:

> "Even in the absence of a statutory requirement to provide findings or reasons, a failure to address a submission centrally relevant to the decision being made may similarly found a basis for concluding that that submission has not been taken into account. Such a failure may be exposed in reasons voluntarily provided. And a failure to take into account such a submission may constitute jurisdictional error."

[30] The Appellant contends that the absence of any mention in the Merits Decision of the arguments in relation to whether reinstatement was appropriate is significant, as it allows the drawing of an inference, which it is submitted is the only inference available to be drawn in the circumstances, that the Deputy President did not consider this part of the Appellant's case.[21]

[31] In summary, it is submitted that the Deputy President failed to engage with a substantial component of the Appellant's case and constructively failed to exercise his jurisdiction. It is in the public interest for permission to appeal be granted where a decision is vitiated by jurisdictional error[22] and the Deputy President's conclusion on the issue of reinstatement should be set aside for this reason.

[32] Ground 2 concerns the Deputy President's failure to consider the relevant matter of whether there was rational or sound evidence that the relationship of trust and confidence had broken down. In oral submissions, the Appellant noted that ground 2 was an alternate to ground 1 and submitted that if ground 1 is upheld by the Full Bench, ground 2 does not take the matter further.[23]

[33] The Appellant contends that there was positive evidence available to the Deputy President that an alternative to dismissal would have been contemplated by the Respondent and, thus, the relationship could plainly have continued in a viable and productive fashion. The Appellant asserts that the Deputy President failed to consider a relevant matter that vitiated the exercise of his discretion under s. 390. The Appellant asserts that a failure to consider such a material matter is disharmonious with settled authority and warrants a grant of permission.

[34] The Appellant addressed grounds 3 and 4 in relation to the finding of animosity between the parties, together. The Appellant submits that the requirements of procedural fairness can be shaped by the particular circumstances and conduct of a case.[24] Generally, a decision maker is not obliged to expose their reasoning process or provisional views.[25] However, fairness may

require the disclosure of such matters where they relate to a critical issue or factor, or where they do not obviously follow from an evaluation of the evidence or where the matter or issue has not otherwise been raised in the proceedings.[26]

[35] In oral submissions, the Appellant asserted that if a matter was going to be taken into account as material, and the matter does not appear an obvious one that would naturally follow from the evidence or the submissions of the parties, procedural fairness requires the decision maker to bring that matter to the parties' attention.

[36] In the present case, the Appellant submitted that there was no evidence or contention that there was "*animosity*" between the parties and the Respondent made no submission that "*animosity*" was a factor militating against reinstatement (noting it made no submission at all that reinstatement was inappropriate). Pointing to the evidence of Mr Buchberger, it is submitted that had the Appellant contacted him after he was peremptorily dismissed by Mr Hagerty on 7 April 2022, there was nothing to suggest that the Appellant could not have been given a warning and continued in his employment.[27] In finding at paragraph [48] of the Decision that there was "*clear animosity*" between the parties, the Appellant submits that the Deputy President denied the Appellant procedural fairness. Such a finding was not one which would have been reasonably apparent to the Appellant nor one which was raised at the hearing.

[37] Further, the Appellant submits that the denial of procedural fairness surmounted the threshold of "*materiality*" described in *Nathanson v Minister for Home Affairs*[28] as requiring proof by an applicant of a "*realistic possibility that a decision-making process could have resulted in a different outcome*" because had the matter been drawn to the attention of the parties, the Appellant could have pointed to Mr Buchberger's evidence and otherwise submitted that there was no evidence of any extant animosity.

[38] The Appellant contends that in concluding that there was animosity between the parties and relying on this as a factor that militated against reinstatement, the Deputy President denied the Appellant procedural fairness and his decision to not order reinstatement was infected by this further jurisdictional error. In the alternative, the Appellant submits that the conclusion there was "*clear animosity*" between the parties was a significant error of fact for the purposes of s. 400(2) of the Act. It was an error of fact as there was no evidence of any such animosity, and the error was significant as it was a substantive factor in the Deputy President's conclusion that reinstatement was inappropriate.

[39] Grounds 5 and 6 relate to unfairness. In relation to these grounds the Appellant contends that the sole basis upon which the Deputy President found that his dismissal was unfair was because it was effected with "*a total absence of procedural fairness*".[29] At paragraph [48], the Deputy President said that had the dismissal been effected in a procedurally fair way, it was unlikely he would have found the dismissal to be unfair.

[40] The Appellant submits that these grounds of appeal are agitated only to the extent that the Deputy President's conclusions on unfairness influenced his conclusions on remedy and having regard to strictures imposed by s. 400(2) of the Act.[30] These grounds of appeal are directed to challenging aspects of the decision-making process leading to the ultimate conclusion of unfairness but not the conclusion of unfairness itself (which can only be challenged by cross-appeal).

[41] With respect to disproportionality and the personal impact of the dismissal, the Appellant submits that it is trite that a dismissal may be "*harsh*" even if there is a valid reason for dismissal if the sanction of dismissal is too severe a consequence in the circumstances or in light of the financial and personal effects of the dismissal for the employee.[31]

[42] The Appellant asserts that if there was a valid reason for dismissal, the sanction of dismissal was too harsh a consequence in light of his otherwise unblemished employment record.[32] The Appellant relies on the adverse economic effects of the dismissal in support of a finding of harshness,[33] and submits that these latter matters were detailed in the Appellant's evidence and not challenged in cross-examination.[34]

[43] In further support of there being unfairness, the Appellant contends that his argument that the dismissal was harsh was also a substantial component of his case which was not considered by the Deputy President. According to the Appellant, this was a clearly material argument directed to the general ground under s. 387(h). The Deputy President's failure to consider it was a failure to respond to a clearly articulated and substantial argument that involved a further constructive failure to exercise jurisdiction. In the alternate, the Appellant submits that the Deputy President failed to take into account a relevant consideration in determining what remedy should be ordered by failing to consider matters bearing on harshness, in assessing the reasons for dismissal which bore on the appropriateness of relief to be granted.

[44] The Appellant points out that the Deputy President found that the Respondent failed to comply with s. 387(c) of the Act by not giving the Appellant an opportunity to respond to the (valid) reason for his dismissal prior to deciding to dismiss him as indicated at paragraph [32] of the Decision. However, the Deputy President found that the Appellant had been advised of the reason for his dismissal and that, presumably, there had been compliance with s. 387(b). The Appellant asserts that the finding evinces a failure to properly construe and apply s. 387(b) and is discordant with the analysis of the Full Bench in *Bartlett v Ingleburn Bus Services Pty Ltd*,[35] which explained that s. 387(b) requires that an employee be notified of the reason for dismissal before a decision has been made to effect the dismissal. In the event that notification occurs after a decision has been made, any attempt to afford an employee an opportunity to respond and seek to change the employer's mind will be illusory and, the Appellant submitted, the requirements of s. 387(b) will not have been complied with.

[45] Mr Hagerty immediately dismissed the Appellant after he '*thought'* or '*believed'* the Appellant had been sleeping in the truck. Mr Hagerty did not notify the Appellant of the reason for dismissal before any definite decision had been made to dismiss him. In summary, the Appellant asserts that the Deputy President therefore erred in failing to find that there had been compliance with s. 387(b).

[46] With respect to ground 6, the Appellant referred to paragraph [26] of the Decision where the Deputy President found that there was a valid reason for the Appellant's dismissal on the basis that he had no reason to be resting up or escaping the rain in the truck. In written submissions, the Appellant drew attention to four matters relied on by the Deputy President to ground this conclusion, contending that none of them were properly supported by the evidence. The Appellant submits that this indicates the conclusion that there was "*no reason*" for the Appellant to be resting or escaping the rain in the truck was a significant error of fact.

[47] In relation to the four matters the Appellant submits as follows:

> "• *First,* there was no evidence that the respondent had an inclement weather procedure or that any such procedure prohibited a worker sheltering from the rain in a truck. There was no evidence, for instance, that the respondent had published such a procedure or that Mr Steed had been trained on it. Mr Steed's evidence in cross-examination was that the procedure when it rained was 'to take shelter'.[36] It was never suggested to him that there was a procedure which required him to take shelter at any particular location.
>
> • *Second*, there was no evidence that there was always indoor work to be performed as the Deputy President asserted or that there had been indoor work available for Mr Steed to perform when he sought shelter in the truck.
>
> • *Third*, the fact that there was a 'hut' where employees could take a break was of little moment, given that Mr Steed's unchallenged evidence was that that area was drenched and, in any event, not protected from the rain.[37]
>
> • *Fourth*, there was no evidence that there was any obligation on Mr Steed to notify his supervisor or a fellow employee that he was sheltering in the truck from 2PM. It was not suggested to him that this was the case in cross-examination. Further, his unchallenged evidence was that he was working by himself in 'yard 5'[38] There was, in other words, no-one to notify."

[48] Taking these matters into account, the Appellant contends that the Deputy President made a significant error of fact in finding that there was no reason for the Appellant to be resting up or escaping the rain in the truck at paragraph [26].

[49] To the extent that the Deputy President may have determined at paragraph [32] and paragraph [48] that there was a valid reason for dismissal based on the Appellant sleeping in the truck, the Appellant submits that the finding was vitiated by a significant error of fact and failure to take into account material matters.

[50] The Appellant also contends that there was no proper basis for the Deputy President to find (as he apparently did at paragraph [32] and paragraph [48]) that there was a valid reason for dismissal because the Appellant was "*sleeping on duty*". In support of the Appellant's submissions that "*duty*" had ceased at 2:30PM on 7 April 2022, the Appellant notes that:

> "At [13] to the Decision, the Deputy President accepted the evidence of Mr Fuller and Mr Hagerty that they had witnessed Mr Steed asleep in the truck between 2:30-3:00PM. Mr Fuller's evidence in his witness statement was that he had seen Mr Steed asleep at 2:45PM. Mr Hagerty's evidence in his witness statement was that he had been contacted by Mr Fuller at 2:48PM and told Mr Steed was observed to be asleep. Sometime after this, Mr Hagerty attended the truck and said he observed Mr Steed asleep. The earliest evidence of *the time* at which Mr Steed had been asleep in the truck was, therefore, at 2:45PM. Whilst Mr Steed denied he had been asleep, it was not suggested to him that he had been asleep before 2:30PM. That was critical, given that Mr Fuller's evidence was that he had "knocked the boys off around 2:30" and before he had gone to check on Mr Steed. In other words, the work day had ceased at 2:30PM."

Respondent's Submissions

[51] The crux of the Respondent's submissions is that reinstatement should not be granted on the basis that:

- the Respondent is unable to provide the Appellant reinstatement as a full time Truck Driver as the Appellant must perform 50% of his duties as a Yard Hand;

- there has been a significant loss of trust in the Appellant by not only Management but also work colleagues. A reinstatement would have little merit and chance of being successful;

- serious consideration would need to be given to the monetary impact on the Respondent;

- a possible redundancy or retrenchment of current employees cannot be ruled out as all current employment positions are filled, with no current employment vacancies;

- reinstatement of the Appellant would result in a worse remuneration package than what the Appellant enjoys at his current employment.

[52] The Respondent submits that the conduct of the Appellant on 7 April 2022, leading to his dismissal demonstrated the Appellant's lack of care and diligence, showed no respect to the Respondent's policies, his work colleagues and reporting to supervisors. The Respondent further submits that the Appellant's quality of work is below what the Respondent can expect from a Yard Personnel on yard duties in a team-oriented work environment.

[53] With respect to loss of trust and confidence, the Respondent contends that the Appellant could not be seen as a trustworthy employee following the incident, as it took more than one decision by the Appellant to result in the established facts, which led to a valid reason for dismissal.

[54] Relying on the evidence given by the Appellant's direct supervisor, Mr Hagerty in the hearing before the Deputy President, the Respondent submits that trust and confidence in the Appellant has broken down.[39]

Consideration

[55] The appeal raises questions of general importance and significance to the Commission's unfair dismissal jurisdiction, in relation to the exercise of the discretion with respect to remedy for an unfair dismissal and the need to afford procedural fairness to parties in unfair dismissal proceedings. We are satisfied that it is in the public interest to grant permission to appeal and we do so. For reasons which will be apparent, it is only necessary that we address grounds 1, 3 and 6.

[56] Ground 1 is founded on the contention that the Deputy President failed to address a substantial component of the Respondent's case in relation to remedy. We agree with this contention. The Appellant at all times sought reinstatement, and this was a central aspect of his case. In the proceedings at first instance, the Respondent did not submit that it had lost trust and confidence in the Appellant and placed no evidence before the Deputy President in this regard. Nor did the Respondent challenge the Appellant's evidence on this point. Further, the Respondent's Director, Mr Buchberger, made several concessions in cross-examination including that:

- There were options other than the summary dismissal of the Appellant;[40]
- He had not drawn any issues to the Appellant's attention during his employment;[41] and
- Based on the Appellant's prior conduct and length of service there was nothing to suggest that if he was given a warning, the Appellant would not have continued his employment with the Respondent.[42]

[57] In closing submissions, the Appellant's then representative pointed out the deficiencies in the Respondent's evidence and the concessions made by Mr Buchberger. The submissions of the Appellant were not addressed in the Merits Decision. We note that in the first instance hearing, Mr Buchberger attempted to qualify his evidence by asserting that the Appellant did have an opportunity to explain his conduct. However, the Deputy President's finding of a lack of procedural fairness is not challenged in the appeal and we agree with that finding notwithstanding the lack of clarity in the Merits Decision resulting from the Deputy President dealing with s. 387(b) and (c) together.

[58] If the Deputy President found that the requirements of s. 387(b) were met, then that conclusion was erroneous as the advice of the reason for dismissal was, on the evidence, not provided in advance. The Deputy President correctly concluded that the Appellant was summarily dismissed without being afforded an opportunity to respond to the reason for dismissal. However, given our conclusions on other appeal grounds it is not necessary to determine this point.

[59] Relevant to ground 1 of the appeal is that the Deputy President's conclusion in relation to the appropriateness of reinstatement was confined to a single paragraph of the Merits Decision. Other than noting in a single sentence that the Appellant sought reinstatement or, in the alternative, compensation, the Deputy President did not consider the Appellant's evidence or submissions, or the concessions made by Mr Buchberger which, as we have noted, were highlighted by the Appellant in closing submissions. We are satisfied that the Deputy President did not have regard for the evidence or the Appellant's submissions on the appropriateness of reinstatement and that this was a constructive failure to exercise jurisdiction.

[60] Section 390(3) of the Act provides that the Commission must not order compensation unless satisfied that reinstatement of the person is inappropriate and the Commission considers that an order for payment of compensation is appropriate in all the circumstances of the case. A finding as to whether reinstatement is inappropriate is foundational to determining remedy and an award of compensation cannot be made without a finding that reinstatement is inappropriate.

[61] While we accept that s. 390(3) confers a wide discretion,[43] we are satisfied that the exercise of that discretion by the Deputy President miscarried because of his failure to consider evidence and submissions that were central to whether reinstatement was inappropriate. The Deputy President's consideration of whether reinstatement was inappropriate was confined to a single paragraph of the Merits Decision which expressed a conclusion without identifying the basis for that conclusion. Accordingly, we uphold appeal ground 1. We also observe that even

if this error was not jurisdictional, we would have found that it was a significant error of fact, for the purposes of s. 400(2) of the Act, as contended in appeal ground 2.

[62] Ground 3 is concerned with the Deputy President's finding that there was clear animosity between the Appellant and the Respondent's management and asserts that the finding was made in a way that denied the Appellant procedural fairness. The contention that underpins ground 3 is that there was no evidence before the Deputy President to support the finding of animosity and the Respondent made no submission that animosity between the parties militated against reinstatement.

[63] The Commission is bound to act judicially and to afford parties procedural fairness.[44] The fundamental principle as set out by the High Court in *Kioa v West*[45] is that natural justice requires that a person know the substance of the case against him or her and be given the opportunity to respond to adverse material that is credible, relevant or significant.[46] It has also been held that while a decision maker is generally not required to expose his or her reasoning process or provisional views for comment by the person affected, there may be circumstances where fairness requires prior disclosure of such matters, such as where they relate to a critical issue or factor, or where they do not follow from an obvious or natural evaluation of the evidence.[47]

[64] The Decision of a Full Bench of the Commission in *Steve Newton v Toll Transport Pty Ltd*[48] (*Newton*) is illustrative of the requirement to afford procedural fairness in circumstances where a member of the Commission forms a view about a matter that is critical to the case advanced by a party or does not naturally follow from an evaluation of the evidence or has not otherwise been raised in proceedings. *Newton* also involved an appeal from a decision of the Deputy President which included a finding that the Applicant (Mr Newton) had engaged in dishonest conduct in the investigation of the incident which led to his dismissal and in his evidence to the Commission, and that he did so for a "*sinister purpose*".[49] On the basis of his finding of dishonesty on the part of Mr Newton, including in his evidence to the Commission, the Deputy President found that Mr Newton had not been unfairly dismissed.

[65] In the appeal, Mr Newton contended *inter alia* that it is not appropriate for the Commission to itself formulate or identify valid reasons for dismissal that are not expressly relied on or advanced by the employer during the course of a hearing.[50] The Full Bench rejected this submission and held that the Commission is not confined to the reason advanced by the employer (either at the time of the dismissal or during the course of the subsequent hearing) and that a valid reason for dismissal can be any valid reason underpinned by the evidence to the Commission.[51] Significantly, the Full Bench stated:

> "[66] We accept that if the Commission determines that there is a valid reason for dismissal which is not expressly advanced by the employer then it must act judicially and accord the parties procedural fairness…"

[66] After noting that the issue of dishonesty in giving evidence to the Commission was irrelevant to whether there was a valid reason for dismissal in the context of s. 387(a), the Full Bench turned to consider whether Mr Newton was afforded procedural fairness in relation to the finding of dishonesty made by the Deputy President. The Full Bench referred to several cases including the judgment of the High Court in *Kuhl v Zurich Financial Services Australia Ltd*,[52] where the plurality held that a party-witness should not be criticised for deliberately

withholding the truth unless reasons are given for concluding that this has occurred, and the party-witness has been given an opportunity to deal with the criticism. The plurality in *Kuhl* also said that in the absence of any challenge from the cross-examiner to the frankness and completeness of the plaintiff's evidence, it was incumbent on the trial judge to make the challenge, if his conclusion that the plaintiff had not been frank was to play a role in a decision adverse to the plaintiff. The plurality further observed that if the criticism did not occur to the judge until after the plaintiff had left the box or the hearing had been concluded, and before the reserved judgement was given, it remained necessary to either recall the plaintiff or to have no regard to that aspect of the plaintiff's evidence.[53]

[67] The Full Bench went on to find that Mr Newton was not afforded procedural fairness in respect of the Deputy President's findings of dishonesty and the imputed motive for the dishonesty, and that a finding of the type made by the Deputy President carries with it an obligation to accord the relevant party procedural fairness. The Full Bench concluded "*absent the matter being squarely put by the cross-examiner it was incumbent on the Deputy President to make the challenge himself*".

[68] The principle to be derived from *Newton* and the cases cited by the Full Bench, is that where a finding on a critical issue or factor adverse to a party is being considered by a Member of the Commission hearing a matter, and the finding does not follow from the evidence or relates to a contention that was not raised in the hearing of the matter, the Member conducting the hearing should put the proposition to the parties and the basis for it, so that the affected party has an opportunity to respond. This is particularly so when the finding is foundational to a conclusion about a matter central to the case advanced by the party. A failure to do so will generally amount to a denial of procedural fairness.

[69] In *Newton*, the question of whether there was a valid reason for dismissal, and the extent of Mr Newton's honesty were central to his case. In the present matter, as we have observed, reinstatement was central to the Appellant's case at first instance. The finding that the Appellant had displayed animosity was a significant factor in the Deputy President's conclusion that reinstatement was inappropriate.

[70] In the present case, there is no indication that the Deputy President raised the matter with the parties, either during or after the hearing. Further, it would not have been reasonably apparent to the Appellant that this finding was in contemplation. To the contrary, the Appellant gave evidence – albeit subjective – that he could maintain a productive and safe working relationship, had good rapport with management and remained hopeful that he could return to the Respondent's employment, and that evidence was not contradicted, and nor was the Appellant cross-examined in relation to it.

[71] Having considered all the material that was before the Deputy President at the hearing, we are unable to discern the evidentiary basis for the Deputy President's finding of "*clear animosity*". There was no submission to that effect advanced by the Respondent. Nor was there any evidence elicited in the hearing below from Mr Buchberger which could be relied upon in support of the finding of "*clear animosity*".

[72] If the Deputy President formed a view during the hearing that the Appellant was displaying animosity towards the Respondent, and that a finding of animosity could directly

impact his claim for reinstatement (a significant issue in his case), the Deputy President should have put the Appellant on notice that this finding was in his contemplation and the basis for it. The requirement to do so was heightened by the fact that the Respondent was not represented by a lawyer or paid agent, and the Respondent's case was conducted by Mr Buchberger, a Director and the person who decided to dismiss the Appellant. If the view of the Deputy President was formed after the hearing, the parties should have been advised and the Appellant given an opportunity to be heard in relation to whether such a finding should have been made.

[73] We accept the submission for the Appellant that had the Deputy President drawn this matter to the parties' attention, the Appellant could have pointed to Mr Buchberger's evidence and otherwise have submitted that there was no extant animosity. If the Deputy President had taken this step the Respondent would also have been on notice about the state of its evidentiary case in relation to reinstatement and would have had an opportunity to address any deficiencies. Given that the Deputy President concluded that he had insufficient evidence from both parties to calculate compensation, and that a further hearing should be held to resolve this matter, the decision in relation to remedy could have been entirely deferred so that both parties were afforded an opportunity to deal with these issues.

[74] Before us the Respondent contended that there has been a significant loss of trust in the Appellant by not only management but also work colleagues. It was further contended before us that reinstatement would have little merit. Both of those contentions may be correct. However, none of this was put to the Deputy President.

[75] The Appellant was not afforded procedural fairness in relation to a significant aspect of his case, and we therefore uphold appeal ground 3. Notwithstanding that it was advanced in the alternative, we are also of the view that the manner in which the Deputy President dealt with the issue of remedy involved a significant error of fact for the purposes of s. 400(2) of the Act on the basis of the finding that the Appellant displayed animosity to the Respondent's management and that the evidence of the Appellant in relation to why reinstatement was not inappropriate, was not considered. If necessary, we would have upheld appeal ground 4.

[76] Ground 6 is concerned with the Deputy President's finding that there was a valid reason for the Appellant's dismissal on the basis that he had no reason to be resting up or escaping the rain in the truck. In our view, this finding is unsound. While the Deputy President accepted Mr Fuller's evidence at [13] of the Merits Decision that the Appellant had been asleep in the truck at 2:45pm, he failed to take in account Mr Fuller's evidence in cross-examination that Mr Fuller had in fact "*knocked the boys off around 2:30*".[54] In our view, on the evidence before the Deputy President, there was no proper basis for him to find that there was a valid reason for dismissal because the Appellant was 'sleeping on duty' where this was *after* the Respondent had determined to shut its site and cease work at 2:30pm. We consider this a significant error of fact that casts doubt on whether a valid reason for dismissal existed, and as such, we uphold ground 6.

Conclusion and Order

[77] The Appellant initially sought that the Merits Decision be quashed and that the Full Bench rehear the matter on the question of remedy and at the rehearing, determine to reinstate the Appellant and make orders for continuity of employment and service. At the hearing of the

appeal, the Appellant sought that the Merits Decision and the Compensation Decision be quashed. The Appellant also accepted that if error is found and the Respondent sought to adduce further evidence on the question of remedy, that is a course that the Full Bench may consider itself or remit the matter to another Member of the Commission to deal with. The Respondent confirmed that it would seek to adduce further evidence if the appeal was upheld, and reinstatement was in contemplation.

[78] Having considered the submissions in relation to the disposition of the appeal, we:

1. Grant permission to appeal.

2. Uphold grounds 1, 3 and 6 of the appeal.

3. Quash the Merits Decision and Compensation Decision.

[79] An Order[55] to that effect will issue with this decision. The application for an unfair dismissal remedy is remitted to Commissioner Johns for redetermination.

VICE PRESIDENT

Appearances:

P Boncardo of Counsel for the Appellant.
H Buchberger for the Respondent.

Hearing details:

2023.
By Microsoft Teams:
May 24.

Printed by authority of the Commonwealth Government Printer

<PR765769>

---

[1] [2023] FWC 15.

[2] [2023] FWC 533.

[3] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]-[46].

[4] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24] – [27].

[5] *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [43], Buchanan J (with whom Marshall and Cowdroy JJ agreed).

[6] *Gelagotis v Esso Australia Pty Ltd T/A Esso* [2018] FWCFB 6092 at [43].

[7] Ibid at [43].

[8] *Sykes v Heatly Pty Ltd t/a Heatly Sports* PR914149 (AIRC, Grainger C) at [21].

[9] *Telstra Corporation v Streeter* [2008] AIRCFB 15 at [27].

[10] PR760019.

[11] Transcript of Proceeding in C2023/557 on 24 May 2023 at PN29 – PN46.

[12] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 (Gummow and Callinan JJ); *Tonab Investments Pty Ltd v Optima Developments Pty Ltd* (2015) 90 NSWLR 268 at [121] (Leeming JA).

[13] *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198 at [28]; *Moszko v Simplot Australia Pty Ltd* (2021) 310 IR 373 at [63].

[14] The Respondent bore the persuasive onus (and likely the evidentiary onus) of establishing a loss of trust and confidence: *Nguyen* at [28]. See also *Jain v Infosys Limited* [2014] FWCFB 5595 at [35]-[37]; *Adaszko v Mitford Investments Pty Ltd* [2021] FWCFB 719 at [28].

[15] *Ming v DPP* [2022] NSWCA 209 at [12]-[18] (Kirk JA).

[16] *Day v SAS Trustee Corporation* [2021] NSWCA 71 at [37] (Meagher JA).

[17] *Nguyen* at [27]. See also *Tenix Defence Pty Ltd v Galea* [2003] AIRC 11 at [7]-[8].

[18] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

[19] *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at [57] (Flick J).

[20] [2012] FCAFC 146.

[21] *Petch v Director of Public Prosecutions (NSW)* [2022] NSWCA at [49] (Basten JA).

[22] *Appeal by the CFMEU* [2014] FWCFB 2709 at [182].

[23] Transcript of Proceeding in C2023/557 on 24 May 2023 at PN89-PN90.

[24] *Re Minister for Immigration and Multicultural Affairs & Anor; Ex parte Miah* (2001) 206 CLR 57 at 109 (Gaudron and Gummow JJ).

[25] *Commissioner of ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591.

[26] *Habib v Director-General of Security* (2009) 175 FCR 441 at [73].

[27] Transcript of Proceeding in U2022/4290 on 14 November 2022 at PN912.

[28] (2022) 403 ALR 398 at [33] (Kiefel CJ, Keane and Gleeson JJ).

[29] [2023] FWC 15 at [42]-[43].

[30] Appeals on questions of fact can only be made to the extent the appeal on the ground the decision involved a significant error of fact: *Knowles v BlueScope Steel Ltd* [2021] FCAFC 32 at [22], [29] and [48] (Flick J); *BP Refinery (Kwinana) Pty Ltd v Tracey* (2020) 276 FCR 9 at [22] (which described the provision as a basal pre-condition to an exercise of power by the Full Bench to correct an error of fact).

[31] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465 (McHugh and Gummow JJ); *B, C and D v Australian Postal Corporation* (2013) 238 IR 1 at [53] (Lawler VP and Cribb C).

[32] Appellant's Outline of Submissions at [81]-[84].

[33] Appellant's Outline of Submissions at [89]-[92].

[34] Exhibit A2 – Steed Reply Statement at [19]-[20].

[35] (2020) 303 IR 1 at [19].

[36] Transcript of Proceeding in U2022/4290 on 14 November 2022 at PN118.

[37] Ibid at PN119-130.

[38] Transcript of Proceeding in U2022/4290 on 14 November 2022 at PN134.

[39] Transcript of Proceeding in U2022/4290 on 14 November 2022 at PN679, PN747-PN749.

[40] Ibid at PN909.

[41] Ibid at PN910.

[42] Ibid at PN911-912.

[43] *Moszko v Simplot Australia Pty Ltd* [2021] at [45] FWCFB 6046; (2021) 310 IR 373 at 389.

[44] *Edwards v Justice Giudice* [1999] FCA 1836 at [44].

[45] (1985) CLR 550.

[46] Ibid at 629 per Brennan J.

[47] *Habib v Director-General of Security* (2009) 175 FCR 411 at 429.

[48] [2021] FWCFB 3457.

[49] Ibid at [103].

[50] *Newton* at [62].

[51] *Newton* at [65]

[52] (2011) 243 CLR 361.

[53] Ibid at [74] – [75].

[54] Transcript of Proceeding in U2022/4290 on 14 November 2022 at PN324.

[55] PR765770.