



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Darren Gardner

v

Piacentini & Son Pty Ltd
(U2023/9309)

COMMISSIONER LIM

PERTH, 19 MARCH 2024

Application for an unfair dismissal remedy

[1] On 26 September 2023, Mr Darren Gardner applied to the Fair Work Commission alleging that he was unfairly dismissed from his employment with Piacentini & Son Pty Ltd (**Piacentini** or **Respondent**).

[2] Mr Gardner's employment as a Production Supervisor with the Respondent commenced on 26 January 2022 and ended by way of dismissal for misconduct on 14 September 2023. The specific reason for dismissal is the Respondent found that Mr Gardner was asleep at work on 7 August and 8 August 2023, and was uncontactable by two-way radio. Mr Gardner denies all the allegations and contends that he was unfairly dismissed pursuant to s 385 of the *Fair Work Act 2009* (Cth) (**Act**).

[3] I conducted case management conferences on 16 November 2023 and 21 November 2023. Directions for the filing of material were subsequently issued. A hearing was conducted on 29 January 2024. Mr Gardner represented himself. Mr Peter Robertson of the Australian Resources and Energy Employer Association represented the Respondent.

[4] Prior to the hearing of the matter my chambers constructed a paginated court book consisting of submissions and evidence of the parties. References to evidence are by way of the relevant page number in the court book.

[5] Having considered the relevant evidence and submissions of the parties, I find that Mr Gardner's dismissal was harsh, unjust or unreasonable. I find that he was unfairly dismissed.

[6] My detailed reasons follow.

2. Evidence

[7] Mr Gardner was the sole witness for his case. Mr Gardner was employed with the Respondent as a Production Supervisor. Mr Gardner initially worked at the Respondent's Gingin operations. When the Gingin operations started to wind down, Mr Gardner was offered

a position at the Respondent's operations at Cataby mine on 10 January 2023.¹ I found Mr Gardner's evidence to be consistent and credible.

[8] The Respondent called the following witnesses for their case:

- (a) Daniel Brazier: Mr Brazier was Mr Gardner's direct supervisor. Mr Brazier has been a supervisor at Cataby mine for approximately six to seven months and was an operator for four years prior to that.² Mr Brazier's evidence contradicted Mr Gardner's, and in some respects also contradicted Mr Rowe's and Ms Jenkins'. Where there were differences between Mr Brazier's evidence and other witnesses, I generally preferred the evidence of other witnesses.
- (b) Peter Rowe: Mr Rowe is a truck driver with the Respondent. I found Mr Rowe to be an honest and open witness.
- (c) Paige Greenwood: Ms Greenwood is a HSE Advisor with the Respondent. Ms Greenwood acted as Mr Gardner's support person at a show cause meeting on 11 September 2023. I found Ms Greenwood to be an honest and credible witness.
- (d) Sam Kelham: Mr Kelham is a Superintendent with the Respondent. I found Mr Kelham gave his evidence openly.
- (e) Danni Jenkins: Ms Jenkins is a truck driver with the Respondent. Mr Brazier is also her supervisor. I found that Ms Jenkins gave her evidence honestly.

2.1 Events of 7 August 2023

[9] Mr Gardner's dismissal concerns the events of 7 August and 8 August 2023. The Respondent says that Mr Gardner was caught sleeping on the job twice, and had his two-way radio turned onto the wrong channel on 7 August 2023.

[10] Mr Gardner's account of what occurred on 7 August 2023 can be summarised from his written evidence and cross-examination as follows:

- (a) Mr Gardner was working the night shift. Part of his duties was to conduct inspections of assigned mine pits.
- (b) This task required him to fill out a pit inspection report. Mr Gardner's pit inspection report from 7 August 2023 was provided as evidence.³
- (c) Mr Gardner's pit inspection report from 7 August 2023 identifies that he conducted three inspections at 6:15pm, 11:30pm and 4:00am. Mr Gardner explained that he completed a start of shift inspection at 6:15pm, a mid-shift inspection at 11:30pm and an end of shift inspection at 04:00am.⁴ Mr Gardner's evidence is that these were not company set times, and that he wrote each time when he started his drive around for each inspection.⁵

- (d) Between midnight to 12:30am, Mr Gardner parked his vehicle near the subsoil dump to fill out his pit inspection report.⁶ He was approximately 15-20 metres from the road. During this time, he observed four trucks on the site circuit that would have passed him every seven to eight minutes.⁷
- (e) It normally takes Mr Gardner around 30 minutes to fill out a pit inspection report. Mr Gardner takes this much time due to the length of the report and the level of detail he puts into the report. Mr Gardner was also told when he first started with the Respondent to put as much information in as possible into reports.⁸
- (f) Whilst Mr Gardner was filling in the report, he had the ignition and his headlights on. He also had the vehicle internal light on.⁹
- (g) Mr Gardner had his back to the driver's side window and was leaning on his diary to fill out the pit inspection report.¹⁰ He fills out reports this way as leaning on the steering wheel sets the horn off, and he is left-handed.¹¹
- (h) At some point Mr Brazier pulled up alongside Mr Gardner's vehicle. Mr Gardner says that he noticed Mr Brazier's headlights swinging across his windscreen as Mr Brazier pulled up. However, he was focused on an item he was filling out on the pit inspection form and finished that before turning around and winding down the window to see what Mr Brazier wanted.¹²
- (i) With regards to his two-way radio being on the wrong channel, the usual channel for communications is channel 13. Mr Gardner's two-way radio was on channel 11. Mr Gardner's evidence is that this was a mistake caused by him accidentally bumping the radio. Mr Gardner explained there are two ways where this can happen – either bumping the handpiece, or due to how the cord runs across the inside of the vehicle, the cord can pull against the dial on the radio.¹³
- (j) Mr Gardner's account is that channel 13 can be a busy channel, but on night shift it is usually very quiet. There may be chatter on the radio at the start of the shift, but that dies off over the duration of the shift.¹⁴ It would not be unusual at 11:00pm for channel 13 to be silent for an hour or two.¹⁵
- (k) This has happened on prior occasions in both the light vehicles and trucks, including to different employees.¹⁶

[11] Mr Brazier's evidence can be summarised as follows:

- (a) He had attempted to contact Mr Gardner on his two-way radio, but there was no response. Mr Brazier spoke with Mr Rowe, who informed Mr Brazier that he had seen Mr Gardner parked up on the subsoil.¹⁷
- (b) Mr Gardner drove up to the subsoil at 9:30pm and saw Mr Gardner's vehicle.¹⁸

- (c) When he pulled up alongside Mr Gardner's vehicle, Mr Gardner was lying back in the driver's seat, which was fully reclined back.¹⁹ Mr Gardner sat up and looked startled to see him.²⁰

[12] Mr Rowe's evidence is that he observed Mr Gardner's car parked up on the subsoil at approximately 2:00am.²¹ Mr Rowe was doing rotations from the digger to the chip head, with one rotation taking approximately 15 minutes. Mr Rowe observed Mr Gardner's car parked in the same spot over three to four rotations.²²

[13] Mr Rowe said that he filled out his incident report within 24 to 48 hours of the 7 August 2023 and provided it to Mr Brazier.²³ The incident report that was tendered into evidence states that it is Mr Rowe's second statement. Mr Rowe explained during the hearing that he had filled out a first statement, and he was unsure where it had gone, so he had to fill out a second one. He could not recall the date or time that he completed the second incident report.

2.2 Events of 8 August 2023

[14] Mr Gardner's account of what occurred on 8 August 2023 is as follows:

- (a) Mr Gardner had finished assisting with a pump recovery. He and a co-worker, Matthew Beanland, went to the North Pit crib room so that Mr Beanland could make himself a coffee.²⁴
- (b) Mr Gardner was in the crib room for approximately 15 minutes.²⁵
- (c) He did not recall hearing Mr Brazier calling for him on the radio in the crib room.²⁶

[15] Mr Brazier's account of what occurred on 8 August is:

- (a) He had attempted to contact Mr Gardner over the two-way radio with no success.²⁷ At roughly 1:00am, he saw Mr Gardner's vehicle in the crib room car park. When he entered the crib room, he saw Mr Gardner leaning back on his chair, hands folded on his chest, legs out and eyes closed.²⁸
- (b) He called Mr Gardner's name a few times, but Mr Gardner did not respond.²⁹ Mr Gardner eventually woke up at Mr Brazier's prompting.³⁰
- (c) Mr Brazier said to Mr Gardner that if he is fatigued, he should raise it. Mr Gardner's response was that he was just resting his eyes. Mr Brazier asked Mr Gardner to go back out into the pit to keep an eye on things.³¹

[16] During cross-examination Mr Brazier was asked why he did not ask Mr Gardner to fill out a fatigue risk assessment if he thought Mr Gardner was fatigued. Mr Brazier's response was that he was new to the role of supervisor at the time, so was not sure of the paperwork that needed to be filled out.³² Mr Brazier was further questioned on whether fatigue would have been a concern for him regardless of him being a supervisor. Mr Brazier's evidence is that fatigue on site is generally downplayed, as losing a worker such as a leading hand or supervisor

is a “big deal” on night shift as the Respondent would have to shut down parts of the site operations.³³

[17] Ms Jenkins’ evidence is:

- (a) Mr Gardner was seated at a table with his head resting on his arms.³⁴
- (b) Mr Brazier walked into the crib room. When Mr Brazier entered the crib room and started talking, Mr Gardner raised his head. Mr Brazier asked Mr Gardner to head out to the north pit to complete pit inspections.³⁵ This was a civil and simple exchange.³⁶
- (c) That she has slept in the crib room during standby.
- (d) She could not recall how long Mr Gardner was in the crib room for and could not recall Mr Beanland being in the crib room.

2.3 Investigation

[18] Mr Rowe gave evidence that Mr Brazier approached him about making a statement about Mr Gardner.³⁷ Ms Jenkins gave similar evidence that either Mr Brazier or Mr Kelham approached her about making a statement.³⁸

[19] Mr Rowe gave his incident report to Mr Brazier.³⁹ Ms Jenkins said that she filled out her statement on 8 August, and then handed the statement to Mr Brazier.⁴⁰ Both gave evidence that they were not interviewed by HR or any decision-maker as part of any investigation.⁴¹

[20] Mr Brazier finished his work swing on either the 8 or 9 August. He then went on seven days R&R leave. When he returned to work around 15 or 16 August, his evidence is that he spoke with Mr Kelham about the two incidents with Mr Gardner. Mr Kelham told Mr Brazier to make a file note on the Respondent’s system.⁴² Mr Kelham’s evidence is that he then advised HR on site and the project manager.⁴³ Mr Brazier provided an incident report to HR on 24 August 2023.⁴⁴

[21] On 6 September 2023, Mr Gardner attended a meeting with Mr Kelham and Mr Johann Coetzee, HR Advisor. Mr Gardner was informed that he was being stood down and was informed of the allegations against him. Mr Gardner’s evidence is that at this meeting, he requested that the dashcam footage from the vehicle he drive be retrieved, as it would exonerate him from the allegations.⁴⁵ Mr Gardner says that Mr Kelham told him that the footage had not been retrieved yet, but that it could. Mr Kelham could not recall this.⁴⁶

[22] Mr Kelham’s evidence of this meeting is that Mr Gardner denied he had been sleeping on the job. Mr Kelham’s account is that he said to Mr Gardner the following:⁴⁷

- (a) Mr Gardner was struggling in the role and there had been multiple discussions in the past about his performance.
- (b) Mr Gardner had been performance managed during his time at the Respondent’s Gingin operations.

- (c) There was an opportunity to step out of his current role and take a dozer operator role. His remuneration would go down slightly, but it would come with no responsibility and Mr Kelham would make sure he progressed to a production digger operator after six months so that he could gain the experience and knowledge on how to run a pit efficiently. This would be with the view of working him back up to a leading hand role.

[23] Mr Kelham's evidence is that Mr Gardner was keen on the proposal.⁴⁸ This was not put to Mr Gardner in cross-examination. Mr Kelham's further evidence is that he asked Mr Coetzee to draw up the proposal for Darren to sign.⁴⁹

[24] On 7 September 2023, Mr Coetzee sent Mr Gardner a show cause letter that provided:

“Dear Darren

SHOW CAUSE

As you are aware, an investigation has been underway following your involvement in serious misconduct that occurred on 07/08/2023 and 08/08/2023.

At the conclusion of the investigation, it has been substantiated that your direct actions were in breach of the following Policies and Procedures.

- Failing to comply with Piacentini & Son Code of Conduct
- Failing to comply with Piacentini & Son Health, Safety and Environmental Policies and Procedures

As discussed on Wednesday 6th September 2023, you have been stood down from your position.

It has been confirmed by witnesses that you:

- On 07.08.2023 after numerous unsuccessful attempts to get hold of you on the two-way radio due to issues being experienced by Operators on your shift, you were found parked up in your vehicle on the subsoil dump asleep in your vehicle, and when asked what channel your two-way radio was on, you responded that it was on channel 11 when you know that channel 13 is used for two-way radio communication on the north side of the site.
- On 08.08.2023 after numerous unsuccessful attempts to get hold of you, you were found asleep at the table in the north go line whilst your crew were out in the pit.

You are required to show cause to the undersigned at a meeting to be held at 10:00am on Monday 11th September 2023 at Cataby, and explain why disciplinary action, up to and including termination of your employment should not be taken against you.

In your response, it is requested that you address the breaches of Company Policies as well as any other reasons or mitigating circumstances that you feel may be relevant.

The Employee Assistance Program (EAP) is available and we encourage you to contact them on [redacted] should you wish to use their services at this time.

If you have any questions, you are welcome to contact me directly on [redacted].

Yours sincerely,

Johann Coetzee
HR Advisor – Cataby”

[25] At the show cause meeting on 11 September 2023, Ms Greenwood attended as Mr Gardner’s support person. Mr Johann Coetzee, HR Advisor, attended for the Respondent.

[26] Mr Gardner’s evidence is that at this meeting he again requested that the dashcam footage be retrieved.

[27] Ms Greenwood’s evidence of the show cause meeting is as follows:

- (a) Mr Coetzee started the meeting by stating that Mr Gardner had been stood down due to being found sleeping on the job and not being contactable. Mr Coetzee stated that the Respondent had concluded its investigation and that Darren had been brought in to give his side of events.
- (b) With regards to 7 August 2023, Mr Gardner stated that he was parked up in his vehicle near a subsoil stockpile completing his pit inspection report. Mr Gardner said that he recalled that he had the interior light on, and that it may have looked like he was sleeping due to being left-handed and having the pit inspection form down on his lap while he filled it out. Mr Gardner also explained that he must have had the two-way radio turned down and that is why he didn’t hear the radio call.
- (c) With regards to 8 August 2023, Mr Gardner stated that he had been dealing with a pump and had to wait for Mr Brazier to get to the north mine as he had been in Pit 1. Mr Gardner said that he had leaned back in his chair while seated at the crib room, but that he was definitely not asleep.
- (d) Mr Coetzee thanked Mr Gardner for coming in and informed Mr Gardner that they would be in touch in the next day or so to let him know the outcome.
- (e) Mr Coetzee asked Ms Greenwood if she could pull the dashcam footage for the light vehicle Mr Gardner operated on 7 August 2023.
- (f) Ms Greenwood pulled the footage from the vehicle approximately one hour after the interview was finished. The footage only went back to the 14 August 2023. Ms Greenwood informed Mr Coetzee of this.

[28] The Respondent provided a file note of the show cause meeting that was drafted by Mr Coetzee.⁵⁰ The file note provides as follows:

“Description of Discussion:

A meeting was held on 11th September 2023 at 10:00am for Darren to be provided an opportunity to show cause why disciplinary action, up to and including termination of his employment should not be taken with regards to the two incidents below.

Darren requested a Support Person and Paige Greenwood agreed to be his Support Person.

Darren also asked whether he may record the meeting and this request was denied by myself. I advised Darren that he was welcome to take notes of the meeting as he had a notepad and pen with him.

Incident 07.08.23

Dan and several operators unsuccessfully tried several times to get hold of Darren on the two-way radio. One of the operators called Dan, and advised him that Darren was parked up on the subsoil dump. Dan then proceeded to drive where Darren was, and found him exactly where the operator had said that he was, parked up on the subsoil dump at approximately 11:30pm.

Dan pulled up to Darren's vehicle with the headlights of the vehicle shining into the cab of Darren's vehicle. Dan saw Darren lying back asleep in the driver's seat of the vehicle.

Darren would down his window and told Dan that he was waiting to pick the unit operators up.

When Dan asked Darren what channel he was on, he responded that he was on channel 11, when the correct channel to have been on for the put was channel 13.

Incident 08.08.23

Dan unsuccessfully tried several times to get hold of Darren on the two-way radio and so he went to look for him.

Dan found Darren at approximately 1:00am lying back in a chair, asleep, in the north go line crib. When Dan woke Darren up, Darren claimed to be "resting his eyes". Dan then instructed Darren to head to the pit.

Employee's Response:

Incident 07.08.23

Darren stated that he was not parked up on the subsoil dump but rather at the intersection of the subsoil dump and main haul road.

He further stated that he was looking down and busy completing the "Pit Inspection Sheet" that was placed on his lap when Dan pulled up in his vehicle.

Darren stated that he didn't know why the two-way radio wasn't on channel 13. He further stated that they change channels depending where they are on site.

He stated that one of the operators may have accidentally bumped the channel or he may have accidentally bumped the channel and changed it.

Incident 08.08.23

Darren stated that he had to sort the pump at MU20 in pit 9 and so he called Dan at approximately 9:30pm and asked if he could assist with supervising the crew in the pit.

Darren sorted out the pump issue by approximately 9:45pm at which time he resumed his Leading Hand duties in the pit.

Darren denied being found asleep in the crib room by Dan, that Dan was unable to get hold of him on the two-way radio.

Summary:

Darren denied the allegations made against him and disputed the witness statement made by Dan as being untrue.

Conclusion:

I advised Darren that his statements made this morning would be taken into consideration when determining the outcome and that he will be advised in writing by tomorrow, Tuesday, 12th September 2023.”

[29] Mr Coetzee was not called to provide evidence or verify the contents of the file note. I understand that the Respondent no longer employs Mr Coetzee. The file note was also not put to Mr Gardner or Ms Greenwood during the hearing.

[30] However, the file note largely aligns with Ms Greenwood’s evidence. I accept the file note insofar as it is corroborated by Ms Greenwood. I accept Mr Gardner’s evidence that he requested that the dashcam footage from 7 August 2023 be retrieved. I accept the entirety of Ms Greenwood’s evidence as to what occurred during the show cause meeting as well as her evidence that she was the one to look up the dashcam footage after the show cause meeting.

[31] On 14 September 2023, Mr Coetzee informed Mr Gardner via email that they were terminating his employment.⁵¹ The termination letter stated:

“Termination of Employment

This letter serves as formal notification following incidents where you failed to comply with Company Policies and Policies [sic], and subsequent meeting you attended on 11th September 2023, where you were offered a Support Person to discuss the incidents.

On 7th August 2023, after numerous unsuccessful attempts by the Production Supervisor to get hold of you on the two-way radio due to issues being experienced by Operators on your shift, you were found by the Production Supervisor parked up on the subsoil dump, lying back and asleep in the driver’s seat of the light vehicle that you were driving. The Production Supervisor was advised by an Operator that you were parked up on the subsoil dump and that is exactly where you were found. When you were asked by the Production Supervisor what channel your two-way radio was on, you responded that it was on channel 11 when you know that channel 13 is used for two-way radio communication on the north side of the site.

On 8th August 2023, after numerous unsuccessful attempts to get hold of you, you were found asleep by the Production Supervisor at the table in the north go line crib whilst your crew were out in the pit. You were also witnessed asleep by an Operator who was on break in the crib.

The Company has taken the following into consideration in reaching the decision to terminate your employment.

- Breach of the following Policies and Procedures
 - Piacentini & Son Code of Conduct
 - Piacentini & Son Health Safety and Environmental Policies and Procedures

- There is a pattern of behaviour that impacts the company’s ability to trust that you are doing what is required of you, and trust that you speak the truth when asked.
- You have shown no accountability and no remorse, and thus offer no pathway for Piacentini to expect that this behaviour won’t happen again.
- Piacentini believes that you, through your actions, seriously breached your obligations and responsibilities under your employment contract.

Your employment will end immediately. Based on your length of service, your notice period is 4 weeks. In lieu of receiving that notice, you will be paid 4 weeks’ notice.

...

Johann Coetzee
HR Advisor – Cataby”

[32] Mr Gardner wrote back to Mr Coetzee that same day requesting the dashcam footage from 7 August 2023. Mr Coetzee informed Mr Gardner that the dashcam footage was not used in making the decision to terminate his employment, as the footage can only be stored for two to three weeks.⁵²

3. Submissions and consideration

[33] There is no contest, and I find, that:

- (a) Mr Gardner had completed the minimum employment period in s 383 of the Act and was covered by the *Piacentini & Son Employee Agreement 2018*. Mr Gardner was thus protected from unfair dismissal pursuant to s 382 of the Act.
- (b) Mr Gardner’s unfair dismissal application was made within the time prescribed in s 394(2) of the Act; and
- (c) The Respondent was not a small-business employer within the meaning of the Act and so the Small Business Fair Dismissal Code did not apply.

[34] Section 385 of the Act provides that:

“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.”

[35] Section 387 of the Act requires me to take into account the below matters in determining whether Mr Gardner’s dismissal was harsh unjust or unreasonable:

“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.”

3.1 Section 387(a) – was there a valid reason for the dismissal related to Mr Gardner’s capacity or conduct?

[36] The Respondent submits that for two nights in a row, Mr Gardner was found to be uncontactable by radio and asleep at work. The Respondent also submits that their evidence should be preferred, despite discrepancies between the witnesses. Mr Gardner refutes the allegations entirely.

[37] I make the following findings regarding 7 August 2023:

- (a) Mr Gardner conducting three inspections of the pit over the course of his shift is consistent with the practice outlined by Mr Brazier and Mr Kelham.⁵³
- (b) There was some contention by Mr Kelham as to how Mr Gardner could have conducted the first inspection at 6:15pm given the length of time that pre-starts take, however the difference is effectively minutes, and not material to either person’s credibility.
- (c) I accept Mr Gardner’s evidence that he parked up near the subsoil after midnight.
- (d) I accept Mr Gardner’s evidence regarding his posture in the vehicle and that he was filling out the pit inspection report with his back towards the driver’s side window.

- (e) I find that Mr Gardner was parked up on the subsoil in his vehicle for approximately 30 to 40 minutes.
- (f) I do not accept Mr Kelham's evidence that filling out a pit inspection report is a "tick and flick" exercise.⁵⁴ An examination of the actual pit inspection report Mr Gardner filled out on 7 August 2023 shows that the report spans four pages, and that Mr Gardner wrote comments for most of the items he was required to check. However, I do find it unusual that it would have taken Mr Gardner as long as it did for him to fill out the whole form.
- (g) I accept Mr Gardner's evidence as to how he was positioned in his vehicle while he was filling out the pit inspection report.
- (h) I accept Mr Gardner's evidence that he was not asleep in his vehicle.
- (i) I accept Mr Gardner's evidence that his two-way radio being turned to channel 11 rather than channel 13 was not deliberate. Ms Jenkins corroborated Mr Gardner's evidence that there is a history of the two-way radios in vehicles being accidentally bumped onto other radio channels.⁵⁵ Mr Brazier and Mr Rowe also corroborated Mr Gardner's evidence that on nightshift it is not unusual for long stretches of radio silence on night shift.⁵⁶ It is therefore understandable that Mr Gardner did not realise that the two-way radio was on the wrong channel.

[38] With regards to the events of 8 August 2023, I make the following findings:

- (a) I accept Mr Gardner's account that he was in the crib room for a short amount of time.
- (b) I accept Ms Jenkins' evidence that Mr Gardner was seated at a table with his head resting on his arms and that he did not rouse until Mr Brazier started speaking.
- (c) On balance, I find that Mr Gardner fell asleep in the crib room.

[39] I find that Mr Gardner did engage in misconduct, but that his behaviour did not rise to the bar of a valid reason for dismissal.

3.2 Section 387(b) and (c) – notification of valid reason and opportunity to respond

[40] I find that the Respondent did notify Mr Gardner of the reason why they were considering terminating his employment and that he was given an opportunity to speak at the show cause meeting on 11 September 2023. However, there were considerable issues with how the Respondent conducted the investigation that I will cover with regards to s 387(h).

3.3 Section 387(d) – any unreasonable refusal by the Respondent to allow Mr Gardner a support person

[41] Mr Gardner submits that he did not have a support person for the meeting on 6 September 2023, but did not give any evidence that he requested one. The evidence does seem to suggest however that Mr Gardner was not given advance notice of what the meeting would be about.

[42] Ms Greenwood attended as a support person for the show cause meeting on 11 September 2023.

3.4 Section 387(e) – warnings concerning performance

[43] Mr Gardner received a prior written warning for driving through a stop sign. Mr Gardner did not contest this warning.

[44] Mr Kelham's evidence seemed to suggest that Mr Gardner has a history of performance issues. Mr Kelham gave evidence that Mr Gardner was struggling in the role at Cataby,⁵⁷ which is why he offered Mr Gardner a different role at the meeting on 6 September 2023. I find that Mr Kelham did have concerns about Mr Gardner's performance but did not give Mr Gardner any warnings prior to 6 September 2023.

[45] Mr Kelham also gave evidence that Mr Gardner was performance managed at Gingin. However, Mr Kelham's understanding of this was from the project manager at the Gingin operations, not from Mr Kelham's direct experience. Mr Gardner disputes that he was performance managed.⁵⁸ The Respondent did not lead any direct evidence to support an assertion that Mr Gardner was performance managed at Gingin, nor was it put to him in cross-examination. Based on the lack of evidence, I cannot accept the Respondent's contention that Mr Gardner was performance managed at the Respondent's Gingin site.

3.5 Section 387(f) and (g) – size of the Respondent's enterprise and whether the absence of dedicated human resource management specialists or enterprise would be likely to impact on the procedures followed

[46] The Respondent submits that at Cataby there is only one HR Advisor. The Respondent also submits that the investigation was affected by Mr Gardner's roster.

[47] The Respondent further submits that they had only recently acquired a new HR Manager, which contributed to the delays in the investigation.

[48] The Respondent did not provide any evidence to support these submissions.

[49] What is clear from the evidence is that throughout the process there was a dedicated HR Advisor, Mr Coatzee. There was therefore no absence of dedicated human resources management specialists. I also note the Respondent's Form F3 states that the Respondent employed approximately 971 employees at the time Mr Gardner was dismissed.⁵⁹ I find that the size of the Respondent's enterprise did not impact on the procedures followed.

3.6 Section 387(h) – any other matters the Commission considers relevant

[50] The Respondent submits that at the meeting on 6 September 2023, Mr Coetzee advised Mr Gardner of the allegations; that he would be stood down on full pay; that the precise allegations would be put to him in writing; and that he would be required to attend a show cause meeting on 11 September 2023. The Respondent further submits that Mr Gardner was given the opportunity to "tell his side of the story" at the show cause meeting on 11 September 2023.⁶⁰

[51] Mr Gardner submits that there were deficiencies in the Respondent's investigation. He notes how long the investigation took and the fact that the Respondent did not retrieve the dashcam footage from 7 August 2023 until it was too late. Mr Gardner submits he was not given an opportunity to discuss his dismissal.

[52] During Ms Greenwood's re-examination, the Respondent sought to lead evidence that there was a fire on site in August 2023, and that contributed to Mr Brazier's delay in reporting the incidents from 7 and 8 August 2023. I noted at the time that that line of questioning should have been put to Mr Brazier, not Ms Greenwood.⁶¹ I make no findings as to how this event could have affected the investigation.

[53] With regards to how the Respondent conducted the investigation, I make the following findings:

- (a) Mr Gardner was first informed of the allegations and the investigation when he was stood down on 6 September 2023. I accept Mr Gardner's evidence that at this meeting he requested that the dashcam footage from 7 August 2023 be pulled.
- (b) Mr Gardner received a letter from Mr Coetzee on 7 September 2023 informing him that the allegations had been substantiated. This is despite the Respondent not putting the precise allegations to Mr Gardner in writing beforehand, contrary to what the Respondent submits. Mr Gardner did not have the opportunity to provide a substantive response to the investigation prior to the Respondent reaching a finding. The Respondent also made its finding without making the effort to retrieve the dashcam footage from 7 August 2023.
- (c) As part of the investigation, Mr Coetzee did not interview Mr Rowe and Ms Jenkins. Mr Rowe's and Ms Jenkins' written evidence was sought and received by Mr Brazier, who was a witness himself. There was also no explanation as to what happened to Mr Rowe's first incident report.
- (d) The show cause meeting was the first opportunity Mr Gardner had to properly respond to the precise allegations. However the Respondent had already made a decision as to the allegations by that point.
- (e) By Ms Greenwood's evidence, vehicle dashcam footage is stored for four weeks. If the Respondent had retrieved the dashcam footage from Mr Gardner's vehicle when Mr Brazier made his incident report on 24 August 2023, or before 4 September 2023, there would be footage that conclusively proves or disproves the allegations regarding Mr Gardner sleeping on 7 August 2023.

[54] The Respondent also led evidence regarding Mr Kelham offering Mr Gardner a demotion to a dozer operator role, though did not make any submissions as to how that should factor into my decision. I accept that Mr Kelham offered Mr Gardner this role at the meeting on 6 September 2023. I also accept Mr Gardner's uncontested evidence that at the show cause meeting on 11 September 2023, Mr Coetzee told him that the dozer operator role was no longer on the table.⁶²

3.7 *Is the Commission satisfied that Mr Gardner's dismissal was harsh, unjust or unreasonable?*

[55] I am satisfied that Mr Gardner's dismissal was harsh in that his behaviour did not meet the bar for a valid reason for dismissal. Mr Gardner should have received a warning for falling asleep in the crib room on 8 August 2023, and he should have been questioned and provided additional support regarding how long it takes him to fill out his reports.

[56] I am also satisfied Mr Gardner's dismissal was unjust given the significant deficiencies in how the Respondent conducted the investigation into the events of 7 and 8 August 2023. In particular, it is a poor reflection on the integrity of the investigation that the Respondent substantiated the allegations before Mr Gardner even received the detail of the allegations in writing, let alone before he had the opportunity to respond to them.

[57] I also find that the Respondent's failure to interview Mr Rowe and Ms Jenkins, and the failure to pull the dashcam footage from 7 August 2023 in time despite receiving Mr Brazier's incident report on 24 August 2023, affected the outcome of the investigation. The issues with the way the investigation was conducted are so significant that even if I had found there was a valid reason for Mr Gardner's dismissal, I would still be satisfied on balance that Mr Gardner was unfairly dismissed.

4. Remedy

[58] I directed both parties to provide evidence and submissions on the question of remedy as well as on the merits of Mr Gardner's unfair dismissal application. However, neither party provided enough material for me to determine the issue of remedy.

[59] Accordingly, I will hear the parties separately on the question of remedy and will issue directions to this effect. The parties are also directed to attend a member assisted conciliation with Deputy President O'Keeffe to attempt to resolve the question of remedy by agreement.



COMMISSIONER

Appearances:

D Gardner, Applicant

P Robertson for the Respondent

Hearing details:

2024.
Perth.
January 29.

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¹ Digital Court Book (**DCB**), page 30.

² Transcript, 29 January 2024, PN256.

³ DCB, page 134.

⁴ Transcript, 29 January 2024, PN75.

⁵ Ibid, PN148.

⁶ Ibid, PN170.

⁷ DCB, page 16.

⁸ Transcript, 29 January 2024, PN70.

⁹ Ibid, PN101-PN103.

¹⁰ Ibid, PN107-PN111.

¹¹ Ibid, PN108.

¹² Ibid, PN120.

¹³ Ibid, PN40, PN52-PN56.

¹⁴ Ibid, PN80.

¹⁵ Ibid, PN84-PN85.

¹⁶ Ibid, PN59.

¹⁷ DCB, page 99.

¹⁸ Transcript, 29 January 2024, PN233.

¹⁹ Ibid, PN243.

²⁰ Ibid, PN242.

²¹ DCB, page 101.

²² Transcript, 29 January 2024, PN384.

²³ Ibid, PN376.

²⁴ Ibid, PN174.

²⁵ Ibid, PN175.

²⁶ Ibid, PN91.

²⁷ DCB, page 100.

²⁸ Transcript, 29 January 2024, PN251; DCB page 100.

²⁹ Ibid, PN251-252.

³⁰ Ibid, PN252.

³¹ Ibid, PN253.

³² Ibid, PN289.

³³ Ibid, PN308-309.

³⁴ Ibid, PN551.

³⁵ Ibid, PN554.

- ³⁶ Ibid, PN555.
- ³⁷ Ibid, PN374.
- ³⁸ Ibid, PN574-PN576.
- ³⁹ Ibid, PN378-PN379.
- ⁴⁰ Ibid, PN580-PN581.
- ⁴¹ Ibid, PN582; PN380-PN383.
- ⁴² Ibid, PN249.
- ⁴³ DCB, page 111.
- ⁴⁴ Ibid, page 65 at 4e.
- ⁴⁵ Ibid, page 16.
- ⁴⁶ Transcript, 29 January 2024, PN486.
- ⁴⁷ DCB, page 111.
- ⁴⁸ Ibid.
- ⁴⁹ Ibid.
- ⁵⁰ Ibid, page 87.
- ⁵¹ Ibid, page 7.
- ⁵² Ibid, page 38.
- ⁵³ Transcript, 29 January 2024, PN269; PN466.
- ⁵⁴ Ibid, PN465.
- ⁵⁵ Ibid, PN561.
- ⁵⁶ Ibid, PN274-PN276, PN388.
- ⁵⁷ Ibid, PN455.
- ⁵⁸ Ibid, PN487-PN489.
- ⁵⁹ DCB, page 46.
- ⁶⁰ Ibid, pages 78-79.
- ⁶¹ Transcript, 29 January 2024, PN430-PN441.
- ⁶² DCB, page 23.