

[2024] FWC 2154

The attached document replaces the document previously issued with the above code on 13 August 2024.

The following edits have been made:

- A person mentioned in the Decision has been de-identified.
- The first initial for a person named in the Appearances.
- Other minor amendments to formatting of footnotes.

Dated 16 August 2024.





# DECISION

*Fair Work Act 2009*  
s 394—Unfair dismissal

**Dylan Macnish**

v

**Virgin Airlines Australia Pty Ltd**  
(U2024/1853)

COMMISSIONER LIM

PERTH, 13 AUGUST 2024

*Application for an unfair dismissal remedy – whether there was a valid reason for dismissal – no valid reason – harsh in the circumstances – reinstatement ordered.*

## **1. What is this decision about?**

[1] Mr Dylan Macnish is a former Cabin Crew Member for Virgin Airlines Australia Pty Ltd (**Virgin**). This decision is about Virgin’s decision to dismiss Mr Macnish after he had a glass of prosecco at the Christmas party for Virgin staff on Sunday 17 December 2023, and then signed up for a red-eye flight that commenced 7.5 hours after he had the glass of prosecco.

[2] Virgin’s position is that it has a zero-tolerance approach to the consumption of alcohol and there is a clear rule that Cabin Crew Members are not allowed to consume alcohol within eight hours of commencing duties. Virgin says that Mr Macnish knew about this rule and knowingly breached it. Virgin asserts that Mr Macnish’s behaviour is a sufficient valid reason that justifies his dismissal, but that if I am not convinced, Virgin also relies on what it says are prior issues with Mr Macnish and Virgin’s fatigue management policy. Specifically, Virgin says that Mr Macnish breached the fatigue management policy by having sex after he requested that a rostered duty be rescheduled due to fatigue.

[3] Mr Macnish says that Virgin’s policies on the consumption of alcohol before commencing duties were not clearly communicated or set out. This is due to Virgin’s confusing management of directives on drugs and alcohol across its policy documents. Further, that he took several reasonable steps to ascertain whether he could sign up for the red-eye shift including consulting with the relevant Cabin Crew Manager, checking Virgin’s Drug and Alcohol Management Program Manual and breathalysing himself. Mr Macnish also contests Virgin’s reliance on prior issues relating to Virgin’s fatigue management policy.

[4] I held a hearing to determine the matter on Tuesday 21 and Wednesday 22 May 2024. I granted permission to Mr T Dixon of Counsel to represent Mr Macnish and to Mr N Ellery of Counsel to represent Virgin.

[5] Both parties provided a wealth of evidence and documentation in support of their cases. I do not recite every detail. However, I have considered all the relevant evidence, and I also acknowledge the significance of the evidence and events to the people involved.

[6] Having considered the relevant evidence and submissions of the parties, I find that there was no valid reason for Mr Macnish's dismissal. Even if I had been satisfied that there was a valid reason, it was still harsh in the circumstances and thus unfair. I find that the appropriate remedy is reinstatement.

[7] My detailed reasons follow.

## 2. The witnesses

[8] Mr Macnish gave evidence in support of his case and called the following additional witness:

- Mr Kyron Timbs: Mr Timbs is a Cabin Crew Manager. He has held this position since March 2024 and was a Cabin Crew Member prior to this, starting in 2021. Mr Timbs was upfront about the fact that he used to be in an intimate relationship with Mr Macnish and that they remain friends. Virgin submitted that I should place no weight on Mr Timbs' evidence because of this.<sup>1</sup> I have noted Mr Timbs' friendship with Mr Macnish but found overall that Mr Timbs gave his evidence openly and honestly. Mr Timbs gave evidence that up until Mr Macnish's dismissal, he had understood Virgin's '8-hour rule' to be a guideline and not a hard rule.

[9] Virgin called the following witnesses in support of their case:

- Ms Lydia Ridge: Ms Ridge is employed as Leader Crew Culture – Cabin Crew. She has held this position since Thursday 14 October 2021. She has worked for Virgin for over 9 years, including as a Cabin Crew Manager, Cabin Crew Member and ad hoc Non-Technical Skills Instructor.<sup>2</sup>
- Ms Danielle Lokys: Ms Lokys is a Leader Crew Culture – Cabin Crew. She has held this position since March 2020 and has worked for Virgin for over 12 years. From Monday 25 December 2023 to Thursday 25 January 2024, she was Acting Crew Culture Manager.<sup>3</sup>
- Ms Bianca Solis: Ms Solis is a Crew Culture Manager – Inflight, a position she has held since Wednesday 19 May 2021. Ms Solis was not cross-examined.
- Ms Jodie Calvert: Ms Calvert is a Manager – Cabin Crew Training, a position she has held since September 2011. She has worked for Virgin for over 22 years. Ms Calvert did not have any interactions with Mr Macnish; her evidence was directed to how Virgin's policy manuals are structured and what they contain. I found Ms Calvert's evidence helpful in understanding Virgin's policy manuals, but not probative in terms of the timeline of events.

- Ms Vanessa Scott: Ms Scott is a Crew Culture Manager – Cabin Crew. She has held this position since January 2023 and has over 20 years’ experience working at Virgin. Ms Scott was not involved in Mr Macnish’s disciplinary proceedings.
- Dr Kelly Bofkin: Dr Bofkin is Virgin’s Group Medical Officer. Dr Bofkin is a highly qualified medical officer. I accept her expertise and her evidence regarding the effects of alcohol on the human body and the safety implications in the aviation industry. However, Dr Bofkin did not have any interactions with Mr Macnish, and so her evidence had limited probative value in determining contested events.
- Ms Georgia Colson: Ms Colson is a Cabin Crew Manager and ad hoc instructor. Ms Colson was an instructor during Mr Macnish’s introductory training. She has been a Virgin employee since 2012.
- Ms Amanda McGregor: Ms McGregor is a Cabin Crew Instructor based in Perth. Ms McGregor was the lead instructor during Mr Macnish’s introductory training. She has worked for Virgin since 2004.
- Mr Karl Harrison-Frederick:<sup>4</sup> Mr Harrison-Frederick is a Cabin Crew Manager and has worked for Virgin for just over two years. Mr Harrison-Frederick did not have any relevant interactions with Mr Macnish and his evidence was limited to an interaction between Mr Timbs and Ms Scott.

### 3. Relevant documents

#### 3.1 The CASA Regulations

[10] Virgin is regulated by the Civil Aviation Safety Authority (**CASA**). Relevantly, Virgin must follow *Civil Aviation Safety Regulations 1998 (Cth) (CASA Regulations)*. The CASA Regulations relevant to this matter are as follows:

[11] Regulation 99.030 (Who must develop and maintain a DAMP): Virgin must have a ‘Drug and Alcohol Management Plan’.

[12] Regulation 91.520(2) (Crew members to be fit for duty): A crew member of an aircraft contravenes this regulation if they carry out a duty for the flight and either consumes alcohol at any time in the eight hours prior to when the flight begins; or, if at the time they carry out the duty, they have a blood alcohol content (**BAC**) of more than 0.00%.

#### 3.2 The DAMP Manual

[13] There are three Virgin policy documents at play in this matter. The first is ‘Volume SSM6: Drug and Alcohol Management Program’ (**DAMP Manual**), which applies to the Virgin Australia entities.<sup>5</sup> The purpose of the DAMP Manual is to “*consolidate the policy and processes relating to the management of alcohol and other drugs in the workplace.*”<sup>6</sup>

[14] The Drug and Alcohol Management Policy forms part of the DAMP,<sup>7</sup> and is explained in the DAMP Manual as follows:<sup>8</sup>

### **P.3 Drug and Alcohol Management Policy**

The Virgin Australia Group is committed to ensuring the health and safety of our employees, contractors, guests and the general public. Ensuring our team members are 'fit for work' is essential to our obligation of ensuring work is conducted safely. The presence of alcohol and other drugs in a team member's system represents a real risk to the safety of our people and guests, well to the safe operation and reputation of our organisation.

The Drug and Alcohol Management Policy (Policy) is part of the Drug and Alcohol Management Program (DAMP), which is managed in conjunction with Virgin Australia Group's regulatory obligations in Australia and New Zealand and within our international operations.

The purpose of this Policy is to ensure that all team members understand their obligations in respect to managing alcohol and other drugs and the interaction with their employment obligations in and about the workplace. This Policy also provides a framework for education, testing, rehabilitation and self-referral, and potential subsequent actions arising from testing for alcohol and other drugs.

Team members will not present for work, undertake or perform any work, or be available for work (e.g. be on call with the possibility of being required to attend the workplace) for the Virgin Australia Group with alcohol or other drugs present in their system above the limits prescribed in the DAMP.

All team members are required to comply with this Policy whilst at work or involved in work-related activities. This means that this Policy applies to all team members during the course of their employment or work, or all contractors in the course of their engagement, with the Virgin Australia Group, including:

- In the workplace, during and after normal working hours
- In connection with work, even if it occurs outside normal working hours
- During work activities and at work-related events attended in a team member's capacity to represent the Virgin Australia Group.

The Policy is to be applied in conjunction with the Code of Conduct, Volume SSM6: *Drug and Alcohol Management Program* and all relevant Safety policies.

[15] Relevant to this dispute, the DAMP Manual says the following about fitness for work:<sup>9</sup>

#### **0.3 Fitness for Duty and Work**

Team members are responsible for ensuring that they do not work or undertake work-related activities for Virgin Australia when they have:

1. One or more of the specified drugs in their system at or above the cut-off levels in the relevant Australian/New Zealand standards.
2. A Breath Alcohol Content (BAC) equal to or above the equivalent of 0.02 g of alcohol per 210 L of exhaled breath (0.02% BAC\*\*).

Team members must consider how alcohol and other drugs consumption while not at work and 'off duty' can potentially have an adverse effect on a person's fitness for duty when they present at work.

Team members are not permitted to consume alcohol and/or drugs while working and/or in Virgin Australia uniform (regardless of their duty status), except for the consumption of alcohol in accordance with the Policy.

Team members shall not possess any illicit drugs while at work or while engaged in any work-related activity.

Team members shall not sell, supply, or distribute any illicit or prescription medication or drugs while at work or while engaged in any work-related activity. Team members may only possess or take prescription drugs while at work or while engaged in any work-related activity in accordance with the Policy.

Team members shall not share or provide any personal medication to other team members for their use.

### **0.3.1 Work-related activities**

'Work' includes actual work, presenting for work, being available for work (i.e. rostered stand-by duty or operational equivalent) or undertaking a duty directly connected to work (i.e. a positioning or 'paxing' sector and business related functions/events), even if it occurs outside normal working hours.

'Work-related activities' include working, being at work and any occupational, educational, commercial or other company endorsed activity, regardless of location.

Wearing an ASIC or overseas equivalent and/or Virgin Australia identification is considered part of the Virgin Australia uniform, and alcohol or other drugs must not be consumed while wearing these.

### **0.3.2 Duty Travel**

Team members who are on Duty Travel and have completed their duties for the day and are not considered available for work are permitted to consume alcohol subject to the following conditions:

- There is no reasonable expectation of having to perform work or work related activities within 8 hours or within the time frame stipulated in the relevant operation manual, whichever is the greater
- There is no reasonable expectation of having to be available for work (i.e. rostered stand-by duty or operational equivalent) within 8 hours or within the time frame stipulated in the relevant operation manual, whichever is the greater
- It is not generally obvious to a casual observer that the team member is an employee or contractor of Virgin Australia.

### **0.3.3 Staff Travel**

Personal staff travel is not considered a work-related activity. However, team members are required to conduct themselves in an appropriate manner and in compliance with the Virgin Australia Code of Conduct and Staff Travel Policy.

#### **0.3.4 Layovers**

Team members who are on layovers for work purposes or as part of their work duties are permitted to consume alcohol subject to the following conditions:

- There is no reasonable expectation of having to perform work or work related duties within 8 hours or within the time frame stipulated in the relevant operating manual, whichever is the greater
- There is no reasonable expectation of having to be available for work (e.g. being on call with the possibility of being required to attend the workplace or undertaking a duty directly connected to work) within 8 hours or within the time frame stipulated in the relevant operating manual, whichever is the greater
- It is not generally obvious to a casual observer that the team member is an employee of contractor of Virgin.

...

#### **04. Drug-Free at Work**

Virgin Australia team members shall not work or undertake work-related activities (see the definition of ‘work’ and ‘work-related’ in Section R.5 – *Terms and Definitions* and Section 0.3.1 – *Work-related Activities*) with the presence of alcohol or other drugs in their system in breach of the Policy and the relevant Drug and Alcohol Management (DAMP) provisions.

When testing at work has produced a verified positive test result (alcohol or other drugs above the thresholds set within the standards and no satisfactory explanation provided at medical review) this will result in an internal investigation, with the outcome determined on a case-by-case basis and in line with our Safety Culture Policy and specifically the ‘Just’ element, under which:

- Individual behaviour is managed in line with organisational values
- Errors will not result in disciplinary action
- Reckless or unjustifiable risks will not be accepted.

Where an employee is found to have breached this Policy the breach may be considered serious misconduct which, other than in exceptional circumstances, is likely to result in termination of employment.

Where a contractor has been found to have breached this Policy the breach will, other than in exceptional circumstances, result in their engagement being terminated immediately.

[16] The DAMP Manual also provides the following section on self-referral:

#### **P.2 Safety Culture**

...



#### **4. Report**

Virgin Australia actively supports and encourages an atmosphere where all team members report information about hazards or safety concerns. This will work to proactively identify current and potential risks thereby preventing incidents and accidents and facilitating continuous improvement. We will provide all team members with the tools to facilitate reporting. There is a strong management commitment to evaluate all safety issues and make decisions about resolving these issues and risks. The reporting of errors will not result in disciplinary action. It is recognised that human error will occur and must be managed. Blame and discipline for unintentional error is counterproductive and damaging to our Safety Culture.<sup>10</sup>

...

#### **3.1 Self-Referral**

A team member who believes they have a alcohol and other drugs dependency is encouraged to bring this to the attention of their responsible manager/supervisor.

Where team members self-refer in this manner, Virgin Australia will consider the individual case and assess the level of support required to assist the team member. Support in this regard may include confidential referral, specialist support or treatment assistance.

Self-referral is not a means to avoid testing. Team members who self-refer after becoming aware that they are to be tested, or after being identified by Virgin Australia for testing in the case of post incident testing or testing for cause, will be managed in the same way as a team member who had not self-referred.

##### **3.1.1 Initiating the Self-Referral Process**

To self-refer, a team member should request a meeting with their responsible manager/supervisor to discuss the nature of their known or potential dependency or contact the Medical Review Officer (MRO) for a confidential discussion.

The team member will be removed from and cease to perform any Safety Sensitive Aviation Activity (SSAA) functions immediately.

Virgin Australia will maintain the confidentiality of any self-referral, and neither the manager nor the MRO will notify others without the consent of the team member.

Employees who self-refer may be stood down (mandatory in Safety Sensitive Roles) on full pay until appropriate assistance has been provided and their case has been reviewed by a MRO. Following self-referral the team member will not be returned to their role until a suitable case management plan has been agreed, including any testing recommended by the MRO, and the team member's fitness for work has been confirmed by the MRO.

Contractors who self-refer will be required to advise their employer and support will be provided via their Drug and Alcohol Management Program or other assistance program. The contractor will not be able to provide services to Virgin Australia until they return a negative alcohol and other drugs test result and have undergone appropriate assessment of their fitness to return to a SSAA as approved by the MRO.

Refer Appendix A.8 - *Self Referral DAMP Process (VAGP-SS-018)*.

### 3.1.2 Facilitated Self-Referral

While employees are always encouraged to self-refer if they have a dependency issue, not all persons affected will have the necessary insight to identify if they need assistance and support with their problem. Fellow employees may be well placed to recognise the need for help, and are encouraged to try to persuade their colleagues to seek help, including confidentially through Virgin Australia Medical Systems.

Any employee who demonstrates behavioural concerns or exhibits signs thought to be related to alcohol or drug dependency and substantiated by multiple concerned individuals, may have their concerns discussed with them by those individuals, with the aim of having them seek professional evaluation and assistance. This will be a further opportunity to confidentially seek medical evaluation/support in the absence of any breach of policy.

If an employee does not elect to take up this assistance and subsequently is found through testing to be in breach of the policy, then normal disciplinary processes will apply.

### 3.1.3 Leave

Dependent on the nature and duration of the most appropriate agreed treatment option, team members who have self-referred may be directed to access accrued personal leave and/or annual leave and/or leave without pay for the duration of their case management. Where appropriate, a team member may also be temporarily internally redeployed to assist with their rehabilitation and minimise risk to workplace health and safety.

The responsible manager/supervisor must consult the MRO and the team member's MOD to determine whether it is appropriate for the team member to take time off work or be redeployed to a non-Safety Sensitive Role.<sup>11</sup>

[17] Throughout the hearing it became clear that there are two ways Virgin employees use the term 'DAMP'. The first is to refer to the DAMP Manual. The second is to refer to all Virgin policies, plans and procedures on drug and alcohol management. For some reason the DAMP Manual captures some of the policies and procedures on drug and alcohol management, but not all.

## 3.3 The Fatigue Risk Management System

[18] The second relevant policy document is 'Volume SSM7.1 – Cabin Crew Fatigue Risk Management System' (**FRMS Manual**).

[19] Section 2.8 of the FRMS Manual provides the following:<sup>12</sup>

### 2.8 FRMS Fatigue Removal Process

All crew are empowered to remove themselves from duty prior to, during or post duty due to fatigue as part of the FRMS Removal and Post Duty Transport/Accommodation Provision. This non-punitive process acknowledges that crew are the final layer of defence against fatigue becoming a safety issue during operations. In instances where a crew member identifies fatigue post-duty, and is unable to drive home, Virgin Australia supports crew requests for transportation home, and/or hotel accommodation prior to onwards travel, refer VAGP Volume A4: *Cabin Crew Policy and Procedures Manual*, Section 7.5.8 – *Accommodation and Transport After a Duty*.

The benefits of supporting crew self-assessment and fatigue removal are:

- Ensuring safe operations
- Increasing alertness levels for subsequent operational activities
- Crew endorsement of the FRMS Dual Responsibility Policy
- Crew engagement
- Providing an opportunity for recovery from fatigue due to personal circumstances by ensuring:
  - Additional rest period achieved
  - A protected sleep environment when removal occurs at a layover port
  - Reduced risk of crew commuting home (driving) while fatigued

Crew may enact a fatigue removal prior to duty for several reasons including:

- Due to self-assessment
- Roster intervention due to FRMS Roster Review
- Management intervention

[20] Section A.2.4 of the FRMS Manual provides:<sup>13</sup>

#### **A.2.4 Missing Mandatory Fatigue Reports/Breach of FRMS**

A breach of the FRMS can include (but is not limited to):

- Failure to submit a fatigue report within 72 hours of removal
- Failure to comply with basic principles incorporated in SMS206 FRMS Training
- Failure to follow dual responsibility policy
- Any acts where it can be proven that post duty transportation/fatigue removal was used to knowingly misuse or manipulate FRMS entitlements (i.e. a crew member carrying out social activities during a fatigue period).

[21] Similar to the use of the term ‘DAMP’, witnesses generally used the term ‘FRMS’ to refer to the FRMS Manual. Again, there are Virgin manuals other than the FRMS Manual that contain directives regarding the management of fatigue.

### **3.4 The A4 Manual**

[22] The third document at play in this matter is ‘Volume A4: Cabin Crew Policy and Procedures Manual’ (**A4 Manual**), which is the manual for Cabin Crew Members. The purpose of the A4 Manual is to, “*provide clear direction to cabin crew on their responsibilities and work procedures relating to standard operating procedures and administrative activities*”.<sup>14</sup> The A4 Manual is several hundred pages long and covers a comprehensive list of topics.

[23] On the issue of alcohol consumption, the A4 Manual provides:<sup>15</sup>

#### **3.2 Drug and Alcohol Management Program (DAMP)**

The Drug and Alcohol Policy is part of the Drug and Alcohol Management Program (DAMP) and is designed to ensure that all team members and contractors understand their obligations in respect to management drugs and alcohol and the interaction with their employment obligations in and about the workplace.

Virgin Australia has in place a Drug and Alcohol Management Program (DAMP) which includes policies, plans and procedures collectively referred to as 'DAMP'.

The DAMP consists of three key elements:

- A drug and alcohol education program
- A drug and alcohol testing program
- A drug and alcohol response program.

The DAMP is managed in conjunction with Virgin Australia's regulatory obligations in Australia and New Zealand and within our international operations.

The Volume SSm6: *Drug and Alcohol Management Program* can be viewed on the VINE: Virgin Australia – Manuals and Forms – Safety Systems – Drug and Alcohol Management Program – DAMP.

Additional information in relation to the Virgin Australia DAMP is also available on the VINE DAMP landing page.

**As a minimum, cabin crew shall abstain from consuming alcohol (whether or not an alcoholic beverage) at the time period of 8 hours immediately before commencing:**

- **Standby**
- **Airport/Available duty**
- **Training**
- **Rostered sign-on time for flight duty**
- **Any duty or function preparatory to acting as a cabin crew (emphasis added)**

**NOTE:** The above time frame is a minimum requirement and, depending on crew consumption of alcohol and other factors, crew may need to abstain from consuming alcohol at a time period of greater than 8 hours immediately before commencing a duty.

- Intoxicated persons shall not act as cabin crew. A crew member of an aircraft shall not be in a condition in which, because of having consumed, used or absorbed any substance (including, but not limited to alcohol or other drugs including a pharmaceutical or medicinal preparation) their mental capacity to act as cabin crew is impaired.
- Alcoholic drinks shall not be consumed by cabin crew while in uniform and in view of the public.

**NOTE:** Cabin crew shall not purchase or consume any alcohol (whether or not an alcoholic beverage) when paxing on Domestic/International Short Haul sectors. This includes paxing in company time on another carrier, whether in uniform or not.

At all times crew shall not purchase or consume any alcohol (whether or not an alcoholic beverage) when operating an aircraft.

- Cabin crew shall not report to work or work related activities with a breath alcohol concentration equal or above the equivalent of 0.02%.
- No alcohol, or containers for alcohol, may be taken onto the flight deck during flight.

[24] The A4 Manual formalises what is referred to as the ‘**8-hour Rule**’ – that Cabin Crew Members must not consume alcohol in the eight hours prior to commencing any sort of duty or work. In this Decision I will refer the A4 Manual’s specific instruction that Cabin Crew Members must abstain from consuming alcohol eight hours before commencing a duty as the ‘**A4 Rule**’.

[25] For completeness, I note that the A4 Manual says the following about the Fatigue Risk Management System:

### 7.5.3 Flight and Cabin Crew Members

Flight and cabin crew members are accountable for actively participating in the FRMS and specifically for:

- Using time off appropriately, to obtain sufficient sleep and prevent excessive wakefulness
- Working with an appropriate individual to ensure that an appropriate risk mitigation process is implemented, or removing themselves from duty when sufficient rest has not been achieved
- Ensuring they are ‘fit for duty’ prior to signing on for duty and in a position to carry out their duties in completion
- Reporting circumstances when they have experienced a fatigue occurrence or potential fatiguing situation and/or identified hazards which may lead to a potentially fatiguing situation

## 4. Timeline of events

### 4.1 Mr Macnish’s Ground School

[26] Mr Macnish commenced working for Virgin on Monday 4 July 2022. For the first five and a half weeks of his employment he attended ‘Ground School’ – Virgin’s training for new employees. Mr Macnish’s Ground School ran from Monday 4 July 2022 to Wednesday 10 August 2022.<sup>16</sup> This training encompassed a wide variety of topics.

[27] The parties agree that the training covered drug and alcohol management. The parties disagree as to what Mr Macnish should have taken away from that training.

[28] Ms Ridge gave a presentation on the first day of Mr Macnish’s Ground School training. Slide 10 of that presentation outlines the four “most relevant” policies to Cabin Crew Members and includes the words, “*Drug and Alcohol Management Policy (DAMP): Zero tolerance on breaches to this policy; if in doubt CHECK!*”.<sup>17</sup>

[29] The instructor notes for this slide provide:<sup>18</sup>

#### Other policies

As well as our Code of Conduct we have other policies that are important for us all to understand and abide by. Some of these include:

- DAMP – our drug and alcohol management policy
  - **What could you expect to see in our DAMP policy?**

- Cannot come to work intoxicated or on illicit drugs
- Must not consume drugs or alcohol 8 hours before your duty commences
- Must be below 0.02BAC at all times whilst at work
- You may be asked to complete a random drug or alcohol test at any time whilst at work.

[30] In her written evidence Ms Ridge says that these notes were strictly adhered to and presented to the training group.<sup>19</sup> During her cross-examination, Ms Ridge acknowledged that she did not mention that the A4 Manual contains a drug and alcohol policy.<sup>20</sup> Mr Macnish does not recall this presentation referring to alcohol.<sup>21</sup> I accept both Ms Ridge's and Mr Macnish's evidence.

[31] Mr Macnish's recollection is that on the second day of Ground School, Tuesday 5 July 2022, there was a 'Regulatory Overview' lecture. During this lecture, there was mention of the concept of 'eight hours'. Mr Macnish's takeaway from this lecture is that there were strict rules, such as the requirement to have a BAC of 0.00% during duty, whilst the 8-hour Rule was a guideline.

[32] Mr Macnish can remember being taught:<sup>22</sup>

- (a) all drug and alcohol related matters can be found in the DAMP Manual;
- (b) the strict CASA Regulations that require Cabin Crew Members to not arrive at sign-on with a BAC level equal or greater than 0.02%;
- (c) Virgin's policy is that Cabin Crew Members must not arrive at sign-on with a BAC greater than 0.00%;
- (d) every person processes alcohol differently, but as a guideline Cabin Crew Members should abstain from drinking eight hours before sign-on; and
- (e) that self-reporting errors would not result in disciplinary action.

[33] Ms McGregor delivered the Regulatory Overview training on Tuesday 5 July 2022. Ms McGregor's evidence is that when she delivers this training, she:

- (a) refers to the pertinent CASA Regulations, which says that air crew must not drink alcohol eight hours before commencing duty;<sup>23</sup> and
- (b) always stresses the 8-hour Rule as non-negotiable.<sup>24</sup>

[34] In cross-examination, Mr Macnish agreed that Ms McGregor had said that Cabin Crew Members should abstain from drinking alcohol eight hours before commencing duty,<sup>25</sup> and that there could be severe penalties if not complied with.<sup>26</sup>

[35] During Ms McGregor's cross-examination, much was made of how the presentation slides are out of date and reference a prior version of the regulations. Other than noting that it's

not desirable to have incorrect references in teaching material, I find that not much turns on this issue in terms of what lessons Mr Macnish took away from Ground School.

[36] On Wednesday 6 July 2022, Mr Macnish completed a regulatory quiz. The quiz had the multiple-choice question, “Consumption of Alcohol. How long before sign-on must crew abstain from drinking?” with the answer options, “a) 48 hours prior to sign on duty; b) 8 hours prior to sign on duty; c) 4 hours prior to sign on for duty; d) 12 hours prior to sign on duty”.<sup>27</sup> Mr Macnish does not remember the question.<sup>28</sup> I accept Mr Macnish’s evidence on this point.

[37] I make the following findings regarding Mr Macnish’s Ground School:

- (a) Mr Macnish was taught about the existence of the DAMP Manual and relevant CASA Regulations.
- (b) He was told that Cabin Crew Members should not consume alcohol eight hours prior to sign-on. He was taught that the eight hours was a guideline in the sense that some people might need more time to metabolise alcohol. I find that he conflated the two concepts together and his takeaway was that the 8-hour Rule generally was a guideline.
- (c) Mr Macnish was not taught that the A4 Manual has a drug and alcohol policy and that it formalises the 8-hour Rule.

#### 4.2 ‘The Cross Check’

[38] ‘The Cross Check’ is a Virgin internal electronic newsletter about operational and business matters that seems to be emailed to staff every 2-3 weeks. Mr Macnish filed copies of the Cross Check from both before and after his termination. Virgin filed a copy of the Cross Check from September 2023. The parties focused on two editions of the Cross Check.

[39] The first was Edition 15, circulated on Thursday 11 August 2023. In Edition 15, it contained a link to a video of Chris McKie (General Manager, Safety Systems and Operations Support) speaking on the ‘DAMP Policy’. I have viewed the video. Counsel for Mr Macnish submitted that it was relevant that in the video Mr McKie does not mention the A4 Manual or the 8-hour Rule.<sup>29</sup>

[40] Mr Macnish viewed the video at the time it was sent. His takeaway from the video was the importance of never having a BAC over 0.02 and being fit to fly under the DAMP Manual.<sup>30</sup>

[41] The second was Edition 18, circulated on Friday 22 September 2023. Edition 18 has the following section:

##### **DAMP testing: How does it work?**

If you are displaying signs of intoxication at sign on or during your duty, you may be subject to reasonable grounds DAMP testing. This can be done in response to behaviours, conduct, or information indicating you may be under the influence of alcohol or other drugs above the prescribed level while at work. To ensure you are always fit to fly, crew must not consume alcohol for a minimum 8hrs before any of these duties: Standby, Airport/Available duty, training, rostered sign-on for flight duty, and any duty or function before acting as cabin crew.

[42] Mr Macnish agreed during his cross-examination that Edition 18 conveyed that Cabin Crew Members must not drink eight hours before duty.<sup>31</sup> During his re-examination Mr Macnish further explained that he took “to ensure you are always fit to fly” to mean compliance with the DAMP Manual.<sup>32</sup> I find that the words in Edition 18 are clear that crew must not consume alcohol eight hours prior to duty. However, I find Mr Macnish’s evidence that he “could not speak of his thoughts at the time” he first read the Cross Check to be the honest account of his view on Edition 18.<sup>33</sup> I find that Mr Macnish does not remember reading Edition 18 at the time he received it or does not recall what he thought when he read it.

#### **4.3 27 September 2023 – concerns regarding Mr Macnish’s fitness for work**

[43] Ms Ridge’s evidence is that on Wednesday 27 September 2023, Cabin Crew Member (Ms X) advised her that she had concerns about Mr Macnish turning up to work hungover on Wednesday 20 September 2023.

[44] On Thursday 28 September 2023, Ms X emailed Ms Ridge her concerns, that Mr Macnish had come to work hungover twice and that he had boasted about being hungover. Further, that Mr Macnish had told her that he was going to purchase a portable breathalyser so that he could check his alcohol consumption on overnights.<sup>34</sup>

[45] Mr Macnish gave evidence that he had previously used the word “dusty” to describe himself during an early morning flight as he took ‘dusty’ to mean ‘tired’ and ‘not my best’.<sup>35</sup> Ms X’s email lacks details, and so it is not clear if these words were what caused her concern.

[46] It does not appear that the specifics of Ms X’s concerns were ever put to Mr Macnish prior to his termination, and they were not put to him during cross-examination.

[47] On Monday 9 October 2023, Ms Ridge called Mr Macnish and asked him to come to the office on Wednesday 11 October 2023 for a health and wellness meeting. Mr Macnish asked Ms Ridge what the purpose of the meeting was. Ms Ridge said words to the effect of, “it’s a Bradford meeting in regard to sick days”.<sup>36</sup>

#### **4.4 Meeting with Ms Ridge on 11 October 2023**

[48] Mr Macnish’s and Ms Ridge’s accounts of what occurred during their meeting on Wednesday 11 October 2023 largely align, though they have placed differing emphasis on parts of the conversation. Based on their accounts and Ms Ridge’s notes that she placed on Mr Macnish’s ‘WIP record’, which is his Virgin personnel file, I make the following findings about this meeting:

- (a) Ms Ridge told Mr Macnish that the meeting was not about sick days, it was about concerns a co-worker had raised which were that Mr Macnish had come to work hungover on early morning sign-ons.
- (b) Mr Macnish was shocked by this. He stressed to Ms Ridge that he cared deeply about his job and that had never drunk alcohol within eight hours of attending work.



- (c) Mr Macnish raised with Ms Ridge that his performance history with Virgin was glowing. Ms Ridge affirmed that she was not questioning his work ethic but needed to address the concerns raised about his wellbeing and fitness for duty.
- (d) Mr Macnish told Ms Ridge that he monitors his alcohol consumption on overnights; makes sure to not drink more than one standard drink per hour and ceases drinking at a minimum of eight hours before duty.

[49] I accept Ms Ridge's evidence that she told Mr Macnish that Virgin has a zero-tolerance approach to "DAMP breaches" and that Mr Macnish said to her that he would never jeopardise his career. During Ms Ridge's cross-examination, she acknowledged that she did not specify whether she was referring to the DAMP Manual or the A4 Manual when she made this comment and that when she raised the 8-hour Rule it was in the context of the DAMP Manual.<sup>37</sup>

#### **4.5 25 November 2023 – medical incident in Brisbane**

[50] On Saturday 25 November 2023, Mr Macnish undertook a layover duty from Perth to Brisbane. After disembarkation, Cabin Crew Members were notified that there was a medical situation at the gate desk as one of the passengers had collapsed. The passenger was a man in his sixties who was semi-conscious with slow and shallow breathing.

[51] Mr Macnish's evidence is that the Cabin Crew Members believed that the passenger may have been having a stroke. Mr Macnish searched for an oxygen tank and assisted with moving the passenger into a wheelchair. During this, the passenger accidentally urinated on Mr Macnish's shirt sleeves. This was the first time Mr Macnish had been involved in a serious medical incident.<sup>38</sup>

[52] Mr Macnish arrived at his hotel at approximately 10pm after some delay due to there being no transport waiting for him outside the airport. Mr Macnish contacted close friends and family as he was affected by the experience.

[53] Mr Macnish was originally rostered on for a paxing flight back to Perth – where the Cabin Crew Member travels on the flight back as a passenger – with a sign-on time of 8:20am on Sunday 26 November 2023. Paxing flights are still treated as duty, because even though the Cabin Crew Member is travelling as a passenger, there is still the possibility of being required to act in the capacity of a Cabin Crew Member.

[54] Due to anxiety from the medical incident, Mr Macnish could not fall asleep. At 4:26am, he contacted Crew Tracking, which is Virgin's rostering and network support team,<sup>39</sup> to advise them that he would be fatigued for the rostered pax flight. Mr Macnish was moved to an afternoon flight back home to Perth, with a 4:45pm sign-on.

[55] After the call to Crew Tracking, Mr Macnish made the decision to meet someone for casual sex through the Grindr app. This was on the basis that having a physical interaction with someone would help him fall asleep. He met with an individual outside his hotel, and they went up to Mr Macnish's hotel room. They had sex and Mr Macnish fell asleep shortly after.<sup>40</sup>

[56] At 9am, Mr Macnish woke and asked his guest to leave. Mr Macnish fell back asleep and then woke again at 3pm. He then presented for his 4:45pm duty.

#### 4.6 29 November 2023

[57] On Wednesday 29 November 2023, Mr Macnish and Ms Ridge had a very brief conversation in the staff kitchen about the medical incident on Saturday 25 November 2023.

#### 4.7 Investigation into 25 and 26 November 2023

[58] Under the FRMS Manual, when an employee ‘accesses fatigue’ a notification is sent to Cabin Crew Management. This notification went to Ms Ridge. Ms Ridge says that she had concerns as Mr Macnish had accessed fatigue more than four hours prior to his rostered sign-on, which raised concerns that he had been out all night before calling Crew Tracking. Ms Ridge’s evidence is that she was also concerned because Mr Macnish had previously accessed fatigue three times in three months.<sup>41</sup>

[59] Ms Ridge requested the Saturday 25 November 2023 CCTV footage of Mr Macnish’s hotel hallway and hotel room swipe card record for Mr Macnish’s room.

#### 4.8 12 December 2023 – First Allegation Letter

[60] On Tuesday 12 December 2023 Ms Ridge sent Mr Macnish a letter informing him that Virgin was investigating allegations of misconduct on Sunday 26 November 2023.<sup>42</sup> The letter outlined two allegations.

[61] *Firstly*, that Mr Macnish failed to comply with the FRMS Manual by removing himself from rostered duty and inviting a guest into his hotel room during his fatigue period (**Allegation 1**). The letter explained that Virgin had obtained CCTV footage and swipe card access records from the hotel that show Mr Macnish left his hotel room at approximately 5:13am; Mr Macnish and a guest returned at 5:18am; and the guest left his room at 9:00am. The allegation was that Mr Macnish removed himself from rostered duty to engage in “social activities”.

[62] *Secondly*, that Mr Macnish lied to Ms Ridge about the medical incident when he spoke with her on Wednesday 29 November 2023 (**Allegation 2**). The allegation was that Mr Macnish told Ms Ridge that the passenger had a stroke and urinated on his arms. Ms Ridge had checked the safety report from the flight which did not record that a passenger had experienced a stroke on the plane and that a Cabin Crew Member had been urinated on.

#### 4.9 17 December 2023 – the Virgin Christmas Party

[63] Mr Macnish was not rostered to work on Sunday 17 December 2023. Mr Macnish attended that Virgin Christmas Party at the Como Lawn Bowl Club at approximately 2pm with Cabin Crew Manager, Mr Amos McEwen. Mr McEwen was rostered to work a red-eye flight to Sydney later that night with sign-on at 10:55pm.

[64] Mr Macnish’s account of the Virgin Christmas Party is as follows:<sup>43</sup>

- (a) Upon arrival at the party, he and Mr McEwen went their separate ways.
- (b) As Ms McEwen was not drinking, Mr Macnish initially did not intend to drink in solidarity with Mr McEwen. However, he did have a single glass of prosecco whilst socialising.
- (c) Half an hour after Mr Macnish had finished his glass of prosecco, he ran into Mr McEwen. This would have been at 2:30pm at the very latest. From this point onwards Mr Macnish and Mr McEwen stayed close by. Mr Macnish did not drink any more alcohol.
- (d) At some point, a colleague handed Mr Macnish a glass of prosecco. Mr Macnish told his colleague that he was not drinking but accepted the glass and held onto it as a social crutch. Mr Macnish did not drink any of it.
- (e) Towards the end of the party, people wanted to continue the festivities at the Cottesloe Beach Hotel. Both Mr McEwen and Mr Macnish were completely sober and went home instead. Mr McEwen dropped Mr Macnish home at around 4:30pm.

**[65]** Ms Colson also attended the Virgin Christmas Party, and she had a brief conversation with Mr Macnish. Her impression was that he was under the influence of alcohol as he was acting very ‘lovey dovey’ and was more animated compared to how he usually was at work. Her evidence is that Mr Macnish seemed excited to continue onto the Cottesloe Beach Hotel and offered to carpool with her.<sup>44</sup>

**[66]** Mr Macnish’s evidence in reply is that Ms Colson was intoxicated at the Virgin Christmas Party and was in an upbeat mood. Mr Macnish says that he did offer Ms Colson a lift to the Cottesloe Beach Hotel as he thinks highly of Ms Colson and he wanted to ensure that she made it to the venue safely. When Mr Macnish told Mr McEwen that he had offered Ms Colson a lift, Mr McEwen advised that they were travelling in the opposite direction, and it would not be practical to give Ms Colson a lift. Mr Macnish relayed this to Ms Colson.<sup>45</sup> I accept Mr Macnish’s account of the interaction with Ms Colson.

**[67]** Mr Macnish tendered Virgin’s interview notes from the investigation that was conducted into the Virgin Christmas Party. Virgin interviewed Ms Eden Wilkins on Wednesday 20 December 2023 and Mr McEwen on Friday 22 December 2023 as part of the investigation, though they were not called to give evidence in this matter.

**[68]** Ms Wilkins posted a photo to her Instagram account of herself, Ms Dagmar Mather, Mr Dan Alessi and Mr Macnish. The notes from Ms Wilkins’ interview provide the following:<sup>46</sup>

- (a) Ms Wilkins saw Mr Macnish holding a flute of prosecco. She was not sure if he was drinking it.
- (b) Ms Wilkins did not notice any behaviour that would indicate that Mr Macnish had been drinking. She stated that Mr Macnish is always a “bubbly, fun guy” and that she did not feel like he was intoxicated.

**[69]** The notes from Mr McEwen’s interview provide the following about the Virgin Christmas Party:<sup>47</sup>

- (a) Mr McEwen had been with Mr Macnish prior to the party, and Mr Macnish had not been drinking.
- (b) He could not recall with 100% certainty the amount of alcohol that Mr Macnish drank. He asked Mr Macnish if he was drinking, and Mr Macnish said to him that he was just having one drink.
- (c) He arrived at the party with Mr Macnish at 2pm. His recollection was that Mr Macnish’s glass was less than half full at 2:30pm and he finished it around 3pm. Mr McEwen did not see him drinking after that.

**[70]** I accept Mr Macnish’s evidence of the Virgin Christmas Party. This includes his evidence that he had one glass of prosecco that he finished by 2:30pm, and that he held onto a second glass to feel more at ease while socialising. It is corroborated by Mr McEwen’s account. Ms Colson’s evidence that Mr Macnish was ‘lovey dovey’ can be explained by the fact that it was the work Virgin Christmas Party.

**[71]** I also note that during Ms Ridge’s cross-examination she conceded that she did not doubt Mr Macnish’s account when he said that he drank one glass of prosecco by 2:30pm and then used the second glass as a social crutch.<sup>48</sup> Ms Lokys took a similar position.<sup>49</sup>

#### **4.10 After the Virgin Christmas Party**

**[72]** At approximately 5:30pm, Mr Macnish received a notification on Snapchat from Mr McEwen that he was down one Cabin Crew Member for his red-eye flight. Mr McEwen asked if anyone would like to pick up the duty. Mr Macnish’s evidence is that he wanted to pick up the duty as Mr McEwen is his friend and he wanted to support Mr McEwen, who was going through some personal issues at the time.

**[73]** Mr Macnish called Mr McEwen. Mr Macnish raised with Mr McEwen that he had drunk alcohol at the Virgin Christmas Party. Mr McEwen said words to the effect of, “I’m pretty sure 8 hours is just a guideline. You will need to be 0.00% when you sign in. I need to get a bit more rest, but you’ll find the information in the DAMP Manual. Let me know how you go.”<sup>50</sup> Virgin does not appear to contest that Mr McEwen gave this guidance to Mr Macnish, and I accept Mr Macnish’s evidence.

**[74]** Mr Macnish’s account is that this was uncharted territory for him as he had never consumed any alcohol on the same day as a duty before. He looked up the DAMP Manual on his iPad and read through ‘0.3 – Fitness for Duty and Work’. Mr Macnish’s assessment was that there was nothing in this part of the DAMP Manual that restricted him from taking up the duty for Mr McEwen’s red-eye flight.

**[75]** Mr Macnish says that to be sure, he did a search of “8 hours”, “8” and “hours” in the DAMP Manual. Mr Macnish found a mention of “8 hours” in “0.3.2 – Duty Travel” and “0.3.4 – Layovers”. However, those sections did not apply to his own situation. Based on this, Mr

Macnish reached the view that he would not be breaching the DAMP Manual by taking up the duty.

[76] Mr Macnish called “Crewing” at 6:23pm to request the duty for flight VA570. At 7pm, Mr Macnish used the breathalyser he has at home. Mr Macnish explained that his household has the breathalyser for social gatherings, and that it has Australian Standard Certification AS3547. Mr Macnish had a BAC level reading of 0.00%.

[77] When Mr Macnish arrived at work, he learnt that the aircraft had been delayed. The rostered sign-on was 9:55pm for a rostered departure at 10:55pm. The actual departure time ended up being 11:22pm.

[78] The notes from Mr McEwen’s interview<sup>51</sup> and his letter in response to Virgin’s letter of allegations<sup>52</sup> corroborate Mr Macnish’s account of their discussions after the Virgin Christmas Party. I accept Mr Macnish’s evidence of his actions after the Virgin Christmas Party.

#### **4.11 20 December 2023**

[79] Over Monday 18 to Wednesday 20 December 2023, Mr Macnish heard rumours that he had operated the red-eye flight on Sunday 17 December 2023 while drunk. Mr Macnish decided to speak to Ms Ridge about the matter.

[80] On Wednesday 20 December 2023, before going to see Ms Ridge, Mr Macnish called Mr McEwen and discussed the rumour. Mr Macnish asked Mr McEwen if he was sure that Mr Macnish didn’t do anything wrong. Mr McEwen said words to the effect of, “You haven’t breached the policy, it could be helpful if you go in and clear the air about the rumour”.<sup>53</sup>

[81] Mr Macnish went to the Virgin Perth office and asked to speak with Ms Ridge. She was not available, and so he spoke with Ms Solis instead. Mr Macnish explained that he had heard rumours started by other co-workers that he had undertaken the red-eye flight on Sunday 17 December 2023 whilst intoxicated, and that he wanted to come in and clear it up.

[82] Mr Macnish further explained that he had consumed one glass of prosecco by 2:30pm, then nursed a second glass as a social crutch. He left this second glass somewhere when he left the venue at 4:30pm. Ms Solis and Mr Macnish had a discussion about the 8-hour Rule, where Ms Solis said it was a rule, not a guideline, and that it was in the DAMP Manual. Mr Macnish said that he checked the DAMP Manual before the red-eye, and that there is no rule.

[83] Ms Solis left the room to look through the DAMP Manual with another Virgin employee, Ms Madeline Williams. Ms Solis, Ms Williams and Mr Macnish looked through the DAMP Manual. Ms Williams then had the idea to check the A4 Manual, where she found the A4 Rule.

[84] Ms Macnish’s evidence is that Ms Solis said to him words to the effect, “I’ll let Lydia know that you’ve come forward with this. You might be stood down for it but that is a decision for Lydia. Don’t worry, this won’t affect your career, there have been much worse allegations against people, even some who are LCC’s now.” Ms Solis contests this – she says that she only said, “Lydia will be in touch with next steps”.<sup>54</sup> Ms Solis was not called for cross-examination.

On balance, I find that Ms Solis told Mr Macnish that she would tell Ms Ridge that he had come forward, that he might be stood down and that Ms Ridge would be in touch with the next steps.

[85] Ms Solis' witness statement included a file note that was emailed to Ms Ridge on Wednesday 20 December 2023.<sup>55</sup> It largely aligns with Mr Macnish's account, bar the differences outlined in [84].

[86] The parties spent some time on the fact that Mr Macnish had used the word "nursed" in relation to his second glass. I accept that he used this wording. However, it was in the context of him explaining that he had held onto the second glass of prosecco as a social crutch. This does not change my finding that he only drank one glass of prosecco and finished it by 2:30pm.

#### **4.12 20 December 2023 – Mr Macnish's response**

[87] Mr Macnish gave a written response to Allegations 1 and 2 on Wednesday 20 December 2023.<sup>56</sup> On Allegation 1, Mr Macnish explained that he did not consider the encounter to be of a social nature and that he did not remove himself from his rostered shift for the purpose of engaging in social activities. He further explained that he understood that having sex is not an orthodox way of falling asleep, however, it is common in the gay community, and it was successful for him.

[88] On Allegation 2, Mr Macnish denied that he was dishonest when speaking with Ms Ridge on Sunday 29 October 2023. He explained that he was light on details as he and Ms Ridge had only spoken in passing. Mr Macnish then explained the medical incident on Sunday 26 November 2023 in greater detail.

[89] Mr Macnish's written response finished with an acknowledgement that he now understood that it is not appropriate to have a guest in a Virgin-provided hotel room for any reason after accessing the fatigue policy. He also indicated that he had reviewed the Virgin Code of Conduct and the FRMS Manual.

[90] Virgin stood Mr Macnish down from duty that same day.

#### **4.13 22 December 2023 – Second Allegation Letter**

[91] On Friday 22 December 2023, Mr Macnish received a further letter alleging that on Sunday 17 December 2023, he engaged in conduct breaching Virgin's policies and the Drug and Alcohol Management Program by consuming alcohol within eight hours of commencing duty (**Allegation 3**).<sup>57</sup>

#### **4.14 28 December 2023 – Mr Macnish response**

[92] On Thursday 28 December 2023, Mr Macnish gave a written response which explained Mr Macnish's account as per [63]–[77] in this Decision.<sup>58</sup>

[93] Mr Macnish's response concluded with:

...I would like to finish by saying the experience of going through this process, especially over the holiday period has been extremely difficult for me. This experience will stay with me and shape my decision-making, and actions very positively in the future.

I know when there is a breach of this nature that this action had to be applied, and I hold complete understanding for the process that needed to be taken by everyone involved. I also deeply apologise for the resources and time spent by everyone during the holiday period on this matter.

Looking forward after this difficult learning experience I ask of you to please understand that I have never worked within a professional landscape that poses such types of challenges and policies. From this experience I have grown a lot professionally and now have a much deeper appreciation and respect for what is required when conducting myself.

While my actions were not preordained, or malicious in nature, and only an attempt to be helpful for the company. I know that saying I was not informed well enough or unaware of this policy is not good enough of a response. When a policy is breached, a policy is breached and it was my responsibility alone to ensure I was educated on exactly what was expected of me.

I hope that with my history of work ethic, a very clear passion for this job, and the value I have shown to the people around me, and that my honest nature and bravery displayed in my action to come straight to management and self-report will guide your judgement.

I promise you that I will be so much more careful in the future. I will always ensure I'm fully aware of Virgin Australia's policies and values, and to never breach any of them again.

I understand that this is a second example of a gap in my knowledge in relation to Virgin Australia policy and in a short space of time. I wish to commit to you, Lydia, and Virgin Australia that I will work harder to make better decisions by refreshing my knowledge of company policies. To that end, I am willing to complete any additional training that you deem required or that you think will assist in my development.

[94] During cross-examination, Counsel for Virgin questioned Mr Macnish's use of language such as, "I genuinely don't recall ever sipping [the second glass of prosecco] and believe it was left behind at the venue full and untouched" in his response letter. Counsel for Virgin put it to Mr Macnish that the language was ambiguous and that he did not know for sure that he had not drunk from the second glass.<sup>59</sup> Mr Macnish refuted this.

[95] I accept Mr Macnish's evidence. There are of course more assertive ways that Mr Macnish could have phrased his account. However, as Mr Macnish pointed out, he is a layperson.<sup>60</sup> I find that the way he communicated in this response letter is consistent with his account that he did not drink the second glass of prosecco.

#### **4.15 3 January 2024 – First Response Meeting**

[96] On Wednesday 3 January 2024, Mr Macnish attended a meeting with Ms Ridge (**First Response Meeting**). Mr Gareth Uren (Assistant Secretary Domestic, Flight Attendants' Association of Australia) attended as Mr Macnish's support person. Mr Macnish's and Ms Ridge's accounts of this meeting again largely align as to what was discussed, and Ms Ridge provided a written record of the meeting.<sup>61</sup> I accept the record of the meeting is accurate.

#### 4.16 6 January 2024

[97] After the First Response Meeting, Mr Uren gave Mr Macnish feedback that the only thing that let Mr Macnish down during the meeting was that he panicked when Ms Ridge asked him about the Virgin Code of Conduct.

[98] Because of this, Mr Macnish reviewed the Code of Conduct and the policy and administration sections of the A4 Manual relating to safety. He summarised these documents in his own words and emailed it to Ms Ridge.<sup>62</sup> I found this email to be genuine and reflective of Mr Macnish's desire to learn and improve.

#### 4.17 12 January 2024 – Investigation Outcome Meeting

[99] On Friday 12 January 2024, Mr Macnish attended a meeting where he was informed of the investigation's outcome. He also received a notice to show cause letter from Ms Ridge, which outlined her findings as follows:<sup>63</sup>

[100] Allegation 1: Was substantiated. Ms Ridge found that:

*...despite the level of fatigue you claimed to be experiencing, your conduct after giving notification that you were fatigued is inconsistent with the FRMS Framework. Ultimately, you invited a person unknown to you into your crew accommodation at 0518 less than an hour after reporting fatigued and during your res period. In the circumstances, you did not use your fatigue leave to appropriately obtain rest. I believe that had you been genuinely fatigued, you would not have engaged in the conduct alleged. This leads me to conclude that you did not take fatigue for authorised purposes which constitutes a misuse, or alternatively even if you were experiencing fatigue, you did not use your rest period for appropriate purposes.*

[101] Allegation 2: Was unsubstantiated. Ms Ridge was “unable to corroborate any version of events”.

[102] Allegation 3: Was substantiated. Ms Ridge:

*...did not accept your assertion that the eight hours was a “safe guideline” and that the DAMP Policy was “misleading” and “the lack of presence meant it was a guide”, given the instances outlined above and your obligations outlined in your employment contract. If you had any concerns or confusion, it would have been appropriate to seek guidance from a Leader.*

[103] The letter informed Mr Macnish that he was required to show cause as to why Virgin should not terminate his employment. His response was to be provided to Ms Lokys, who would be making the decision regarding his employment.

[104] During Ms Ridge's cross-examination, she explained that as part of concluding the investigation, she made the recommendation to Ms Lokys to terminate Mr Macnish's employment.<sup>64</sup>



#### **4.18 17 January 2024 – Mr Macnish’s Show Cause Reply**

[105] On Wednesday 17 January 2024, Mr Macnish’s solicitor – Mr Nicholas – sent Mr Macnish’s show cause reply to Ms Lokys.<sup>65</sup> The response was lengthy. The main points can be summarised as follows:

- (a) Terminating Mr Macnish would be unjust as Ms Ridge’s findings are incorrect; Mr Macnish did not breach any Virgin policy. It would also be inconsistent with Virgin Australia’s policy on self-reporting.
- (b) To the extent that there was any breach, it was unintentional.

#### **4.19 22 January 2024 – Show Cause Meeting**

[106] Mr Macnish attended the show cause meeting on Monday 22 January 2024 with Ms Lokys and Ms Monica Gregory (Virgin HR). Ms Lokys provided a written record of the meeting. It details that Mr Macnish and Ms Lokys spoke at length about his show cause reply; Mr Macnish’s knowledge of Virgin’s drug and alcohol management policies; his training; and the events of Saturday 25 November 2023 and the Virgin Christmas Party.<sup>66</sup>

#### **4.20 1 February 2024 – Show Cause Response Meeting**

[107] Mr Macnish met with Ms Lokys and Ms Gregory on Thursday 1 February 2024. Ms Lokys informed Mr Macnish that she had made the decision to terminate his employment. Mr Macnish was subsequently provided with a termination letter; the relevant sections are reproduced below:<sup>67</sup>

Dear Dylan,

##### **Notification of termination of your employment**

...

As you are aware, the investigation found that two allegations were substantiated, Allegation 1 and Allegation 3. The substantiated conduct was in breach of your contract of employment, the Virgin Australia Code of Conduct, Fatigue Risk Management Policy, Safety Policy, the A4 Cabin Crew Policy and Procedures Manual and the Cabin Crew Agreement 2021.

Firstly, you failed to comply with the FRMS framework when you removed fatigued [sic] and invited a guest to your company provided crew accommodation during your fatigue leave period (Allegation 1). Despite the level of fatigue you claimed to be experiencing, your conduct after giving notification that you were fatigued was a concern and considered to be inconsistent with the provisions of the FRMS framework. In our meeting on 22 January 2024, you stated that you believed that you had complied with the FRMS framework, albeit in an unorthodox way and acknowledged how Virgin Australia could perceive your activities on the morning on 26 November 2023 as being ‘social’ rather than to achieve rest. You however maintained that you were genuinely fatigued and did use the fatigue period to achieve rest.

Secondly, it was found that you consumed alcohol within eight (8) hours of operating in your capacity as Cabin Crew (Allegation 3). In your responses you repeatedly stressed that you

believed the 8-hour rule was a guideline and not a firm rule. However, these assertions were not persuasive given that you were reminded of this rule multiple times throughout your employment as particularised in the Investigation Findings – Notice to Show Cause letter dated 12 January 2024.

Further, only 2 months prior to the incident, on 11 October 2023, you had a conversation with your Leader Crew Culture, Lydia Ridge during which she brought the following matters to your attention:

- she had concerns around your fitness to fly and that you had allegedly been hungover on early morning sign-ons;
- everyone metabolises alcohol differently and you may need to stop drinking earlier than the 8 hours to ensure compliance;
- as an employee you had obligations to ensure that you are DAMP compliant; and
- Virgin Australia has a zero tolerance approach to damp (sic) breaches.

During this discussion you advised that you:

- monitor your alcohol consumption on overnights;
- ensure that you are not consuming more than 1 standard drink an hour; and
- cease drinking at a minimum of 8 hours.

Based on this discussion, your training and given you have operated as cabin crew for approximately 18 months, I reasonably believe that you did understand your obligation to abstain from alcohol in the 8 hours prior to a duty but performed a duty regardless of not complying with this obligation.

In your responses you have also stated that the 8-hour rule is not specifically referred to in the DAMP Policy/Procedure. I do not accept that this excuses your conduct. As outlined above you have received training on the 8-hour rule and in the show cause response meeting you accepted that it is your obligation to uphold the requirements set out in the A4 Cabin Crew Policies and Procedures Manual where the requirements and consequences of non-compliance are set out. You further accepted that you had breached the 8-hour requirement when you operated having consumed alcohol within the prior 8 hours.

...

While I did carefully take into consideration your responses, I am not satisfied that you would not engage in repeated conduct of a similar nature to Allegation 3 in the future, particularly given this incident occurred so soon after your discussion with Lydia. Your role requires you to complete overnights and Virgin Australia does not have the trust or confidence in you that there would not be a repeat of this behaviour. Taking into account Virgin Australia's duties to ensure the safety of your colleagues and our guests, this is not a risk that it is prepared to take.

Taking all the circumstances into account, a decision has been made to terminate your employment, effective 1 February 2024, for serious misconduct. In reaching this decision I have also taken into consideration your length of service, your prior disciplinary history and the impact a termination of employment would have on you. My view is that termination of your employment is both reasonable and proportionate.

The decision to terminate your employment is based on Allegation 3 alone, which is conduct that is inconsistent with the continuation of your contract of employment. I have not taken

Allegation 1 into account in reaching this decision because, while I do not accept that you did the right thing, following your further responses during the show cause meeting and the mitigating circumstances you have explained (i.e. the incident the night before prevented you from having restful sleep) I am not of the view that this conduct should contribute towards a decision to terminate your employment.

...

Danielle Lokys  
Acting – Crew Culture Manager

## 5. Consideration

[108] 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.

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

- a) Mr Macnish had completed the minimum employment period and was covered by the *Virgin Australia Cabin Crew Agreement 2021*. He was protected from unfair dismissal under s 382 of the Act;
- b) Mr Macnish filed his unfair dismissal application within time;<sup>68</sup>
- c) Virgin was not a small-business employer within the meaning of the Act; and
- d) The dismissal was not a case of genuine redundancy.

[110] Section 387 of the Act requires me to consider set criteria in determining whether Mr Macnish’s dismissal was harsh, unjust or unreasonable. I set out my consideration below.

### 5.1 Section 387(a) – was there a valid reason for dismissal?

[111] A valid reason is one that is “sound, defensible or well-founded”<sup>69</sup> and should not be “capricious, fanciful, spiteful or prejudiced”.<sup>70</sup>

*Allegation 3 – what was the policy?*

[112] I accept that aviation is a highly regulated industry (and for good reason). I also accept that Cabin Crew Members perform safety-critical functions and that there are strong and valid reasons why Cabin Crew Members must always have a BAC level of 0.02% as reflected in the CASA Regulations. Virgin's A4 Rule that Cabin Crew Members must abstain from drinking alcohol eight hours prior to sign-on is more cautious compared to the relevant CASA Regulations that Cabin Crew Members must refrain from drinking alcohol eight hours prior to take-off. I do not find this to be unreasonable, and I find that Mr Macnish was in breach of the A4 Manual by drinking the glass of prosecco 7.5 hours prior to his sign-on.

[113] However, just because an employee is in breach of a policy, it does not automatically mean that there is a valid reason for the dismissal. The circumstances must be considered. I note and agree with Virgin's reliance on the Full Bench case of *Sydney Trains v Hider*,<sup>71</sup> where the Bench noted that not every established breach of a requirement of workplace policy will constitute a valid reason for dismissal.<sup>72</sup>

*Allegation 3 – what did Mr Macnish know?*

[114] As detailed at [37], I find that Mr Macnish did take away from the Ground School a general understanding that you should not drink alcohol eight hours prior to a duty and understood that Virgin took a zero-tolerance stance to drugs and alcohol, such as requiring a BAC level of 0.00% at sign-on. I similarly accept Virgin's evidence and submissions that during the meeting with Ms Ridge on Wednesday 11 October 2023, Mr Macnish's words conveyed that he understood that he should not drink alcohol eight hours prior to a duty.

[115] I accept Mr Macnish's evidence that he had not been in the situation of drinking alcohol prior to a duty before, and that he was not sure of the specific detail of the 8-hour Rule.

[116] I find that it was not unreasonable for Mr Macnish to have understood the concept of not drinking eight hours prior to a duty as a guideline, and that Virgin had specific rules with greater detail in written policy.

[117] As much as Virgin asserted that their eight-hour prohibition on alcohol prior to duty was clear and understood, the evidence did not support this. The evidence from all the witnesses is that at Virgin, 'DAMP' and the 8-hour Rule are often referred to generally, which fails to capture the nuance that the drug and alcohol policies are spread out over multiple manuals and that there are different policies that refer to the concept of 'eight hours'.

[118] Mr Timbs' evidence is that he shared Mr Macnish's understanding that the 8-hour Rule was a guideline, and not a hard rule. Mr Timbs gave evidence that on Monday 11 March 2024 he attended Cabin Manager conversion training in Brisbane with nine other recently promoted Cabin Managers. There was a discussion regarding DAMP testing, where Mr Timbs told the class that "even if a [Cabin] Crew Member has consumed one drop of alcohol 7 hours and 59 minutes prior to a duty, they are still breaching a DAMP policy in the A4 Manual that is not listed in the DAMP [M]anual. It's not a guideline, it's a rule".<sup>73</sup>

[119] Mr Timbs' further evidence is that Ms Scott said that it was a guideline, because everyone breaks down alcohol differently. Ms Scott rebutted Mr Timbs' evidence – she recalls saying words to the effect that the 8-hour Rule is a rule, and considerations should be made as

the eight-hour timeframe is a minimum cut off and some team members should abstain from consuming alcohol more than eight hours prior to sign-on, depending on the circumstances.<sup>74</sup>

[120] Mr Harrison-Frederick in cross-examination agreed that Ms Scott said words to the effect of, “it is not a rule” and “it is a guideline” when referencing the 8-hour Rule.<sup>75</sup> However, he understood it in the context of Ms Scott explaining how people metabolise alcohol.<sup>76</sup> I find that the conflicting evidence around this conversation highlights the lack of nuanced understanding of how Virgin’s drug and alcohol policies are structured and communicated.

[121] Mr McEwen was not called to give evidence, but it was accepted that he clearly thought that Mr Macnish was not in breach of any policies.<sup>77</sup>

[122] I appreciate that the shared understanding of three people do not make a general rule. However, Mr Timbs and Mr McEwen would have gone through similar – if not the same – training as Mr Macnish, and exposed to the same communications in the workplace. This supports a finding that Mr Macnish did not understand that the 8-hour Rule was more than a guideline.

[123] Ms Ridge referred to slide notes from Mr Macnish’s first day of Ground School which emphasised that if a Cabin Crew Member was ever in doubt about the DAMP Manual, they should check. Mr Macnish did this. He checked with the relevant Cabin Crew Manager, Mr McEwen. Mr McEwen gave his view that he thought Mr Macnish was in the clear and told Mr Macnish to check the DAMP Manual. Mr Macnish did so. Mr McEwen is a Cabin Crew Manager and Mr Macnish was entitled to rely on Mr McEwen’s guidance.

[124] I find that even if Mr Macnish understood that the 8-hour Rule was more binding than a guideline, it was not unreasonable for him to think that the details of the rule would be set out in the DAMP Manual.

### *Allegation 3 – how should the DAMP Manual be interpreted?*

[125] I find it is reasonable that an employee would look at the DAMP Manual and conclude that it contains what they need to know about Virgin’s rules concerning drug and alcohol consumption. Aviation is a highly regulated industry. Everything is spelled out and captured in regulations, plans, policies and manuals. The DAMP Manual expressly states that it applies to all Virgin employees and that it is a consolidation of Virgin’s policies and procedures regarding the management of alcohol and drugs in the workplace. This tells employees that the DAMP Manual combines all of Virgin’s drug and alcohol management policies and procedures. This is supported by how the DAMP Manual refers to duty travel and layovers, which do not apply to all Virgin employees.

[126] I also note that in the ‘Fitness for work and duty’ or ‘Work-related activities’ sections in the DAMP Manual it does not advise employees to check their relevant operating manual. This contrasts with the sections on ‘Duty Travel’ and ‘Layovers’, which set out the relevant rule and tells staff to check the relevant operating manual.

[127] I find that based on the wording of the DAMP Manual, it was reasonable for Mr Macnish to think that everything he needed to know about Virgin’s approach to drugs and alcohol was

contained in the DAMP Manual. This is supported by the evidence that when Virgin's witnesses such as Ms Ridge spoke to Mr Macnish about being 'DAMP compliant', they were referring to the DAMP Manual and did not mention the A4 Manual.

[128] I agree with Mr Macnish that there is no blanket prohibition on drinking eight hours prior to duty in the DAMP Manual, and that the layover and duty travel sections did not apply to his situation.

[129] Confusingly, the sections on layover and duty travel are worded in such a way that it contemplates situations where a Virgin employee could be permitted to drink alcohol within eight hours of a duty. This was acknowledged by Ms Ridge during her cross-examination.<sup>78</sup> Ms Ridge also conceded that a person could be compliant with the DAMP Manual but not be compliant with the A4 Manual. Ms Ridge's evidence is that the A4 Manual would take precedence but could not explain why.<sup>79</sup>

[130] Virgin submits that Mr Macnish's circumstances were very similar or analogous to a layover or duty travel situation. It therefore should have been obvious to Mr Macnish that if the DAMP Manual explicitly bans drinking within eight hours of commencing duties in a layover or duty travel scenario, then the same rule should apply to him in his circumstances.<sup>80</sup> I am not persuaded by this. If the rules on layover and duty travel were meant to apply more broadly, then it would say it in the DAMP Manual.

[131] During closing submissions, Counsel for Virgin asserted that regardless of whether the 8-hour Rule was in the A4 Manual or the DAMP Manual, it was still a rule that Virgin is entitled to expect compliance with. Counsel gave the example of where if a company had no written policies, then they would be entitled to rely on verbal directives.<sup>81</sup> I am not persuaded by this example. Virgin is not in the situation of a company with no written policies. As noted above, aviation is highly regulated industry with a high level of written regulation and policies. It is reasonable for employees in the aviation industry to think that they can rely on written policies.

[132] In this case, there were verbal discussions about the 8-hour Rule, which were generally in the context of being 'DAMP compliant'. When Mr Macnish had questions, he checked the DAMP Manual. This is entirely reasonable. Given what the DAMP Manual says about consolidating Virgin's drug and alcohol management policies, it is also reasonable for Mr Macnish to think that what is in the DAMP Manual takes precedence, rather than anything conveyed verbally.

[133] In summary, though Mr Macnish was in breach of the A4 Rule, I find in the circumstances that it was not a valid reason for dismissal.

[134] For completeness, I address Ms Ridge's evidence regarding two related matters to Allegation 3:

- (a) Issues of Mr Macnish turning up to work hungover: Virgin did not call Ms X, the Cabin Crew Member who emailed Ms Ridge, to give evidence around her concerns that Mr Macnish had turned up to work hungover. As her evidence could not be tested and is in dispute, I do not rely on it.

- (b) French incident: In Ms Ridge’s evidence she cites that Mr Macnish had an ‘apparent incident’ in France in June 2023 where Mr Macnish had to attend a French hospital suspected alcohol poisoning. Mr Macnish explained that his drink had been spiked. Ms Ridge clearly did not believe this and said that “this information does tend to suggest a pattern of behaviour in relation to alcohol use”.<sup>82</sup> Ms Ridge did not give any evidence that she had investigated this incident.

Mr Macnish provided a cogent explanation of what occurred. He provided names of the Virgin staff he was with and explained that they had spent the day in Paris during their time off. Mr Macnish had drunk during the day but had also been eating. After having a drink at a bar, Mr Macnish became unusually unwell and went to a hospital. When Mr Macnish returned back to Perth, he saw a GP who gave the opinion that it was likely his drink had been spiked with liquid ketamine. Mr Macnish provided his GP’s medical certificate to Virgin.<sup>83</sup> Mr Macnish was not cross-examined on this evidence. I accept Mr Macnish’s account in this regard.

### *Allegation 1*

[135] Though Ms Lokys did not rely on Allegation 1 as a reason for dismissal (though she did consider it overall as a pattern of Mr Macnish’s behaviour), Virgin relies on Allegation 1 as a valid reason for dismissal. I agree with Ms Lokys’ sentiments in the termination letter detailed in [107] of this Decision: I do not find that Mr Macnish’s actions on Sunday 26 November 2023 constitute a valid reason for dismissal.

[136] I must admit that I found Virgin’s approach to Allegation 1 and the fatigue management issue on Sunday 26 November 2023 mystifying.

[137] During Ms Colson’s cross-examination, she acknowledged that Cabin Crew Members can bring friends and family to stay with them in their Virgin-provided accommodation.<sup>84</sup> During Ms Ridge’s cross-examination, Ms Ridge conceded that if a straight, married man were to have sex with his wife after accessing fatigue, then it would “probably not” be any of Virgin’s business to comment on it.<sup>85</sup>

[138] Ms Ridge also acknowledged that it is common practice for Virgin employees who are on layovers or who are working in other cities away from their home base to use dating apps when they are staying in Virgin-provided accommodation.<sup>86</sup> There is nothing wrong with using dating apps for casual sex. What happens between informed and consenting adults is their own business, unless it breaches a lawful and reasonable workplace policy.

[139] I find that Mr Macnish was genuinely fatigued the night of Saturday 25 November 2023. I accept his evidence of the medical incident and how it affected him. I found Ms Ridge’s approach to this matter difficult to understand. It seemed clear that the medical incident did occur. It is not unreasonable that a staff member would be affected by it, yet Ms Ridge found that Mr Macnish was not genuinely fatigued.

[140] Ms Ridge also brought Allegation 2 against Mr Macnish, based on a short conversation in passing. It would have been reasonable and expected for Ms Ridge to speak with Mr Macnish

once she read the safety incident report from Saturday 25 November 2023 to clarify any discrepancies, rather than going straight to levelling a formal allegation.

[141] Section A.2.4 of the FRMS Manual provides that staff must refrain from knowingly misusing or manipulating fatigue management entitlements, such as by carrying out social activities during a fatigue period. Putting to one side the question of whether sex is a social activity, I find that Mr Macnish did not access fatigue for the purpose of having casual sex; he accessed it because he was affected by the medical incident, and he had not been able to sleep. I accept that he engaged in casual sex to go to sleep. Whilst that may not be the way that everyone chooses to help them fall asleep, it does not mean that Mr Macnish was manipulating or misusing the fatigue entitlement.

[142] The only part that I find concerning is the safety aspect of meeting a stranger late at night and then inviting them back to your accommodation. Mr Macnish should have had more regard for his personal safety. However, I accept that Mr Macnish's thinking was clouded by the recent medical incident and his fatigue. I also note that it would be unfair of Virgin to have disciplined Mr Macnish just for inviting a stranger into his accommodation given the evidence that it is a common practice amongst staff.

[143] I am not persuaded that Mr Macnish breached the FRMS Manual on Saturday 25 November 2023. Even if I had found that Mr Macnish had breached it, given that he was genuinely fatigued and the fact that using dating apps while in Virgin-provided accommodation is common practice, I would not have found that it gives rise to a valid reason for dismissal.

#### *Other matters*

[144] For completeness, I note that Virgin drew attention to Mr Macnish accessing fatigue regularly, including three times in a three-month period. During re-examination, Mr Macnish explained that he had COVID-19 at the time.<sup>87</sup> During Ms Ridge's cross-examination, she conceded that it was not unusual that someone recovering from COVID-19 would access fatigue more frequently.<sup>88</sup> In those circumstances, I do not find anything alarming about Mr Macnish's history of accessing fatigue.

[145] Virgin also drew attention to instances where Mr Macnish had attended work late. In Mr Macnish's circumstances, I do not find that this constitutes a valid reason for dismissal.

#### **4.2 Section 387(b) and (c) – notification of valid reason and opportunity to respond**

[146] An employee protected from unfair dismissal should be notified of the reason to terminate their employment before the decision to dismiss is made.<sup>89</sup> Failure to do so impacts on their ability to respond to that reason before the decision to terminate is made.<sup>90</sup>

[147] Virgin broadly put its reasons for dismissal to Mr Macnish for him to respond to. However, there were elements that were not put to Mr Macnish, such as:<sup>91</sup>

(a) that he deliberately commenced his duty despite knowing that he was in breach of the 8-hour Rule;<sup>92</sup>

(b) that Virgin has a zero-tolerance approach to breaches of its drug and alcohol policies;



(c) that Virgin was not satisfied that he would not engage in similar breaches in the future; and

(d) specifics regarding the conversation he had with Ms Ridge on Wednesday 11 October 2023.

[148] Virgin submits that the investigative and show cause processes were careful and considered and all relevant matters were put to the Applicant. In the alternative, where there are any minor gaps, criticism of this is pedantic.

[149] I agree with Virgin that the substance of the issues that Ms Lokys relied upon in reaching her decision to dismiss Mr Macnish were put to him. I find that the substantive reason Ms Lokys made the decision to dismiss Mr Macnish was Ms Ridge's finding that Mr Macnish had breached the A4 Rule and Ms Lokys' view that Mr Macnish had a pattern of disregard for Virgin's policies. Though Ms Ridge and Ms Lokys did not put the issues outlined in [147], Mr Macnish was told of the substantive reason for dismissal and was given the opportunity to respond.

#### **4.3 Section 387(d) – any unreasonable refusal by the Respondent to allow a support person**

[150] Virgin did not refuse any request for a support person. This is a neutral consideration in assessing Mr Macnish's dismissal.

#### **4.4 Section 387(e) – warnings concerning performance**

[151] The dismissal was not related to unsatisfactory performance. This is also a neutral consideration.

#### **4.5 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**

[152] It is uncontroversial that Virgin is a large enterprise with dedicated human resources specialists. This is a neutral consideration.

#### **4.6 Section 387(h) – any other matters the Commission considers relevant**

##### *Self-referral*

[153] There was much debate between the parties as to whether Mr Macnish had self-reported his error regarding the A4 Rule. I find that he did. It was put to Mr Macnish during his cross-examination that if he had not heard his co-workers talking about the Virgin Christmas Party, he would not have come forward to see Ms Ridge (and subsequently spoke to Ms Solis instead) on Wednesday 20 December 2023. Mr Macnish's answer is that he would not have known there was an incident.<sup>93</sup> This is a reasonable answer. Mr Macnish (or any other staff member) cannot be faulted for not self-reporting if they do not know that they have breached a policy.

[154] The DAMP Manual explicitly encourages self-referral of mistakes to promote a robust safety culture. Part of this encouragement is the position that “the reporting of errors will not result in disciplinary action”. This is to be commended.

[155] I don’t believe that Mr Macnish had this part of the DAMP Manual specifically in mind when he went to speak with Ms Solis on Wednesday 20 December 2023. However, I find that he did want to be upfront and honest about him operating the red-eye flight once he became aware that it might be an issue. This is something I have taken into consideration in weighing up whether Mr Macnish’s dismissal was unfair.

#### *Comparison to other staff who have breached the 8-hour Rule*

[156] Mr Macnish relies on a recent incident involving another Perth-based staff member who I will refer to simply as ‘Doe’ to preserve their privacy. Doe is a Cabin Crew Manager who received a result of 0.02% when breathalysed at work to test their BAC level. This was an express breach of the CASA Regulations and DAMP Manual. Doe was not terminated or demoted.<sup>94</sup> This was on the grounds of Doe’s medical issues with alcohol.

[157] Virgin submits that where an individual has a genuine health condition and seeks treatment and support, Virgin takes a responsible health-based approach, rather than a traditional disciplinary approach to support the person in continuing in employment. This is also to be commended.<sup>95</sup>

[158] Virgin further submits that Mr Macnish did not raise that he had an alcohol dependency issue or any other relevant health issue that contributed to his conduct.<sup>96</sup> I accept this submission.

[159] However, Doe’s case shows that Virgin is capable of nuance when it comes to breaches of the 8-hour Rule. Nuance does not mean being soft or lenient when it comes to serious issues of alcohol and safety, especially in a safety-critical industry such as aviation. But a lack of nuance runs the risk of creating unfair outcomes.

#### *Employment record*

[160] It is not disputed that Mr Macnish’s performance at work was of a high standard. Ms Ridge acknowledged in cross-examination that Mr Macnish had “glowing” feedback from Cabin Crew Managers.<sup>97</sup>

[161] I also note Ms Lokys’ concession that when reaching the decision to terminate Mr Macnish’s employment, she did not take his work performance feedback into consideration.<sup>98</sup>

### **5. Conclusion – Mr Macnish’s dismissal was unfair**

[162] I have considered the factors in section 387 in relation to Mr Macnish’s dismissal. I find that though Mr Macnish did breach the A4 Rule, it did not give rise to a valid reason in the circumstances. I also find that Mr Macnish did not breach the FRMS Manual.

[163] If I had been satisfied that Mr Macnish's breach of the A4 Rule constituted a valid reason for dismissal, I still would have reached the view that his dismissal was harsh for the following reasons:

- (a) Mr Macnish took steps to check whether he was fit to sign-on for duty, such as checking with the relevant Cabin Crew Manager, checking the DAMP Manual and breathalysing himself.
- (b) Mr Macnish was entitled to think that the DAMP Manual contained everything he needed to know about Virgin's drug and alcohol management at the workplace. He was not in breach of the DAMP Manual when he presented for work on Sunday 17 December 2023.
- (c) Ms Ridge and Ms McGregor both acknowledged that in their dealings with Mr Macnish at both the Ground School and at the meeting on Wednesday 11 October 2023, at no point did they reference the A4 Manual when referring to the 8-hour Rule.
- (d) Mr Macnish was proactive in addressing the issue. Once he became aware that he may have breached a policy, he spoke with Ms Solis (in lieu of Ms Ridge) on Wednesday 20 December 2023. It arguably would have been easier for him to try and ignore the gossip and hope that it went away but he chose to try and be proactive in addressing his concerns regarding his employment.
- (e) Virgin has a rightfully strong stance on the consumption of alcohol in the workplace. However, it is not a strict 'zero-tolerance' stance as shown by the Doe example.

[164] Mr Macnish was not in the situation of someone who was rostered on to work, had too many drinks at the Virgin Christmas Party and then proceeded to turn up to work. He was not rostered on at the time he attended the Virgin Christmas Party; he had one drink 7.5 hours before his scheduled sign-on; he checked with his manager; he checked the DAMP Manual; he breathalysed himself; and he was compliant with the DAMP Manual and CASA Regulations at the time he commenced his duty.

[165] As I have already explored, I do not find that Mr Macnish breached the FRMS Manual. If I had found that he had, it would not rise to the standard of a valid reason given the circumstances of the medical incident and the common practice of Virgin staff using dating apps while away from their home city.

[166] Mr Macnish's dismissal was unfair. I now turn to consider the appropriate remedy.

## **6. Remedy**

[167] Section 390 of the Act sets out the circumstances in which an order for reinstatement or compensation may be made:

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

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

- (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
  - (b) the person has been unfairly dismissed (see Division 3).
- (2) The FWC may make the order only if the person has made an application under section 394.
- (3) The FWC must not order the payment of compensation to the person unless:
- (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
  - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

**[168]** I am satisfied that, pursuant to s 390(1) and (2), Mr Macnish made an application for unfair dismissal, is a person protected from unfair dismissal and was unfairly dismissed.

**[169]** Mr Macnish seeks reinstatement to his role of Cabin Crew Member.

**[170]** Virgin submits that reinstatement is not appropriate as there has been a fundamental breakdown of trust. Virgin says that if Mr Macnish were to be reinstated, it would convey to other Cabin Crew Members that they can breach the 8-hour Rule and ‘get away with it’.<sup>99</sup> Further, Virgin says that Mr Macnish’s key managers consider Mr Macnish is dishonest when he says he did not know or did not understand the 8-hour Rule, even if the Commission was to find the contrary, means there is a real breakdown in the necessary trust and confidence in him for ongoing employment.

**[171]** In *Nguyen v Vietnamese Community in Australia T/A Vietnamese Community Ethnic School South Australia Chapter*<sup>100</sup> (*Nguyen*), the Full Bench of the Commission considered and summarised relevant principles in assessing the impact of loss and confidence on the question of whether reinstatement is appropriate. I respectfully adopt the Full Bench’s principles at [27] as below (citations omitted):

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.

- The reluctance of an employer to shift from a view, despite a tribunal’s assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

[172] Virgin’s submissions cannot be sustained in light of the principles in *Nguyen*. I do not accept that after this matter that Virgin staff will think they can ‘get away’ with breaches of Virgin’s drug and alcohol management policies – if anything, Mr Macnish’s case will assist in staff clearly understanding how Virgin’s policies are set out.

[173] I find that it is appropriate to reinstate Mr Macnish. In reaching this conclusion, I rely on the following:

- (a) As acknowledged by Ms Ridge, Mr Macnish was well regarded by Cabin Crew Managers who gave him “glowing” feedback.
- (b) Mr Macnish conducted himself professionally and politely throughout the investigation and the show cause processes.<sup>101</sup>
- (c) Mr Macnish’s engagement with the investigation process and his responses. His show cause replies showed genuine contrition and reflection. His email on Saturday 6 January 2024 demonstrated that he had reviewed Virgin’s policies and summarised them in his own words. I am satisfied that Mr Macnish has learned a lasting lesson from this experience and will act accordingly if he is reinstated.

## **6.1 Reinstatement – to what position should Mr Macnish be appointed?**

[174] Section 391(1) of the Act provides that an order for Mr Macnish’s reinstatement must be an order that Mr Macnish’s employer at the time of the dismissal reinstate Mr Macnish by:

- (a) reappointing Mr Macnish to the position in which he was employed immediately before the dismissal; or
- (b) appointing Mr Macnish to another position on terms and conditions no less favourable than those on which Mr Macnish was employed immediately before the dismissal.

[175] Virgin did not make any submissions regarding the availability of Mr Macnish’s former position as Cabin Crew Member. It is public knowledge that the position of Cabin Crew Member still exists in Virgin’s enterprise. I am satisfied that it is open to me to make an order reappointing Mr Macnish within 21 days of the date of this decision to his former position as Cabin Crew Member.

## **6.2 Reinstatement – is it appropriate to make an order to maintain continuity?**

[176] Section 391(2) of the Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to maintain the following:

- (a) the continuity of Mr Macnish's employment;
- (b) the period of Mr Macnish's continuous service with the employer or, if applicable, the associated entity.

[177] Given my findings regarding the harshness of Mr Macnish's dismissal, I consider it appropriate to make an order to maintain Mr Macnish's continuity of employment and period of continuous service with Virgin.

### **6.3 Reinstatement – is it appropriate to make an order to restore lost pay?**

[178] Mr Macnish does not seek an order for backpay. I do not make any order in this regard.

## **7. Order**

[179] An Order giving effect to this Decision has been issued separately.<sup>102</sup>



### COMMISSIONER

#### *Appearances:*

*T Dixon* of Counsel for the Applicant, instructed by *J Nicholas*, solicitor, Nicholas Legal.  
*N Ellery* of Counsel for the Respondent, instructed by *L Khan*, senior legal counsel, Virgin Airlines Australia Pty Ltd.

#### *Hearing details:*

2024.  
Perth:  
21, 22 May.

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<sup>1</sup> Digital Court Book (DCB) page 1374 at [46].

<sup>2</sup> Ibid page 1385 at [1]–[3].

<sup>3</sup> Ibid page 1510 at [1]–[4].

<sup>4</sup> Mr Harrison-Frederick was initially summonsed by Mr Macnish to give evidence pursuant to s 590 of the *Fair Work Act 2009* (Cth). On the first day of hearing, Counsel for Mr Macnish informed me that they no longer wished to call Mr Harrison-Frederick to give evidence. Counsel for Virgin subsequently made an application pursuant to s 590 to call Mr Harrison-Frederick to give evidence. I granted this application. *See*: Transcript, 21 May 2024, PN962–9.

<sup>5</sup> DCB (n 1) page 1039 at P.4.1.

<sup>6</sup> Ibid at P.4.2.

<sup>7</sup> Ibid page 1049 at 0.1.1.

<sup>8</sup> Ibid page 1037.

<sup>9</sup> Ibid page 1053.

<sup>10</sup> Ibid page 305-6.

<sup>11</sup> Ibid page 1079.

<sup>12</sup> DCB (n 1) page 1167.

<sup>13</sup> Ibid page 1199.

<sup>14</sup> Ibid page 309.

<sup>15</sup> Ibid page 407.

<sup>16</sup> Ibid pages 86–91.

<sup>17</sup> Ibid page 1483.

<sup>18</sup> Ibid page 1492.

<sup>19</sup> Ibid page 1395 at [66].

<sup>20</sup> Transcript, 21 May 2024, PN1200.

<sup>21</sup> DCB (n 1) page 56 at [7].

<sup>22</sup> Ibid at [8].

<sup>23</sup> Supplementary Digital Court Book page 6 at [23].

<sup>24</sup> Ibid page 7 at [28].

<sup>25</sup> Transcript, 21 May 2024, PN415.

<sup>26</sup> Ibid PN418.

<sup>27</sup> DCB (n 1) page 1579 at [22].

<sup>28</sup> Ibid page 57 at [10].

<sup>29</sup> Transcript, 21 May 2024, PN214.

<sup>30</sup> Ibid PN757.

<sup>31</sup> Ibid PN461.

<sup>32</sup> Ibid PN768-9.

<sup>33</sup> Ibid PN460.

<sup>34</sup> DCB (n 1) page 1430.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid page 60 at [30].

<sup>37</sup> Transcript, 22 May 2024, PN1515–19.

<sup>38</sup> DCB (n 1) page 62 at [46]; page 63 at [48].

<sup>39</sup> Ibid page 294.

<sup>40</sup> Ibid page 63 at [51].

<sup>41</sup> Ibid page 1390 at [38]–[40].

- <sup>42</sup> Ibid pages 137–140.
- <sup>43</sup> Ibid page 64 at [54]–[59].
- <sup>44</sup> Ibid page 1580 at [3]; page 1581 at [33].
- <sup>45</sup> Ibid page 269 at [9(b)].
- <sup>46</sup> Exhibit A1, Document 1, Meeting Guide – Witness Statement, Eden Wilkins, 20 December 2023.
- <sup>47</sup> Exhibit A1, Document 3, Meeting Guide – Witness Statement, Amos McEwen, 22 December 2023
- <sup>48</sup> Transcript, 21 May 2024, PN1213.
- <sup>49</sup> Transcript, 22 May 2024, PN1757–60.
- <sup>50</sup> DCB (n 1) page 65 at [61].
- <sup>51</sup> Exhibit A1, Document 3, Meeting Guide – Witness Statement, Amos McEwen, 22 December 2023.
- <sup>52</sup> Exhibit A1, Document 5, LOA Response Final Amos, 24 January 2024.
- <sup>53</sup> DCB (n 1) page 66 at [71].
- <sup>54</sup> Ibid page 1612 at [6].
- <sup>55</sup> Ibid pages 1614–16.
- <sup>56</sup> Ibid pages 143–5.
- <sup>57</sup> Ibid pages 146 – 149.
- <sup>58</sup> Ibid page 150.
- <sup>59</sup> Transcript, 21 May 2024, PN590–8.
- <sup>60</sup> Ibid PN581.
- <sup>61</sup> DCB (n 1) pages 1452–68.
- <sup>62</sup> Ibid page 153.
- <sup>63</sup> Ibid pages 157–61.
- <sup>64</sup> Transcript, 21 May 2024, PN1207.
- <sup>65</sup> DCB (n 1) pages 162–5.
- <sup>66</sup> Ibid pages 1529–47.
- <sup>67</sup> Ibid pages 166–8.
- <sup>68</sup> *Fair Work Act 2009* (Cth), s 394(2).
- <sup>69</sup> *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333, (1995) 62 IR 371, [373].
- <sup>70</sup> Ibid.
- <sup>71</sup> [\[2020\] FWCFB 1373](#).
- <sup>72</sup> Ibid at [35].
- <sup>73</sup> DCB (n 1) page 247 at [29].
- <sup>74</sup> Ibid page 1617 at [8]–[9].
- <sup>75</sup> Transcript, 21 May 2024, PN1146.
- <sup>76</sup> Ibid PN1163–65.
- <sup>77</sup> Transcript, 22 May 2024, PN2811–12.
- <sup>78</sup> Transcript, 21 May 2024, PN1314–16.
- <sup>79</sup> Ibid PN1323–5.
- <sup>80</sup> DCB (n 1) page 1371 at [27]–[28].
- <sup>81</sup> Transcript, 22 May 2024, PN2833.
- <sup>82</sup> DCB (n 1) page 1395 at [68].
- <sup>83</sup> Ibid page 256 at [8(e)].
- <sup>84</sup> Transcript, 22 May 2024, PN2463–7.
- <sup>85</sup> Ibid PN1479.



<sup>86</sup> Ibid PN1483–6.

<sup>87</sup> Transcript, 21 May 2024, PN876.

<sup>88</sup> Transcript, 22 May 2024, PN1493.

<sup>89</sup> *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport Print S5897*, [70]–[73], [(2000) 98 IR 137].

<sup>90</sup> Ibid [75].

<sup>91</sup> DCB (n 1) page 73 at [118].

<sup>92</sup> Transcript, 22 May 2024, PN1593.

<sup>93</sup> Transcript, 21 May 2024, PN616.

<sup>94</sup> Transcript, 22 May 2024, PN1521–34.

<sup>95</sup> DCB (n 1) page 1381 at [97].

<sup>96</sup> Ibid at [98].

<sup>97</sup> Transcript, 22 May 2024, PN1495–9.

<sup>98</sup> Ibid PN2125–6.

<sup>99</sup> DCB (n 1) page 1382 at [103].

<sup>100</sup> [\[2014\] FWCFB 7198](#).

<sup>101</sup> DCB (n 1) page 74 at [120]–[121].

<sup>102</sup> [PR778285](#).