



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Mahamed Ali

v

Sydney Trains

(U2023/3993)

COMMISSIONER MATHESON

SYDNEY, 8 JANUARY 2024

Application for an unfair dismissal remedy – breach of policies and procedures – record keeping for credit card expenditure – provision of card details to other employees - dismissal not unfair – application dismissed.

[1] On 10 May 2023, Mr Mahamed Ali (Applicant) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Sydney Trains (Respondent). The Applicant seeks reinstatement and orders for continuity of employment and restoration of lost pay.

When can the Commission order a remedy for unfair dismissal?

[2] Section 390 of the Act provides that the Commission may order a remedy if:

- (a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and
- (b) the Applicant has been unfairly dismissed.

[3] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[4] Section 382 of the Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:

- (i) a modern award covers the person;
- (ii) an enterprise agreement applies to the person in relation to the employment;
- (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

When has a person been unfairly dismissed?

[5] Section 385 of the Act provides that a person has been unfairly dismissed if the Commission 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.

Background

[6] There is a long timeline of events leading up to the dismissal of the Applicant. The factual background to the matter is as follows:

- The Applicant commenced employment as Transit Officer in January 2003 for the then State Rail Authority at the age of 19.
- The Applicant accepted voluntary redundancy from the then rail entity with an effective termination date of 31 January 2014. At that time the Applicant was a Senior Transit Officer.
- The Applicant's employment commenced with the Respondent, Sydney Trains in 2014 as a Cleaner in Charge.
- In June 2015 the Applicant was appointed to the role of Area Manager in the Fleet Maintenance Division.
- In June 2018 the Applicant was appointed to the role of Fleet Presentation Operations Manager South West in the Fleet Maintenance Division.
- In August 2020 the Respondent demoted the Applicant to the position of Area Manager for conduct which the Respondent said breached the Code of Conduct, Attendance and Leave Policy and Motor Vehicle Fleet Procedure. In particular, the allegations the Respondent found were substantiated were allegations that:
 - between 1 March 2019 and 30 September 2019 the Applicant failed to be honest and/or accurate in relation to the work he performed by failing to work the 'actual work hours' claimed, in breach of the Code of Conduct; and
 - between 1 March 2019 and 12 September 2019 the Applicant used his Respondent issued motor vehicle for non-work related purposes and was not authorised to use the motor vehicle for these non-work related purposes.

- The Applicant was issued with a corporate credit card referred to as a ‘PCard’(PCard) to pay for certain business related expenses.
- The Respondent required employees who held PCards to upload receipts of expenditure into a system called ‘Expense8’ and a manager would log into this system and had the option to either accept or reject the expenditure.
- The Applicant was off work and in receipt of workers’ compensation payments or ‘sick leave in lieu of W/Comp’ between 15 April 2021 and 13 May 2022.
- On 10 May 2022 the Respondent provided the Applicant with a letter dated 6 May 2022 advising him that its Workplace Conduct and Investigations Unit (WCIU) had commenced an investigation and that he was suspended from duty.
- An investigation in relation to the matter was conducted by an external provider, National Workplace Investigations.
- On 14 July 2022 the Respondent provided the Applicant with correspondence detailing six allegations that were the subject of an investigation. These allegations are set out below and further particulars relating to each of them were set out in the correspondence:
 - **Allegation 1:** Between 22 February 2019 and 16 December 2020 (inclusive) the Applicant used his PCard to make purchases but did not supply any and/or adequate documentation. In making this allegation the Respondent referred to 28 transactions in relation to which it said tax invoices were not uploaded into Expense8 or were illegible.
 - **Allegation 2:** Between 4 April 2019 and 16 February 2021 (inclusive), transactions were made using the PCard that had been issued to the Applicant which were non-compliant with the relevant ‘Sydney Trains Purchasing Card Policies and/or procedures’.
 - **Allegation 3:** On 14 February 2021 the Applicant purchased items on his PCard as personal or private expenditure. Various transactions were identified by the Respondent in relation to this allegation.
 - **Allegation 4:** Between 21 October 2021 and 5 April 2022 (inclusive) the Applicant used his PCard to attempt to make transactions while he was on workers’ compensation.
 - **Allegation 5:** From 25 January 2022 the Applicant did not declare and did not seek approval to engage in secondary employment.
 - **Allegation 6:** On or around 26 May 2022 the Applicant submitted to the Respondent/Transport for NSW (TfNSW) a State Insurance Regulatory Authority ‘Certificate of Capacity/Certificate of Fitness’ form falsely stating that he had not engaged in any form of paid employment or voluntary work for which he has received or was entitled to receive payment.
- It was alleged in the letter that he had breached:
 - the Transport for NSW Code of Conduct (Code of Conduct);
 - the Sydney Trains Purchasing Card Technical Policy (effective 5 July 2018);
 - the Sydney Trains Purchasing Card Procedures (effective 10 September 2020); and
 - the Sydney Trains Workplace Standards Policy – 1.4 Procedure: Secondary Employment and Emergency Services Work (effective July 2019).
- The letter of 14 July 2022 sought a response from the Applicant within 14 days.
- On 5 August 2022 the Applicant provided a written response to the allegations.

- On 17 August 2022 the external investigator wrote to the Applicant requesting a response to a number of questions. The Applicant provided a response on 24 August 2022.
- On 28 September 2022, the Applicant was issued a letter explaining that allegations 1, 2 and 5 had been substantiated but that allegations 3, 4 and 6 had not.
- The letter of 28 September 2022 set out a preliminary disciplinary outcome, being dismissal.
- On 21 November 2022, the Applicant provided a written response to the preliminary disciplinary outcome.
- On 7 December 2022, the Respondent issued the Applicant with a final disciplinary outcome letter confirming its decision to dismiss him.
- On 13 January 2023, the Applicant requested that his dismissal be reviewed by the TfNSW Disciplinary Panel.
- On 14 February 2023, the Applicant received correspondence informing him that the TfNSW Disciplinary Panel had decided that:
 - the original decision would be set aside; and
 - the matter would be referred back to the original decision maker to have further information obtained and a new decision made.
- On 8 March 2023, the Respondent wrote to the Applicant inviting him to provide further commentary regarding:
 - the Respondent's assertion that he had been dishonest and untruthful in his declarations regarding secondary employment as well as during the disciplinary investigation;
 - why the Respondent should not consider his behaviours give rise to an irretrievable loss of trust and confidence in the employment relationship;
 - any other circumstances, special considerations or any other information the Applicant wished to provide as to why the Respondent should not terminate his employment.
- On 16 March 2023 the Applicant provided a written response.
- On 19 April 2023 the Respondent informed the Applicant that it had decided to terminate his employment and the dismissal took effect that day.
- The Applicant was paid 4 weeks' pay in lieu of notice.

The hearing

[7] There being contested facts involved, the Commission is obliged by s.397 of the Act to conduct a conference or hold a hearing.

[8] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing for the matter (s.399 of the Act) and the hearing took place across two days on 4 and 5 September 2023.

Permission to appear

[9] The Applicant was represented by the Australian Rail, Tram and Bus Industry Union. The Respondent sought to be represented before the Commission by a lawyer.

[10] Relevantly, s.596(1) of the Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[11] Section 596(2) provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter before the Commission only if:

- (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
- (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
- (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

[12] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the Act.¹ The decision to grant permission is a two-step process. First it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.²

[13] On 23 August 2023 the Respondent filed submissions addressing why it said the Commission should grant permission for it to be legally represented and the Applicant filed submissions in opposition. By way of summary the Respondent submitted:

- complexities arise in relation to the matter as the matter would require cross examination of multiple witnesses concerning a range of factual disputes and in circumstances where there is a short timetable for hearing legal representation would assist in moving through each witness expeditiously;
- the matter requires the interpretation of several of the Respondent's policies and procedures and having experienced legal counsel involved would assist the Commission in analysing the relevant sections of those policies and procedures;
- the Commission should grant permission for it to be legally represented pursuant to s.596(2)(a) of the Act on the grounds that it would enable the matter to be dealt with more efficiently taking into account the complexity of the matter.

[14] The Respondent also submitted that permission to be represented by a lawyer should be granted pursuant to:

- s.596(2)(b) of the Act on the basis that the Respondent does not employ any legal or human resources personnel and has no employees that would be able to represent it effectively at the hearing; and
- s.596(2)(c) of the Act on the basis that the Applicant is represented by an experienced industrial advocate and it would be at a disadvantage if representation was denied.

[15] The Applicant submitted, by way of summary:

- the issues in dispute gravitate toward considerations of harshness in respect of s.387(h) of the Act;
- the allegations which constitute the Respondent's case for dismissal broadly concern transactions which the Applicant has filed and served evidence and submissions about;
- there is nothing manifestly complex or unusual in the matter and the Commission should reject the Respondent's submissions concerning efficiency in line with *Urbanski*;³
- the Respondent receives direct and continuing support from Transport for NSW shared services which provides a large team of legally qualified practitioners and human resources personnel who administer all aspects of the investigation and dismissal process on behalf of the Respondent;
- the Respondent has access to qualified practitioners who are intimately familiar with the Applicant's matter, the reasons for the dismissal and who continue to coordinate the case for the Respondent;
- whether the advocates for either side are 'fairly matched' it is not relevant to the question of whether permission should be granted, rather the relevant consideration is whether there exists a significant degree of disparity between the resources of a publicly funded corporation and those of the Applicant;
- such disparity is magnified in circumstances where the Respondent has unlimited resources to instruct an external law firm and engage counsel.

[16] Having considered the submissions and materials filed in relation to the matter I was satisfied that there was complexity associated with the matter. The materials filed in relation to the matter are voluminous, there are a significant number of facts in contest and the matter was encumbered by interlocutory applications involving production of evidence. I considered that granting permission to the Respondent to be represented by a lawyer would enable the matter to be dealt with more efficiently anticipating that a lawyer would assist in ensuring cross examination of witnesses, submissions and evidence was focused on the relevant issues for determination.

[17] Having considered those matters, I determined that allowing the Respondent to be represented by a lawyer would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter. I therefore decided to exercise my discretion to grant permission for the Respondent to be represented.

[18] Accordingly, at the hearing the Respondent was represented by Ms Megan Brooks of Counsel, instructed by Ms Sara Westcott.

Witnesses

[19] The Applicant gave evidence on his own behalf and filed three witness statements with attachments, and the following witnesses also gave evidence on his behalf:

- Mr Todd Ryman, a former colleague of the Applicant;
- Mr Ahmad Addouj, a former colleague of the Applicant; and
- Ms Helen Bellette, an Industrial Officer at the Australian Rail, Tram and Bus Industry Union.

[20] The following witnesses gave evidence on behalf of the Respondent:

- Mr Ronald Devitt, Deputy Executive Director of Fleet Maintenance in the Respondent's Engineering and Maintenance Branch;
- Ms Camilla Greenwood, Senior Manager – Professional Standards and Conduct at Transport for NSW.

Submissions

[21] The Applicant filed submissions in the Commission on 8 August 2023. The Respondent filed submissions in the Commission on 29 August 2023.

[22] Final written submissions were filed by the Applicant on 1 September 2023.

Has the Applicant been dismissed?

[23] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[24] Section 386(1) of the Act provides that the Applicant has been dismissed if:

- (a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or
- (b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[25] Section 386(2) of the Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[26] There was no dispute and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

[27] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the Act.

Was the application made within the period required?

[28] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[29] It is not disputed and I find that the Applicant was dismissed from his employment on 19 April 2023 and made the application on 10 May 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was the Applicant protected from unfair dismissal at the time of dismissal?

[30] I have set out above when a person is protected from unfair dismissal.

Minimum employment period

[31] It was not in dispute and I find that the Respondent is not a small business employer, having 15 or more employees at the relevant time.

[32] It was not in dispute and I find that the Applicant was an employee, who commenced their employment with the Respondent on 17 November 2014 and was dismissed on 19 April 2023, a period in excess of 6 months.

[33] I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

Application of an enterprise agreement

[34] It was not in dispute and I find that, at the time of dismissal, the *Sydney Trains and NSW Trainlink Enterprise Agreement 2022* (Enterprise Agreement) applied to the Applicant's employment.

[35] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[36] Section 388 of the Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code if:

- (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
- (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[37] As mentioned above, I find that the Respondent was not a small business employer within the meaning of s.23 of the Act at the relevant time, having in excess of 14 employees (including casual employees employed on a regular and systematic basis).

[38] I am therefore satisfied that the Small Business Fair Dismissal Code does not apply, as the Respondent is not a small business employer within the meaning of the Act.

Was the dismissal a case of genuine redundancy?

[39] Under s.389 of the Act, a person's dismissal was a case of genuine redundancy if:

- (a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[40] It was not in dispute and I find that the Applicant's dismissal was not due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[41] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

[42] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Statutory considerations - Was the dismissal harsh, unjust or unreasonable?

[43] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

[44] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.⁴

[45] I set out my consideration of each below.

Section 387(a) - Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[46] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”⁵ and should not be “capricious, fanciful, spiteful or prejudiced.”⁶ However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.⁷

[47] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.⁸ “The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.”⁹

Applicant's submissions

[48] By way of summary, the Applicant submitted that there was no valid reason for the dismissal related to the Applicant's capacity or conduct because:

- the Applicant did not engage in serious misconduct;
- the conduct relied upon by the Respondent to dismiss him had at all times been approved by managers who held authority to approve each of the submitted expenses;
- the decision to dismiss him was procedurally unfair, including because of the gap in time being approximately 18 months between the investigation and when the allegations were presented to the Applicant.¹⁰

[49] The Applicant also submitted that the decision to dismiss him was made on a capricious, spiteful and prejudicial basis because of the conduct of senior managers who had engaged in a campaign to target his employment following his discovery and reporting of hidden unauthorized surveillance devices in the workplace.¹¹

[50] The Applicant noted that in the decision of *Selveachandran v Peteron Plastics Pty Ltd*, Northrop J found that a valid reason is a reason that is sound, defensible or well-founded and that a “reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason”.¹²

[51] The Applicant filed a witness statement with a number of attachments. Attachment B to the Applicant's witness statement is the Applicant's response to the allegations made by the respondent concerning alleged breaches of the Respondent's policies and procedures. In this letter dated 5 August 2022 the Applicant said, by way of summary:

- he was targeted and singled out since speaking about unlawful action by his manager;
- he had an unblemished record until being placed under the leadership of Mr Wybron and Mr Watson;

- Mr Wybron and Mr Watson had a “lax attitude”, and most managers followed their directives for fear of being targeted or “managed out of the business”;
- managers who questioned the purchasing process were advised to be team players;
- Mr Watson would make decisions at management meetings demanding Operations Managers purchase items for the sites they manage;
- Mr Wybron requested that the PCard information of Operations Managers be given to management and administrative staff for their use;
- administrative staff used the Applicant’s PCard without approval or notification on numerous occasions and the Applicant was told at the weekly meeting “Alan approved it; just submit it, and he will approve it”;
- the Applicant and other Operations Managers were called into the Clyde Hub after refusing to assist with ordering and were told if they did not follow directions they would be placed under performance management;
- it was remarkable that the investigations into the Applicant’s transactions were occurring almost three years after they were incurred and approved by his manager and that “this simple issue could have been raised to [the Applicant’s attention] at any time by a manager, allowing [the Applicant] to explain the situation and rectify the issues immediately”;
- the Applicant has not engaged in secondary paid employment without authorisation.

Respondent’s submissions

[52] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant’s capacity or conduct because the Applicant repeatedly failed to comply with the Respondent’s policies and procedures and submitted that the termination of the Applicant’s employment was a justified and proportionate response to this.¹³ In particular, the Respondent sought to rely on the following reasons which it submitted were valid reasons for the dismissal:

- the Applicant breached the Respondent’s Purchasing Card Technical Policy and the Code of Conduct;
- the Applicant breached the Secondary Employment Procedure as he had been dishonest and untruthful regarding his secondary employment; and
- the Applicant, as an experienced manager, was trusted to behave ethically and diligently ensuring that all work practices were conducted appropriately and with strict observance to the highest standards of propriety and in accordance with applicable policies and procedures which applied and in which he had been trained and he breached his duties in this regard.¹⁴

[53] The Respondent sought to rely on the evidence of Mr Devitt, Deputy Executive Director of Fleet Maintenance. Mr Devitt does not believe he has personally met the Applicant¹⁵ however it is apparent from Mr Devitt’s evidence that Mr Devitt made the decision that the appropriate disciplinary outcome in relation to the Applicant was dismissal.

[54] Mr Devitt’s evidence was that in late September 2022 the investigation into the allegations against the Applicant was finalised and:

- three of the allegations were not substantiated (i.e. Allegations 3, 4, and 6);¹⁶

- in respect of Allegation 1, relating to the alleged failure of the Applicant in the period between 22 February 2019 and 9 January 2020 to supply any and/or adequate supporting documentation for PCard purchases, 22 of the 28 particularised allegations were substantiated;¹⁷
- in respect of Allegation 2, relating to the Applicant's PCard purchases in the period between 4 April 2019 and 16 February 2021 which were allegedly non-compliant with the relevant PCard policies and procedures, nine of the 15 particularised allegations were substantiated;¹⁸
- Allegation 5, relating to the Applicant's failure to seek approval for secondary employment was substantiated.¹⁹

[55] Mr Devitt said that he considered the investigation report (which forms part of Attachment F to Applicant's witness statement) and supporting materials and was satisfied that the allegations were substantiated and amounted to breaches of the Code of Conduct, as well as the policies identified in the letter of allegations.²⁰

[56] Mr Devitt's evidence was that:

- following a meeting of the Sydney Trains Disciplinary Review Panel (Sydney Trains DRP) where the findings of the investigations were discussed, he came to the preliminary view that the appropriate disciplinary outcome was dismissal;²¹
- on 28 September 2022 he sent a letter to the Applicant outlining the findings of the investigation and his preliminary view that the appropriate outcome was dismissal and inviting the Applicant to make a submission in relation to the proposed outcome which would be considered before determining the final outcome;²²
- on 21 November 2022 Ms Bellette of the Rail, Tram and Bus Industry Union (RTBU) provided a response on the Applicant's behalf;²³
- he considered the response and it was discussed at a second meeting of the Sydney Trains DRP but it did not affect his view that dismissal was the appropriate outcome;²⁴
- on 7 December 2022 he sent a letter to the Applicant advising him that his final view was that the appropriate outcome was dismissal, with that letter informing the Applicant that he could request that the TfNSW Disciplinary Panel review the decision;²⁵
- the Applicant applied to the TfNSW Disciplinary Panel to have the decision reviewed and on 14 February 2023 the TfNSW Disciplinary Panel set aside the decision and referred the matter back to Mr Devitt;²⁶
- on 8 March 2023 the Applicant was given the opportunity to provide further information in response to questions put by the Respondent²⁷ and the Applicant provided a further written response on 15 March 2023;²⁸
- on 19 April 2023 the Applicant was advised of the new decision to terminate his employment effective from this date.²⁹

[57] Mr Devitt's evidence was that:

- as a PCard holder the Applicant was required to adhere to the requirements of the relevant PCard policy and procedures;³⁰
- the Applicant signed a copy of the "Cardholder's Agreement to Conditions of Use";³¹
- the Applicant undertook training in relation to PCard use.³²

[58] The Respondent submitted that the conduct of the Applicant was of sufficient gravity or seriousness so as to constitute a valid reason for the dismissal because:

- the policies and procedures regarding PCard use are particularly important in a government sector context given the activities and expenditure of public monies;
- the privileges and responsibilities associated with such activities are particularly important in circumstances where significant trust is placed on government sector employees to exercise good judgment, act with honesty and integrity and ensure that such expenditure is appropriate, proportionate, necessary and reasonable;
- the importance of ensuring any purchases are appropriately documented, supported by evidence such as tax invoices/receipts and compliant with relevant thresholds is critical to ensure appropriate governance and reporting obligations;
- policies associated with declaring, regulating, monitoring or approving secondary employment activities are similarly important and enable potential or actual conflicts of interest to be identified and / or mitigated, and ensure health and safety considerations such as fatigue can be appropriately managed;
- the Applicant's failure to comply with the relevant policies was of sufficient gravity or seriousness to constitute a valid reason for the dismissal as when considering misconduct and breaches of these types of policies and procedures, particular attention is and should be given to the matter of trust and confidence in the employment relationship noting the fundamental duties of employees, and in particular government sector employees, with regard to honesty, integrity, and ethical decision making; and
- the Applicant had not been honest and forthright in his responses particularly with regard to secondary employment notwithstanding having been provided with repeated opportunities, had failed to demonstrate any remorse or contrition for his conduct and the conduct demonstrated a pattern of dishonest and unethical behaviour and disregard for his employment obligations;³³
- when the whole of the Applicant's conduct (including during the investigation process) is taken into account, the Respondent's loss of trust and confidence is soundly and rationally based.³⁴

[59] The Respondent submitted that:

- the Applicant sought to justify his conduct on the basis that at the time he believed he had the authority of his supervisor to act outside of the policies and procedures, and there was a culture of acting in breach of the policies;
- even if the Commission is satisfied that Mr Ali was acting with honest intent, it does not mean there was an absence of a valid reason for the dismissal.³⁵

[60] In advancing this argument, the Respondent sought to rely on the comments of Deputy President Anderson in *Andrawos*³⁶ who said:

“[240] Given his pre-existing friendship with Mr McBryde-Martin and James's unusual circumstances and conduct, I am satisfied that the situation faced by Mr Andrawos was unique and challenging for any employee to manage.

[241] However, a good person doing the wrong thing even for the right reason does not set aside that person's obligation to do the right thing, especially when they have been trained by their employer to do the right thing.

[242] Where misconduct is serious, as was the case here, there are necessary limits to a claim of honourable and honest intent as a ground of mitigation. This is particularly so in a workplace concerned with money matters and where the proven conduct is inconsistent with the expectations or requirements of the business and is capable of attracting the attention of regulators that provide the business with a licence to operate".

The Applicant's role

[61] Mr Devitt's evidence was that at the time of his dismissal the Applicant held the role of Area Manager – Fleet Presentation and was accountable for cleaning operations and approximately 20 employees on any given shift.³⁷

[62] A copy of a position description for the Applicant's role was attached to Mr Devitt's statement. The Applicant was taken to that position description during cross examination and did not dispute its contents or that he held the responsibilities described within it. Of note, one of the "complementary capabilities" for this role is to "Demonstrate Accountability" at an "adept" level which is described as being "proactive and responsible for own actions, and adhere to legislation, policy and guidelines".

The PCard Policy and Procedure

[63] The Respondent has a 'Purchasing Card Technical Policy' (PCard Policy) which states as its purpose 'to outline the requirements that must be used in relation to the application, acceptance and usage of a' PCard.³⁸ The PCard Policy, which Mr Devitt said was effective from July 2018 to September 2020,³⁹ applies to all PCard activities undertaken for and on behalf of the Respondent by its employees.⁴⁰ The PCard Policy also makes reference to other documents relevant to it, including but not limited to a 'P-Card Expense Instruction Guide'.

[64] The Respondent has a 'Purchasing Card Procedures' document (PCard Procedure) which 'sets out mandatory requirements for the use, management and administration of' PCards. Mr Devitt said the PCard Procedure was effective between September 2020 and 15 July 2021.⁴¹ In some respects the PCard Procedure overlaps with the content of the PCard Policy and there are some differences. Of note, Appendix A of the PCard Procedure indicates that car washing services cannot be purchased using a PCard and that 'Washing of Sydney Trains fleet vehicles is paid through a fuel card'. That appendix also indicates at item 45 that motor vehicle and fleet expenses including oil, repairs and spare parts cannot be purchased using PCards and directs the reader to the 'Vehicle Fleet Management policies and procedures'.

Roles and responsibilities in relation to PCards

[65] Section 7 of the PCard Policy sets out roles and responsibilities in relation to PCards. In relation to cardholders, this includes:

- understanding the procedure and ensuring the responsible use of the PCard;
- coding/certifying and submitting transactions to an authorising officer;
- ensuring irregularities or suspected fraudulent activity are reported appropriately and immediately;
- ensuring the completeness, accuracy and appropriateness of purchase descriptions and purpose recorded and approved through verification of the transactions within Expense8 and tax invoices.

[66] The PCard Policy provides that a cardholder can nominate a representative to code/certify and submit transactions on their behalf.

[67] More detailed requirements of cardholders are set out elsewhere in the PCard Policy.

What does the PCard Policy say about what can and can't be purchased using a PCard?

[68] Section 5.2 of the PCard Policy states that a PCard can be used to purchase goods and services that meet the criteria in s.5.7 of the PCard Policy however as s.5.7 refers to management of the PCard rather than what can be purchased with it, it seems likely that the reference to s.5.7 was intended as a reference to s. 5.6.

[69] In this regard section 5.6.1 of the PCard Policy provides that a PCard can be used to purchase goods and services that meet the following criteria:

- expenditure must be business related;
- the purchase is less than \$5,000 (unless pre-approval has been granted for non-standard limits);
- the item purchased is not in an 'excluded category' as set out in the policy.

[70] Section 5.4 of the PCard Policy states that the maximum transaction limit for a single purchase is \$5,000. This contrasts with the PCard Procedure which states that the standard transaction limit for a PCard is \$10,000.

[71] Section 5.6.1 of the PCard Policy then goes on to provide 'examples of categories that should be purchased using a PCard' including:

- flights, accommodation, overnight travel and food services (food, beverage, venue rental);
- non-catalogue items (excluding Contingent Labour Hire, Day Labour Hire, Plant Hire Wet & Inventory);
- education and training (e.g. conferences, venue hire, training courses);
- repair and maintenance services (e.g. cleaning, pest control, equipment servicing);
- retail outlets (e.g. grocery, office sundries etc);
- wholesale trade (e.g. hardware trade outlets);
- information media (e.g. online book stores);
- printing services (e.g. brochures, signs, photocopy charges);
- transport and logistics (e.g. taxi, train, tickets, couriers);
- one-time or infrequent vendors.

[72] Section 5.6.2 of the PCard Policy states that a PCard cannot be used for certain types of purchases including but not limited to:

- catalogue purchases;
- non-business items for personal use or benefit;
- Sydney Trains fleet motor vehicle expenses, including fuel, oil, repairs and spare parts, see Fleet Management. During cross examination the Applicant confirmed he understood this.

[73] While separate lists of approved and prohibited categories are provided in sections 7.1 and 7.3.4 of the PCard Procedures the differences are immaterial.

[74] Appendix A of the PCard Procedure does however include a table setting out 'PCard Purchasing Items, Descriptions and Guidance'. Seventy-seven (77) items are set out in this table which includes either a cross or tick next to the item description. The inference to be drawn is that if a tick appears next to the item description the PCard can be used to purchase that item however if a cross appears the PCard is not to be used to purchase that item. Of note the item 'motor vehicle and fleet expenses including oil, repairs, spare parts' is marked with a cross rather than a tick and the condition description refers the reader to the 'Vehicle Fleet Management policies and procedures'.

[75] Other items marked with a cross in the table include but are not limited to:

- personal items;
- office stationary and supplies (with the description stating these must be purchased from the 'Catalogue for Office Supplies via EQUIP (COS)');
- 'purchases made over the phone by staff other than the cardholder'.

[76] The following notes appear under section 5.6.2 of the PCard Policy:

- 'Purchases deemed to be of a personal nature must be reimbursed to Sydney Trains within 7 days of the purchase date, by making a payment into your Purchasing Card account at any Westpac Branch and coding the transaction in Expense8 to Personal Expense.'
- 'A Cardholder must not split a transaction, invoice or order to circumvent their individual Transaction limit. Split transactions breach the Cardholder's financial delegation and the Cardholder Agreement. The P-Card Enquiry Desk monitors and investigates split transactions. For example, a Cardholder with an approved Transaction Limit of \$1,000 must not purchase goods and services with a value of \$1,700 and split the payment into two separate transactions of \$900 and \$800. This would be a breach of the Cardholder's financial delegation of \$1,000 per individual transaction'.

[77] Further, section 5.6.2 of the PCard Policy states that PCards cannot be used in certain circumstances including but not limited to where:

- the cost of the transaction exceeds the cardholder's limit/delegation or monthly limit;
- the cardholder is attempting to split the transaction;

- the transaction is listed as prohibited in 6.3 (however this appears to have intended as a reference to s.5.6.2).

What does the PCard Policy say about PCard usage conditions?

[78] Section 5.2 of the PCard Policy states that all PCard transactions must be supported by a valid tax invoice and Expense8 statement.

[79] Section 5.6 of the PCard Policy requires that:

- the Cardholder (defined as the employee issued with a PCard, whose name appears on the card and holds an expenditure delegation conferred by the Sydney Trains Chief Executive) will need to use the PCard;
- the Cardholder is required to code in Expense8 details of the Profit Centre (obtained from the Intranet) including details of the purpose of the transaction and submit it to the Authorising Officer for authorisation;
- each transaction will need to be authorised by the Authorising Officer, who must view the scanned tax invoice(s) prior to authorising the transaction in Expense8;
- PCard transactions should be populated and authorised within Expense8 by the 27th of every month.

[80] Section 5.7.1 of the PCard Policy deals with card security and makes clear that:

- under no circumstances is a PCard holder to let another person use their card;
- the cardholder must not give the card details such as card number and expiry date to another person to make purchases on their behalf;
- the PCard is not transferable and must not be used by any other person than the authorised cardholder.

These requirements are broadly consistent with the card security requirements in section 7.2 of the PCard Procedure.

Approval and authorisation of expenditure

[81] Section 5.6.5 of the PCard policy says that after PCard transactions have been approved and certified they are authorised.

[82] Sections 5.6.3 and 5.6.4 of the Policy describes the certification and approval process which involves the cardholder certifying that the payment is correct and making the following declaration:

“I approve the commitment or incurring of this expenditure. I acknowledge I am accountable for this expenditure. I have exercised efficiency and due economy, when approving expenditure within my delegation and (except as permitted) is not for my personal benefit.”

[83] Section 5.6.4 of the Policy requires that the Cardholder take certain steps when completing a purchase. For “over-the counter” purchases this includes:

- signing the EFTPOS Receipt prepared by the supplier;
- obtaining a tax invoice and ensuring it meets ATO Guidelines.

For other purchase methods the cardholder is required to:

- make a note of the purchase, submit the order, and sign the supporting documentation;
- request a tax invoice if purchasing from an Australian supplier;
- ensure that the tax invoice meets the ATO Guidelines;
- retain all confirmation receipts/emails and approved supporting documentation and attach them to the tax invoice.

[84] In certifying the transactions the cardholder is required to attach the tax invoice and supporting documentation to the monthly statement summary.

[85] Section 6.2 of the PCard Policy explains that the cardholder must obtain a valid tax invoice (including GST free invoices for all purchases) and that a valid tax invoice is necessary for the Respondent to claim GST credits for its purchases. Requirements of a valid tax invoice are described for different purchase amounts. During cross examination the Applicant was asked if he understood that was what was required and the Applicant confirmed that he did.

[86] Section 5.6.5 of the PCard Policy provides that the immediate manager of the cardholder is responsible for authorising PCard expenditure and that doing so involves:

- reviewing independently the approval and certification of the transaction;
- authorising the transaction for payment or rejecting the transaction in Expense8;
- ensuring that all tax invoices are scanned and attached to the transaction in Expense8 and that the purpose of the purchase is appropriate and meets the PCard criteria.

What does the PCard Policy say about misuse of PCards?

[87] Section 5.2 of the PCard Policy states that misuse of PCards may result in immediate suspension / cancellation of the card and disciplinary action in accordance with the Code of Conduct.

[88] Section 8 of the PCard Policy also deals with breaches of the policy and indicates that misuse may result in card suspension or cancellation and disciplinary action.

The Cardholder's Agreement

[89] On 6 June 2016, the Applicant signed a cardholder's agreement in relation to the PCard (Cardholder's Agreement) agreeing to certain conditions of use. These included:

- 'Only the person named on the Card may use the Card. It is not transferable. The Card must not be used by any other person other than the cardholder. Cardholders must not give the card details such as card number and expiry date to another person to make purchases on their behalf.'

- ‘The cardholder holds Personal Financial Delegation for purchasing card transactions only’.
- ‘No personal expenses of any nature to be incurred on the [PCard]...’
- ‘The Cardholder’s delegation and monthly credit limit must not be exceeded under any circumstances...’
- ‘Transactions must not be split to circumvent the limit of the Cardholder’s delegation.’
- ‘Purchasing Card may only be used in accordance with the Purchasing Card Procedures and other applicable Policies, Procedures and Instructions.’
- ‘Purchasing Card must not be used for motor vehicle expenses...’
- ‘Documentary evidence of each transaction (e.g., Tax Invoices and EFTPOS Receipts) must be obtained or prepared by the Cardholder, giving details of the amount, date, purpose and supplier.’

The Transport Light Motor Vehicle Procedure and Motor Vehicle Fleet Procedures

[90] Mr Devitt’s evidence was that the light motor vehicles used by the Respondent (such as those used by the Applicant) are leased from a third-party provider.

[91] TfNSW has a ‘Transport Light Motor Vehicle Procedure’ (Motor Vehicle Procedure) with an effective date of 22 December 2020 and which applies to employees performing work for the Respondent. The Motor Vehicle Procedure states that it ‘details the entitlement, acquisition, use and management of all vehicles leased or purchased for use by’ TfNSW officers.

[92] The Respondent has a document entitled ‘Motor Vehicle Fleet Procedures’ (Fleet Procedure) effective from 20 June 2016 which sets out its procedures in relation to its motor vehicle fleet.

[93] Of note section 2.3 of the Fleet Procedure provides that no aftermarket accessories (e.g. bullbars and winches) are to be fitted to a fleet vehicle of the Respondent. Section 4.5 goes on to say that fitting accessories after the vehicle is delivered requires the endorsement of the relevant General Manager, with approval from the Fleet Project Manager and that:

‘The user area should arrange quotes or seek input from TSS Fleet Services and source finding prior to the approval of the Fleet Project Manager being sought. Accessories will be sourced by the Division, in consultation with TSS Fleet Services, from approved suppliers and using authorised fitters for the accessory.’

The Code of Conduct

[94] The Code of Conduct is dated July 2018. It sets out a number of staff responsibilities including a requirement to comply with agency policies and procedures. Section 8 of the Code of Conduct sets out specific requirements in relation to secondary employment including a requirement to obtain written approval from a delegated officer before engaging in any form of secondary employment.

[95] During the hearing Mr Ali was taken to section 3 of the Code of Conduct in relation to ‘staff responsibilities’, including the requirements to ‘comply with agency policies and

procedures’ and ‘report unethical, dishonest and/or corrupt conduct’. Mr Ali was also taken to the ‘manager responsibilities’ in section 4 including the requirements for managers to:

- set an example to staff by demonstrating agency values and be accountable for their actions and omissions;
- communicate acceptable standards of behaviour to staff, and to take preventative or corrective action where unacceptable behaviour or practices are identified; and
- raise awareness with staff regarding agency policies and procedures.

The Secondary Employment Procedure

[96] The Respondent has a ‘Procedure: Secondary Employment and Emergency Services Work’ with an effective date of 5 July 2019 (Secondary Employment Procedure) which forms part of its ‘Policy: Workplace Standards’.

What is ‘Secondary Employment’ under the Secondary Employment Procedure

[97] The Secondary Employment Procedure defines ‘Secondary Employment’ as:

- ‘any paid office or paid employment or
- any business or private practice or any profession or
- any voluntary emergency services work,

undertaken outside the duties of an employee’s position’ at the Respondent, ‘including when on paid or unpaid leave’.

[98] The Secondary Employment Procedure states that this includes:

- ‘any permanent, temporary, casual, part time or full time work with another employer, agency or organisation;
- all self-employment;
- all independent contracting or consulting;
- operating or being involved in any capacity in a business, including but not limited to: occasional duties such as bookkeeping; employment as an employee; engagement as a contractor/consultant; being a partner, sole trader, majority shareholder or officeholder (such as a director or secretary);
- operating or being involved in any capacity in a private business (excluding self-managed superannuation funds) including being a partner, sole trader, director, secretary or majority shareholder;
- all emergency services work (whether paid or voluntary);
- holding any office or engaging in any paid employment for which an employee is entitled to be paid, but where they choose not to accept payment or accept only an honorarium or allowance for their services’.

[99] A note below the list of inclusions states that ‘an employee must declare their involvement in a company or business even if that company or business is inactive, i.e. if their Australian Business Number (ABN) is still current, the employee must declare their involvement in this business’.

Approval requirements in relation to Secondary Employment

[100] The Secondary Employment Procedure states that the Respondent ‘requires that employees seek approval for all Secondary Employment, whether paid or unpaid and for all voluntary emergency services work’. It goes on to say that such ‘applications will not be refused without good reason because [the Respondent] recognises that Secondary Employment can provide benefits to the community and to individuals and is sometimes necessary in individual circumstances. It is not intended to pry into an individual’s private life’.

[101] Section 5.2 of the Secondary Employment Procedure states that employees ‘who undertake Secondary Employment and/or emergency services work are required to complete an online *Secondary Employment Request* via Transport Equip or the paper version of the *Secondary Employment and Emergency Services Application* on an annual basis’. It goes on to say that employees ‘who do not obtain written approval to undertake Secondary Employment or do not adhere to the conditions outlined in the approval will be in breach of [the Secondary Employment Procedure] and the Code of Conduct and may be subject to disciplinary action’.

[102] Section 5.3 of the Secondary Employment Procedure states that all employees who are considering Secondary Employment must:

- ‘seek written approval from the relevant delegated officer **prior to commencing such work**
- provide all of the information required in the online or paper version of the application form. If insufficient information is provided this may delay the approval process
- provide all information that is relevant to the application, taking into account the general principles and other requirements of [the Secondary Employment Procedure];
- not commence Secondary Employment or emergency services work until written approval is received’.

[103] The Secondary Employment Procedure goes on to say that an ‘employee will be in breach of this Procedure and may be subject to disciplinary action if relevant information is omitted, or incorrect or misleading information is provided on their application’.

[104] The Secondary Employment Procedure provides that approvals are for a maximum of 12 months up to 30 June each year and that employees who wish to continue their Secondary Employment past this date must complete another application form. A one month grace period applies to those employees whose Secondary Employment has not changed since the previous years’ approval.

Training

[105] The Respondent filed a copy of the Applicant’s ‘Learning History Report’ setting out training that the Applicant had undertaken for the Respondent. Within this spreadsheet are a number of entries going back as far as 2002 including but not limited to:

- ‘Purchasing Card Overview for Authorising Offices – Online’ with a stated completion date of 19 September 2019;

- ‘Purchasing Card for Cardholders – Online’ with a stated completion date of 19 November 2018 and status marked as ‘attended’ ;
- ‘Purchasing Card for Cardholders – Online’ with a stated completion date of 19 November 2018 and status marked as ‘completed’;
- ‘Code of Conduct – Online’ with a stated completion date of 19 January 2015 and status marked as ‘completed’,

[106] The Respondent provided a copy of the content of the online training in relation to the PCard which explained:

- A PCard ‘may only be used by an approved Cardholder’.
- ‘Cardholders must sign and abide by the Conditions of Use’.
- The requirement to ‘abide by the TfNSW Purchasing Card Policy and Purchasing Card Procedure and accounting principles’.
- ‘Misuse of [PCards] may result in immediate suspension/cancellation of the card and disciplinary action in accordance with the TfNSW Code of Conduct’.
- ‘Transaction limit (the maximum spend in an individual transaction) is \$5,000.
- ‘You must not split a transaction to circumvent your transaction limit. This is a breach of Policy.’
- ‘All PCard transactions must be supported by a valid tax invoice or a valid receipt...’ and requirements for tax invoices.
- That the PCard ‘is not transferable. Do not give your card details to another employee or allow another employee to physically use your purchasing card.’

[107] The Respondent provided a copy of the content of the online training in relation to the then Code of Conduct which:

- explains ‘All staff are responsible for knowing and complying with these policies – and asking questions if unsure. Managers have extra responsibilities to act ethically and lead by example’;
- explains that staff are responsible for ensuring their behaviour and actions, including failure to take action, is in accordance with the Code of Conduct and that any suspected breach of the Code of Conduct should be reported by an employee to their manager or to a more senior staff member;
- includes a scenario relating to secondary employment and explains that written approval is needed before an employee can take a second job.

[108] Mr Ali gave evidence during the hearing that he understood the Code of Conduct applied to his employment and when taken to the Code of Conduct training acknowledged that he had an obligation to report a suspected breach of the Code of Conduct to his manager or a more senior staff member. Mr Ali was also taken to sections of the Code of Conduct training which state:

‘Transport is responsible for providing you with access to current policies and procedures. All staff are responsible for knowing and complying with these policies – and asking questions if unsure. Managers have extra responsibilities to act ethically and lead by example.’

[109] Mr Ali agreed during cross examination that this statement applied to him.

[110] At Attachment H to the Applicant's witness statement is a letter from the Applicant's representative dated 13 January 2023. In that letter the representative indicated it was common practice for PCard training to be completed by administrative staff at the direction of Mr Watson and that the Applicant received no training in PCard processes because the training was completed by someone else. The Applicant's representative restates this in a letter dated 15 March 2023 at Attachment I to the Applicant's witness statement.

[111] In this regard, Mr Devitt's evidence was that should an employee of the Respondent procure another employee to complete important training relating to card usage and expenditure of public money he would regard that as a very serious disciplinary issue.⁴²

[112] During cross examination the Applicant clarified the training in relation to the PCard was presented at a meeting that he attended but that the online "ticking of the boxes" was undertaken by an administrative staff member. The Applicant also confirmed during cross examination that he did the Code of Conduct training.

Alleged misconduct concerning the PCard

[113] While the Respondent made six allegations in the letter provided to the applicant on 14 July 2022, it found that only three of these allegations were substantiated, being Allegations 1, 2 and 5. During the hearing the Respondent indicated that it did not wish to rely on the transactions involving the purchase of flowers on 4 April 2019 or the purchase of eskies on 16 February 2021.

[114] Allegations 1 and 2 concerned use of and record keeping in relation to the PCard.

Allegation 1

[115] Allegation 1 was that between 22 February 2019 and 16 December 2020 (inclusive) the Applicant used his PCard to make purchases but did not supply any and/or adequate documentation. In making this allegation the Respondent referred to 28 transactions in relation to which it said tax invoices were not uploaded into Expense8 or were illegible.

[116] In correspondence dated 28 September 2022 the Respondent told the Applicant that it had found, following its investigation, that the allegations in relation to six of these transactions, being purchases for cleaning products, were unsubstantiated but that its allegations in relation to the balance of the transactions had been substantiated. The Respondent said that the value of the purchases for which the allegations were substantiated was \$9,806.83. Taking out the cost of the purchase of the eskies and flowers that the Respondent no longer relies on (being purchases of \$983.96 and \$60), the value of the transactions the Respondent says are substantiated is reduced to \$8,762.87.

[117] In his correspondence of 5 August 2022 the Applicant addressed each of the 28 transactions stating their purpose and setting out the process followed in seeking approval of the expenses. Allegation 1 relates to the documentation supplied by the Applicant in relation to

the expenses, rather than why the expense was incurred. In this regard, the following themes emerge from the Applicant's response to Allegation 1:

- there was a workplace practice for Operational and Area Managers to upload information per Mr Watson's directions and this was often done without the declaration form being completed as he advised there were time constraints to submit. The Applicant clarified in correspondence to the external investigator on 24 August 2022 that the 'declaration' he referred to was a declaration used when transaction records went missing;
- the Applicant has never been trained in the process or questioned;
- the Applicant's manager Mr Watson and the purchasing and finance team approved the transactions;
- there were monthly audits performed in relation to all transactions;
- the issue could have been raised with the Applicant at any time by a manager, thereby allowing the Applicant the opportunity to explain the situation and have it rectified immediately.

[118] The Applicant also provided the following specific context addressing his absence of receipts for individual transactions.

Food purchase associated with events and meetings

[119] In his correspondence of 5 August 2022 the Applicant said:

- The purchases on 22 February 2019 from 'Handyway Dominos', 9 April 2019 from 'Osmayne Kebabs PL', 13 June 2019 from 'El Jannah Granville PT' were associated with a Cleaning Roadshow. The Applicant said that he would pre-order and pay for the food, in some case because the Area Managers did not have their own PCards, and the Area Managers would then collect the food so it was hot for the meeting.
- The purchase on 27 August 2019 from 'El Jannah Penrith Pty' was in relation to food to take to a cleaning yard he attended for the 'Clean Sweep Cup' and to meet newly recruited cleaners. The Applicant said the receipt is difficult to read but that it can clearly be seen it is for a food purchase.
- The purchase on 15 October 2019 from 'BP Katoomba' was for light refreshments for himself and management who accompanied him, including Mr Watson, to the Lithgow Cleaning Yard visit for the Clean Sweep Cup and Mt Victoria cleaning yard to roll out a new cleaning system.
- The purchase on 20 November 2019 from 'Student Biryani' in the amount of \$91 was a purchase of food for day shift cleaning staff based at Auburn Stabling Yard as a part of the Cleaning Road Show.
- The purchase on 28 November 2019 from 'El Sweetie' in the amount of \$195.00 was to purchase food for the Cleaning Roadshow or the Clean Sweep Cup and that he was suspended from duty at the time when the document was required to be uploaded.
- The purchases on 19 December 2019 from 'El Jannah Blacktown' in the amount of \$108.70 and on 30 December 2019 in the amount of \$164.20 from 'El Jannah Penrith Pty' were to purchase food for management meetings in Blacktown. The Applicant said it was often the practice that the food would be ordered and paid for by the Applicant but someone else would collect the food which was when the receipt was received. The

Applicant said when this occurred it would often take some time for the manager to supply the receipt and that he was suspended from duty at the time when the document was required to be uploaded.

- The purchase on 9 January 2020 from ‘El Jannah Penrith’ in the amount of \$190.40 was for food at the cleaning sites he managed as a thank you to the staff that worked during the bush fires and that this was purchased on Mr Watson’s instructions. The Applicant said he was suspended from duty at the time when the document was required to be uploaded.
- The purchase on 16 December 2020 from ‘SMP Jasmin1 Chester H1’ in the amount of \$335.45 was to purchase food for the Mortdale Maintenance Centre as part of the Cleaning Road Show. The Applicant said he was suspended from duty at the time when the document was required to be uploaded.
- The purchase on 16 December 2020 from ‘SMP Jasmin1 Chester H1’ in the amount of \$335.45 was to purchase food for the Mortdale Maintenance Centre as part of the Cleaning Road Show. The Applicant said he was suspended from duty at the time when the document was required to be uploaded.

[120] In correspondence dated 17 August 2022 the external investigator sought to understand from the Applicant whether he personally collected the food on any of the occasions and if he did not, who did collect the food. The Applicant stated in his response of 24 August 2022 that he could not recall due to the length of time between the events and the allegations. The external investigator also sought to understand whether a tax invoice was provided and what steps the Applicant took to obtain a tax invoice from those who collected the food. The Applicant responded that there were some occasions when a tax invoice was provided but he was unsure if it was for the specific dates mentioned and that while he cannot recall the exact steps he took to get receipts it is likely he would have followed up to obtain a copy of the receipt via phone.

Phone cover

[121] The Applicant said his purchase on 25 September 2019 from ‘Sunshine Communicati’ was for the purchase of a mobile phone protection cover. In his explanation the Applicant made reference to Mr Watson and the purchasing and finance team having approved the transaction.

Fleet vehicles

[122] The Applicant said his purchases on 8 April 2019 from ‘Joudy Investment PL’ and 5 August 2019 related to the washing and detailing of fleet vehicles. The Applicant said that other managers who did not have PCards accompanied the Applicant in their cars and the Applicant paid for their cars in addition to his and Mr Watson’s.

[123] The Applicant said his purchase on 22 November 2019 from ‘A1 Hand Car Wash’ in the amount of \$89.50 was incurred for the washing and detailing of his work issued vehicle “as per the customary practice of Fleet Presentation”.

[124] The Applicant said his purchase on 21 December 2019 from ‘A1 Hand Car Wash’ in the amount of \$68.50 was incurred for the washing and detailing of his work issued vehicle “as per the customary practice of Fleet Presentation” and that this location does not issue tax invoices.

Cleaning products

[125] The Applicant said his purchase on 26 March 2019 from 'Complete Office Supp' was for cleaning products purchased on behalf of Area Managers that did not have PCards and were for sites the Applicant managed.

[126] The Applicant said his purchases on 22 August 2019 from 'Master Australia' in the amounts of \$4,620.00, \$4,282.45 and \$4,862 were for cleaning equipment and chemicals on the direction of Mr Wybron and Mr Watson as a part of a roll-out of a new cleaning method with the cost being split between four or five managers. The Applicant said his purchases on 1 November 2019 in the amounts of \$4,815.80, \$4,815.80 and \$4,603.50 were also as a part of a rollout of a new cleaning method. The Applicant said that:

- the transactions were made before he was made aware of the charge and he had no control or opportunity of getting the receipt;
- when the purchases were questioned by the Applicant and other managers they were advised by Mr Wybron that they had to start supporting the business or they would be managed out;
- the Applicant was directed to give his PCard details to Ms Rebecca Arnold for her use to make purchases on the business' behalf.

[127] In its correspondence of 28 September 2022 the Respondent advised the Applicant that the allegations in relation to these purchases were not substantiated.

[128] The Applicant said his purchase on 13 December 2019 from 'Abcoe Distributors P' in the amount of \$1,075.95 was for cleaning equipment and possibly cutlery for the Cleaning Roadshow and that he was suspended from duty at the time when the document was required to be uploaded.

[129] In correspondence dated 17 August 2022 the external investigator queried when the Applicant was directed to give his PCard details to Ms Arnold and how. The Applicant responded in correspondence dated 24 August 2022 that he could not recall the dates and was directed to provide the details verbally to Ms Arnold in management meetings. The Applicant suggested this would be reflected in the meeting minutes. In his response the Applicant said he provided the details via a text message.

Other work supplies

[130] The Applicant said his purchase on 28 November 2019 in the amount of \$1,558.00 from 'Total Tools Penrith' was for an industrial spill kit to deal with a chemical leak. The Applicant said the regular supplier 'Backwoods' was closing for the December shut down period and had no stock and that the industrial spill kit was purchased at the request of Mr Watson. The Applicant said he was suspended from duty at the time the receipt was required to be uploaded.

[131] The Applicant said his purchase on 4 January 2020 from 'Costco Wholesale Austr' in the amount of \$774.82 was for storage boxes and drinking water for various sites that the

Applicant managed. The Applicant said he was suspended from duty at the time the receipt was required to be uploaded.

Allegation 2

[132] Allegation 2 was that between 4 April 2019 and 16 February 2021 (inclusive), transactions were made using the PCard that had been issued to the Applicant which were non-compliant with the relevant 'Sydney Trains Purchasing Card Policies and/or procedures. In making this allegation the Respondent referred to 15 transactions in its letter of allegation and in his correspondence of 5 August 2022 the Applicant addressed each of these transactions. In correspondence dated 28 September 2022 the Respondent told the Applicant that it had found, following its investigation, that the allegations in relation to six of these transactions (relating to purchases from the merchant 'Coles Group Gift Cards' on 6 June 2019, 'The Good Guys' on 23 July 2019, purchases from 'Master Australia' on 22 August 2019 and 1 November 2019, alleged incorrect coding of a purchase on 9 January 2020 and a purchase on 14 February 2023 from 'Costco Wholesale Aus'), were not substantiated. but that its allegations in relation to the balance of the transactions had been substantiated. The Respondent said that the value of the purchases for which the allegations were substantiated was \$1,770.96.

Fleet vehicles

[133] The Respondent referred to purchases from 'Joudy Investment' in the amounts of \$124.50 on 8 April 2019 and \$78.50 on 22 August 2019, a purchase in the amount of \$151 from 'South Coast Auto Rep' on 3 June 2019, purchases from 'Jana Services Pty Lt' in the amounts of \$125 on 14 June 2019 and \$90 on 8 August 2019, and purchases from 'A1 Hand Car Wash' in the amounts of \$89.50 on 22 November 2019 and \$68.50 on 21 December 2019.

[134] In relation to these purchases the Respondent stated 'A purchasing card can not be used for Sydney Fleet motor vehicle expenses'.

[135] In relation to the purchases from 'Joudy Investment' on 8 April 2019 and 22 August 2019, 'Jana Services Pty Lt' on 14 June 2019 and 5 August 2019 and 'A1 Hand Car Wash' on 22 November 2019 and 21 December 2019 as noted in the response to Allegation 1 the Applicant said these purchases related to the washing and detailing of fleet vehicles. The Applicant said that other managers who did not have PCards accompanied the Applicant in their cars and the Applicant paid for their cars in addition to his and Mr Watson's.

[136] In his response of 5 August 2022 the Applicant referred to his earlier response in relation to Allegation 1 and also said 'Mr Ali was never advised or trained for this in addition to it being a customary practice of which his senior managers also followed'.

[137] In relation to the purchase from 'South Coast Auto Rep' on 3 June 2019 the Applicant said that he purchased fog lights for work vehicles 'on the recommendation of Safety' and that the purchase and installation were done under the approval and direction of Mr Watson. The Applicant said in his response that 'going through Project Officer would have entailed a longer delay due to this process causing time delays as it involves much bureaucracy and would have been considered a modification.' In correspondence dated 17 August 2023 the external investigator queried how and when 'Safety' provided the recommendation to install fog lights

on the Applicant's work vehicle to which the Applicant responded that he received the advice from 'Safety' on a trip with Mr Watson after a near miss with a kangaroo and approval was given verbally by Mr Watson to get the vehicle fitted with fog lights. The Applicant said Mr Ryman was tasked with sourcing the fog lights to have them installed as per Mr Watson and Mr Wybron's vehicles.

Split transactions

[138] The Respondent referred to nine individual purchases in the amounts of '\$1,314.85, \$214.85, \$1014.85, \$2089.85, \$2089.85, \$2089.85, \$414.85, \$914.85 and \$2,124.85' on 6 June 2019 with the merchant 'Coles Group Gift Cards' and three individual purchases from 'Master Australia' on 1 November 2019 in the amounts of \$4,815.80, \$4,815.80 and \$4,603.50.

[139] In relation to these purchases the Respondent stated that at the time of the transactions the Applicant's PCard had a transaction limit of \$5000 and PCards cannot be used to circumvent individual transaction limits and split transactions.

[140] In relation to the purchases of the Coles Group Gift Cards the Applicant said that Cleaning Presentation had a practice of issuing Coles Group Gift Cards to cleaners on cleaning sites if they achieved the target of no lost time injury. The Applicant said that it was customary practice for Mr Rebecca Arnold to use managers' PCards to make these purchases with the full visibility and approval of Mr Wybron and Mr Watson.

[141] The Applicant said he had no visibility of the purchases as Ms Arnold had a record of card numbers and PIN numbers in order to make these purchases as evidenced by the invoice addressed to her for these purchases.

[142] In relation to the purchases from 'Master Australia', as noted in response to Allegation 1 the Applicant said his PCard was used to purchase cleaning products at the direction of Mr Wybron and Mr Watson as a part of a rollout of a new cleaning methodology. The Applicant said the purchases were made by Ms Rebecca Arnold using his PCard and that the transactions were made prior to him being made aware of the charge and he had no control or opportunity of getting the receipt.

[143] The allegations of splitting transactions in relation to the Applicant's PCard use were either withdrawn or not substantiated. During cross examination Mr Devitt was asked why these allegations were withdrawn where other allegations of breaches remained on foot. Mr Devitt said in response that his understanding was that while it was determined it was 'splitting orders' it could not be determined whether it was the Applicant or Ms Arnold who made the purchase. The notion of 'splitting transactions' involves a deliberate attempt to circumvent a transaction limit and that if the purchases were made without the Applicant's prior knowledge (i.e. because they were made by someone else that he had given his card details to) it could not be asserted that it was the Applicant who intended to split the transaction.

Alleged non-business expenditure

[144] The Respondent made reference to a purchase in the amount of \$454 on 23 July 2019 from 'The Good Guys'. In relation to this purchase the Respondent stated that a purchasing

card can not be used for non-business items and all purchasing card expenditure must be business related.

[145] The Applicant said that he was directed by Mr Watson to supply all maintenance centres with new cameras, cases and other items requested by the Area Managers at their weekly meeting, as per customary practice.

[146] The Respondent made reference to a purchase in the amount of \$922.77 on 14 February 2021 from 'Costco Wholesale Aus' and purchase in the amount of \$983.96 from 'Anaconda' with the Applicant's home address nominated as the delivery address. In relation to these transactions the Respondent stated 'a purchasing card cannot be used for catalogue purchases and expenditure must be business related.'

[147] In relation to the 'Costco Wholesale Aus' purchase the Applicant said this was for two grill presses for Mortdale Maintenance Centre and Macdonaldtown Stabling Yard as well as storage boxes and three phone cradles for use in work vehicles. In correspondence dated 17 August 2022 the external investigator asked why the purchase was made on a Sunday when the Applicant was not rostered for duty. The Applicant responded that he was requested by his managers, Mr Ryman and Mr Potts, to purchase the items as he worked night shift and the shop's regular hours were outside his normal working hours. The external investigator also queried why he did not purchase these catalogue items through an Ariba approved supplier to which the Applicant responded that going to Costco was customary practice within Fleet Presentation. The external investigator noted that the grill presses had not been located and queried where the Applicant took the items. The Applicant responded saying that he left them at the Mortdale Maintenance Centre and Macdonaldtown Stabling Yard and would have no knowledge if the items had been removed off site.

[148] In relation to the purchase from 'Anaconda' the Applicant said this was for the purchase of eskies for sites. The Respondent no longer seeks to rely on this purchase as a ground for dismissal.

Incorrect coding of expense

[149] The Respondent made reference to a purchase in the amount of \$190.40 on 9 January 2020 from 'El Jannah Penrith'. In relation to this transaction the Respondent stated this transaction was incorrectly coded as a purchase of gift cards.

[150] The Applicant said in his response that he had no recollection of the transaction being incorrectly coded and said the expense may have been for the staff due to bush fires and that the Acting Manager may have purchased the items and collected them using the Applicant's PCard. The Applicant also said he may have been suspended when the coding occurred and his response inferred that Ms Arnold may have coded the transaction.

The Applicant's evidence concerning PCard usage

[151] The Applicant filed two witness statements in the proceedings, one dated 8 August 2023 and the other dated 1 September 2023. The Applicant gave the following evidence:

- Each of the transactions he made using his PCard were approved by Mr Watson covering the period between 2019 and 2022.⁴³
- On numerous occasions, holders of PCards, including the Applicant, were directed to make purchase of items for business purposes and to spread the costs of the transactions across each of the PCards.⁴⁴ The Applicant provided an email from Mr Wybron to Mr Ryman and to which the Applicant was copied which provided an example of such a direction. The email included a list of items for purchase from Mr Ryman to which Mr Wybron has responded ‘Spread cost among cards, all to be stored in Wollongong’.⁴⁵
- The Applicant did not receive training in relation to Expense8.⁴⁶
- Most of the time the Business Coordinator would do the coding in Expense8 as she had a better understanding of it and the invoices were already with her from the manager she gave the card number to for purchases.⁴⁷
- The Applicant was directed to provide an administrative employee (Ms Arnold) with his PCard for her use in booking accommodation, catering and other items and she would sometimes make these purchases without his knowledge and would send the Applicant an “invoice to upload”.⁴⁸ The Applicant provided evidence of this including:
 - a text message between the Applicant and Ms Arnold on 29 November 2018 which included a copy of the Applicant’s PCard⁴⁹,
 - an undated picture in a text exchange between the Applicant and Ms Arnold which the Applicant says is a picture of an envelope containing the Applicant’s PCard that Ms Arnold had left after using it⁵⁰;
 - a text message exchange between Ms Arnold and the Applicant in which Ms Arnold says “We will need to purchase food for tonight. I’m at the hotel in Blacktown but have no car or p-card. How did you want to organise it?”⁵¹
 - a text message from Ms Arnold on 3 July 2028 that appears to include a photo of a purchase from ‘El-Jannah Blacktown Pty Ltd’ in the amount of \$237.20 via PayPal⁵².
- Area Managers who did not have a PCard would pay for things using his PCard and send him the receipt to upload into Expense8, sometimes weeks after an event.⁵³ The Applicant provided evidence of this including a text from ‘Rashminder’ including:
 - a picture of a tax invoice for a purchase at El Jannah restaurant;⁵⁴
 - a picture of a tax invoice for washing of three vehicles at ‘Spotless Car Wash N Café’;⁵⁵
 - a text message from ‘Rashminder’ following up the Applicant for payment of an invoice for food.⁵⁶
- The Applicant’s PCard was used to cater for work related events.⁵⁷ The Applicant attached various pictures of work related events in which food can be seen.⁵⁸
- On every single occasion the purchases and invoices were approved by Mr Watson.⁵⁹
- When the Applicant raised concerned about issues associated with accountability and record keeping with Mr Watson he told the Applicant to be a “team player” and to pay the amount owing using his PCard.⁶⁰ During cross examination the Applicant confirmed that he raised his concerns with Mr Watson and Mr Wybron and was told to be a “team player”, that he was “skating on thin ice” or that he would be “managed out of the business at some stage.”
- The Applicant was never informed or advised that any of his transactions were declined or that his coding of any expenses was incorrect at any stage since he has been using the PCard.⁶¹

- In relation to the suggestion that motor vehicle expenses cannot be incurred using PCards the Applicant said there is a conflicting TfNSW policy which allows use of PCards for payment of car washing.⁶²
- In relation to Mr Devitt's suggestion that a fuel card is to be used when paying for car washing⁶³ the Applicant said that work vehicles had to be handwashed because they were fitted with lights that prevented them from going through automatic car washes and the PCard was the only way to pay for hand washing services.⁶⁴ The Applicant also said that the car needed to be cleaned internally and that automatic car washing facilities don't provide this option.⁶⁵ The Applicant said fleet vehicle washing was a process that was addressed at the senior level and a direction was given to all managers within fleet presentation to have the fleet vehicle washed at a car wash centre, which was a customary practice that all managers within the business followed.⁶⁶
- In relation to the purchase of fog lights from 'South Coast Auto Rep', the Applicant said that he was told at an operations meeting that all vehicles would be fitted with lights and that employees would need to swap vehicles while this was taking place. The Applicant said he didn't purchase the light but was given an invoice to pay for the installation due to a safety concern.⁶⁷

[152] During cross examination the Applicant did not deny that he had failed to provide any or adequate supporting documentation in relation to 22 PCard transactions as alleged by the Respondent. The Applicant agreed during cross examination that the value of those purchases was approximately \$9,800.

Mr Ryman and Mr Addouj's evidence in relation to PCard process and usage

[153] Mr Ryman gave evidence about the PCard process, explaining:

- PCard transactions are firstly approved for purchase by a manager;
- the item is then purchased;
- the transaction is then required to be loaded into the Expense8 System;
- once loaded into the system the manager with delegation has the authority to approve or reject the transaction;
- where a transaction is approved by the manager, the transaction is then 'sent' by the system to the PCard finance team who can review the transaction and either approve or reject it.⁶⁸

[154] Mr Ryman gave evidence that:

- washing cars using PCards was a normal practice;⁶⁹
- in circumstances where the Respondent's vehicles had lights affixed to the roof of the car, they were not permitted by the operator to use the automatic machine and needed to be hand washed;⁷⁰
- the hand wash service was a separate business and did not accept the Caltex fuel card;⁷¹
- the transactions concerning the installation of fog lights were the subject of a senior operations management meeting where approval was included in the minutes for action, he subsequently purchased lights on approval from Mr Watson and Mr Wybron and made payment using his PCard;⁷²

- he had also been directed to provide the particulars of his PCard to administrative employees, including Ms Arnold, so they could purchase items on their behalf⁷³ and as a part of this practice Ms Arnold was provided with a photo of the PCard and its PIN;⁷⁴
- it is customary for the Respondent to provide catering at its information sessions, called ‘Roadshows’, and the Respondent would use the PCards of any number of employees who held a PCard to pay for this.⁷⁵

[155] Mr Ryman also gave some evidence that infers some dubious practices by Mr Watson surrounding approval of PCard expenditure by other employees. This included:

- that Mr Watson directed him to approve accommodation and expenses incurred by another employee on a PCard to attend a Christmas Party at a bowling club after Mr Ryman had rejected the PCard purchase statement for this expense;⁷⁶
- that Mr Watson directed him to approve expenses related to meals consumed by another employee and Mr Watson with the stated purpose of the expense being ‘networking’;⁷⁷
- that he was directed by Mr Watson to pay invoices for expenses incurred by two employees in the amounts of approximately \$5,000 and \$6,000 and this occurred after both employees had ceased employment with the Respondent.⁷⁸

[156] During the hearing Mr Ryman gave evidence that Mr Watson would use the PCard to wash his own car, that Mr Watson and Mr Wybron “always harped on” that vehicles should be cleaned. Mr Ryman indicated that the fuel card could not be used for this purpose and that PCards would be used for this purpose.

[157] Mr Addouj, a former employee of the Respondent, gave evidence that:

- he recalled being given the Applicant’s PCard information (and that of other Area Managers) on numerous occasions for the purposes of catering;⁷⁹
- he recalled the Applicant paying for the washing of his vehicles and the vehicles of other employees as they did not have PCards at the time and this was done on the direction of Mr Watson at the weekly area manager meeting as they did not have an account with any facility to have the fleet vehicles cleaned.⁸⁰

Alleged misconduct concerning secondary employment

[158] By way of context, the Applicant had submitted a ‘Secondary Employment & Emergency Services Work Application’ which was approved in May 2020. This application indicated that the Applicant owned a landscaping business called Moscaples which involved “cleaning and tidying up of properties. Helping out the needy and family and friends with basic outdoor clean/freshen up.” On 12 November 2020 Mr Ryman emailed the Applicant and asked if he could advise on any secondary employment and asked him to provide an application (if necessary) as his secondary employment approval had expired. On 13 November 2020 the Applicant replied and stated:

“I thank you for you enquire in relation to my secondary employment. As it has been a very productive year thus fare and now been back to my full time work at Sydney Trains and due to fatigue management and the busy workload in my currently role as an Area Manager and the excessive hours of travel I had to make decision for my safety and

wellbeing to cease this path at this stage. Northshore Concreting PTY LTD and Moscape is currently been managed by other parties but should it change in the near future I shall update my status on Secondary Employment.”

[159] During cross examination the Applicant was asked who the other parties were who managed Moscapes as indicated in the response on 13 November 2020 to which the Applicant indicated he was “not sure why [he] put that in there” and that the business was not active, not registered and not licensed. The Applicant also confirmed that Northshore Concreting Pty Ltd was his brother in law’s business.

[160] On 10 May 2022 the Respondent provided the Applicant with a letter dated 6 May 222 advising him that its Workplace Conduct and Investigations Unit (WCIU) had commenced an investigation that he may have breached the Respondent’s policies and procedures, including the Secondary Employment Procedure.

[161] Shortly after this on 11 May 2022 the Applicant submitted a ‘Secondary Employment & Emergency Services Work Application’ seeking approval to:

“Help out family member to get out and about for mental health and seen and meeting people whilst off roster. Helping with passing/packing equipment picking up rubbish on site washing down tools and equipment driving etc. Helping out my kids football team as required on games days as a trainer if required to run out the water and pass the ball with the kids.”

[162] In this application the Applicant had ticked ‘No’ next to the question ‘Do you own the business?’. The Applicant had also ticked a box indicating ‘The secondary employment is a one-off occasion and not ongoing (eg during a period of paid or unpaid leave)’.

[163] On 18 May 2022 Ms Bellette of the RTBU wrote to the Respondent indicating that due to the Applicant’s mental health and on the recommendation of his treating doctor, the Applicant was attempting to socialise with his family which included travel to their places of business and the Applicant was concerned that the Respondent would interpret this as secondary income. The letter also stated that the Applicant held an ABN since 2014 which remained active and referred to a previous secondary employment form submitted by the Applicant that was approved on 20 May 2020 by Mr Wybron. The letter of 18 May 2022 sought clarification as to whether the Respondent required the Applicant to complete a secondary employment form and attached the secondary employment form that the Applicant had completed.

[164] On 20 May 2022 Mr Devitt responded indicating that in relation to the Applicant’s secondary employment application dated 11 May 2022, the type of activities outlined in that application did not meet the definition of ‘secondary employment’ and as such an application was not required. The letter stated that if the nature of the work the Applicant was performing changed to meet the definition of ‘secondary employment’ as per the relevant procedure, he should apply for approval. The response did not respond to the disclosure that the Applicant had held an active ABN since 2014. It did however indicate that the Applicant would receive a letter containing the allegations once the particulars of the allegations had been finalised by the business.

[165] It seems that Mr Devitt reflected further on his response because on 29 June 2022 (in a letter dated 27 June 2022) he wrote to the Applicant again seeking clarification in relation to details of the Applicant’s secondary employment activities stating:

“Upon further review, the contents of your *‘Secondary Employment & Emergency Services Work’* application form dated 11 May 2022 and the details provide by Ms Bellette on 18 May 2022 provide different information.

In particular, it is noted that you did not complete the section on the form titled *‘Secondary employment organisation/business details’* which provides details of the business name and address, contact details, and nature of the business for which you are working.

It is also noted although you hold an active ABN, this business activity has not been listed on your application, and it is therefore unclear as to whether these business activities are related, or indeed whether you are undertaking such work.

The activities that you have listed in relation to assisting your child’s football team fall clearly within the definition of participation in community organisations, and are quite separate to the business activities above.

Therefore, for the purposes of clarity in relation to your secondary employment application and associated declarations made by you, and for Sydney Trains to then consider the approval or otherwise of each activity on its own merits, I have attached new forms for you to complete.

You are required to complete a separate form for each different activity as application so it is clear to Sydney Trains what each separate activity involves, the timeframes involved, whether you are receiving payment or not, and the names of the companies and/or organisations for which you are working.

For completeness, all relevant information should be included on the form(s) and not in a separate email. However, if you need to attach additional information please refer to that relevant form.”

[166] The Applicant did not respond to this letter and indicated during cross examination that he had stopped undertaking the activities to “avoid the headaches”.

[167] On 13 July 2022 Mr Devitt wrote to the Applicant again indicating he had not received a response to the letter he had sent on 29 June 2022 and directed the Applicant to, within 24 hours:

- ‘Submit an updated application/s to undertake secondary employment to reflect all secondary employment and business activities you are currently contemplating and/or engaged in.
- Complete a separate form for each different activity. This is so that it is clear to Sydney Trains what each separate activity involves, the timeframes involved,

whether you are receiving payment or not, and the names of the companies and/or organisations for which you are working.

- Include all information on the form(s) and not in a separate email’.

[168] The letter stated:

“For the avoidance of all doubt, if you do not submit any updated applications, you do not have approval to participate in any secondary employment or business activities. Should you participate in any secondary employment and business activities without approval, you may be in breach of your obligations arising under the Transport Code of Conduct, the Procedure and other associated policies and procedures.”

[169] Allegation 5 was that from 25 January 2022 the Applicant did not declare and did not seek approval to engage in secondary employment. In its ‘Notification of Investigation and Allegation Letter’ dated 14 July 2022 the Respondent stated that the information it was relying on in relation to this allegation was that:

- (a) The Applicant was registered as an individual /sole trader with an ABN and business name ‘Landscapes NSW’ that had been registered since 25 January 2022.
- (b) The business ‘Landscapes NSW’ had:
 - i. a website registered to the Applicant’s ABN;
 - ii. an Instagram account with a photograph of a truck with that website printed on the side; and
 - iii. a Facebook page which was created on 1 February 2022 and to which a video was posted on 28 February 2022 depicting uniforms embroidered with ‘Landscapes NSW’ and a photograph was posted on 2 March 2022 with the caption “Our team is on the ground working with the SES Teams in assisting the best we can in these tough and changeling (sic) times.”
- (c) On 10 February 2022 the Applicant purchased a silver King Kong box trailer.
- (d) Between 3 and 17 May 2022 it was observed via surveillance that:
 - i. on 3 May 2022, the box trailer was observed parked in the driveway of the Applicant’s residence with gardening and landscaping tools and supplies loaded within it;
 - ii. on 9 May 2022 the Applicant drove a Ford Ranger to King Long Trailers, St Mary’s where the box trailer was hitched to the rear of the Ford Ranger;
 - iii. on 9 May 2022 the Applicant returned to his residence where he unloaded a pressure cleaner from the box trailer, placed retaining wall blocks onto the trailer and jerry cans into the rear tray of a ute before departing on board the Ford Ranger that towed the box trailer;
 - iv. at 8.31am on 11 May 2022 the Applicant emerged from his residence, was wearing work boots and loaded several items in the rear tray of the Ford Ranger including a whipper snipper, blower, hedge trimmer and jerry cans;
 - v. at approximately 8.45am on 11 May 2022 the Applicant departed his residence via the Ford Ranger that towed the box trailer and travelled to a specific location in Penrith (Penrith Location);
 - vi. at approximately 8.02am on 12 May 2022 the Applicant emerged from his residence and departed on board the Ford Ranger that towed the box trailer and travelled to the vicinity of the Penrith Location;

- vii. at 8.25am on 12 May 2022 the Applicant unloaded a pressure cleaner from the box trailer and entered a property at the Penrith Location. Over a period of approximately 90 minutes the Applicant was observed to:
 - i. pressure clean the dwelling, boundary walls and driveway;
 - ii. converse with an unknown male who arrived on site on board a vehicle with “Renosell’ insignia printed on it;
 - iii. prune vegetation on the property with a machine pruner which the Applicant loaded into the trailer;
 - viii. at 10.0am on 12 May 2022 the Applicant departed the Penrith Location and went to a location in Londonderry (the Londonderry Location) where the Applicant remained for approximately 4.5 hours and was observed to wear work boots and operate a tractor;
 - ix. at 6.40am on 16 May 2022 the Applicant emerged from his residence attired in work boots and loaded equipment into the rear tray of the Ford ranger before departing and travelling to a property in Quakers Hill (the Quakers Hill Location) where workers from MAM Projects were onsite and were operating an excavator;
 - x. on 16 May 2022 over a period of six hours at the Quakers Hill Location the Applicant was observed to converse with an unknown man on the property’s driveway, leave the site for approximately one hour while work continued, converse on his mobile phone, converse with an unknown male from MAM Projects/MDC Landscapes on multiple occasions and retrieve various tools from the rear of the Ford Ranger and carry them on site;
 - xi. at 6.30am on 17 May 2022 the Applicant emerged from his residence attired in work boots and loaded various equipment into the rear tray of the Ford Ranger before departing and travelling to the Quakers Hill Location where he remained for several minutes before departing.
- (e) The Applicant submitted a ‘Secondary Employment & Emergency Services Work Application’ dated 11 May 2022 in which he:
- i. sought approval to undertake voluntary work to “Help out family member to get out and about for mental health and seen and meeting people whilst off roster. Helping with passing/packing equipment picking up rubbish on site washing down tools and equipment driving etc. Helping put my kids football team as required on games days as a trainer if required to run out the water and pass the ball with the kids”;
 - ii. declared that he did not own a business;
 - iii. declared that his secondary employment is a “one-off occasion and not ongoing”.
- (f) The Respondent advised the Applicant that his application was not required as volunteering did not meet the definition of ‘secondary employment’.
- (g) The Applicant did not submit any additional Secondary Employment & Emergency Services Work Applications’.

[170] In relation to Allegation 5, by way of summary, the Applicant said in his response of 5 August 2022 that:

- he has always sought approval for secondary employment;
- he registered a business name to an ABN active since 2013;

- social media activities were done by a family member of the Applicant;
- the business is non-operational and has not gone live;
- the business in question, MDC and MAM Projects, is the Applicant's family members' business;
- his family is in the construction industry;
- his brother-in-law sought to coax him out of the house due to his mental condition and support him during the time he had off work and the Applicant may have been at a site that would be perceived as him working when he was visiting;
- the other locations and sites mentioned in the allegations are his family residences where they own farm animals and equipment which the Applicant regularly uses for general property maintenance;
- he has not engaged in any paid office or paid employment whilst being off work.

[171] In his further response to the external investigator on 24 August 2022, the Applicant said:

- he had not engaged in secondary employment;
- the business in question was not operational, is just a registered business name and no paid work has been conducted whilst the Applicant has been off work;
- Deputy Executive Director Mr Ron Devitt confirmed that the Applicant's activities did not meet the definition of secondary employment and an application was not required for day-to-day activities the Applicant highlighted whilst visiting family and friends;
- the Applicant wished to keep his family and friends' personal information withheld because it had been a stressful time and he considered his privacy had already been breached.

[172] The Applicant also gave the following evidence in these proceedings:

- The businesses registered under his ABN are non-operational⁸¹ and he is not conducting any business activities associated with the ABN or registered business names.⁸²
- The Applicant does not have a business bank account.⁸³
- On the occasions where the Applicant was observed onsite at properties other his own, he was visiting his brother-in-law for a few hours and left site.⁸⁴ The Applicant said he had no role in project management and was not there in any capacity other than as a visitor.⁸⁵

[173] During the hearing the Applicant was taken to an ASIC report showing the business name 'LANDCAPES NSW' which was registered on 25 January 2022 with the Applicant being the holder of the business name. It was put to the Applicant during cross examination that "this is obviously a different business to the Moscapes business that you declared in 2020" to which the Applicant responded "correct". Both the names Moscapes and Landscapes NSW are registered to the same ABN.

[174] During cross examination the Applicant was asked whether he agreed he had an obligation to declare the Landscapes NSW ABN each year, even if it was inactive and that he did not do that. The Applicant said "correct". It was also put to the Applicant that he was directed to provide the relevant details of any secondary employment by Mr Devitt, including an active ABN, and he did not do so. The Applicant indicated that he had supplied the

information about what he was doing for the year and that HR and Mr Devitt advised that if he was not working he was not required to complete the form.

[175] During the hearing the Applicant was also taken to records from the 'Drives' database which indicate that the Applicant purchased a trailer in February 2022. The Applicant confirmed that he bought the trailer. During cross examination the Applicant was also taken to a report prepared by the contractor engaged to undertake surveillance which shows pictures taken on 16 May 2022 depicting the Applicant wearing work boots and loading items in and out of the back of his vehicle. It was put to the Applicant that he was doing some work at the property he was photographed on that day to which the Applicant said he was not working that day but was visiting his brothers-in-law to pick up tools to take them to the farm. The Applicant also indicated that work boots were a part of his normal daily attire. The Applicant confirmed that his family did not own the property at which he was photographed. The investigation report indicated that a door knock was conducted at this residence, that the owner was not a relative of the Applicant and had advised that they had some landscaping works undertaken at the property including on 16 May 2022. The report stated that the owner advised that throughout the engagement they liaised with 'Moe' because the owner of the business (Mustapha) had poor English. The report indicates that the owner stated 'Moe' project managed the worked undertaken but did not carry out physical works on site. The report states that the owner provided an invoice and that the Applicant was not an owner of the business engaged to undertake the works. During cross examination the Applicant said "I was only there for one day and the next day for 20 minutes". It was put to the Applicant that he was project managing to which he responded. "No I was only there for a few hours and then left and the next day for 20 minutes so it was impossible to project manage".

[176] Mr Devitt's evidence was that having considered the evidence obtained during the disciplinary process and the Applicant's response he was satisfied that the Applicant had breached the Secondary Employment Procedure because:

- the Applicant had failed to declare a current ABN;
- he accepted the investigator's finding that the Applicant had been acting in a project management capacity at the Quakers Hill Location on 16 May 2023;
- the definition of secondary employment in the Secondary Employment Procedure contemplates "being involved in any capacity in a business";
- while the investigator accepted that there was no evidence that the Applicant had been paid in respect of the activities at the Quakers Hill Location, the Secondary Employment Procedure requires employees to "seek approval for all Secondary Employment, whether paid or unpaid".⁸⁶

[177] Mr Devitt also gave evidence that he was concerned the Applicant had been untruthful in his declarations regarding secondary employment and in his responses to the disciplinary process, noting with respect to the application made on 11 May 2022 the Applicant did not declare that he owned the ABN associated with "Landscapes NSW"⁸⁷ and the Secondary Employment Procedure requires a declaration to be made even if the business is inactive. Mr Devitt said he was not satisfied that the Applicant had honestly described his activities associated with that business as he considered that the social media activity and evidence of Landscapes NSW uniforms being produced was not consistent with the business being "non-

operational”.⁸⁸ Mr Devitt said that these matters contributed to his decision on 7 December 2022 that affirmed the preliminary disciplinary outcome of dismissal.⁸⁹

Suggestion of ulterior motive for dismissal

[178] The Applicant gave evidence that in September 2019 he reported unlawful video and audio surveillance footage taken of him to Mr Hookey, Mr Wybron and Mr Watson and was stood down within months of doing so.⁹⁰

[179] As noted above, Mr Ryman was a colleague of the Applicant. Mr Ryman gave the following evidence:

- In November 2019 he was employed as an Operations Manager in Fleet Presentation, the Applicant was also an Operations Manager at that time and both he and the Applicant Reported to Mr Wybron.⁹¹
- On or about August or September 2019, the Applicant told him that he had discovered surveillance devices that had been secretly installed in a wall safe at the Parramatta office and he was going to report it.⁹²
- Mr Ryman subsequently discovered there were unauthorised surveillance devices at sites he was in charge of including Wollongong, Leppington and Liverpool stabling yards.⁹³ Mr Ryman raised his concerns regarding this discovery with Mr Wybron.⁹⁴
- In November 2019 he met with Mr Wyrbon and during this meeting Mr Wybron said “I can put recording devices where I like, and you and [the Applicant] are picking on Marty [Hookey]” followed by “I will get rid of you both if you don’t drop this matter”.⁹⁵
- On or around August 2020, he was informed that both Mr Wybron and Mr Hookey were suspended from work pending an investigation into the installation of the surveillance devices.⁹⁶

[180] Mr Addouj, a former employee of the Respondent, gave evidence to the effect that he had been asked to gather evidence against the Applicant.⁹⁷

[181] Ms Greenwood’s evidence was that:

- On 15 April 2021, the Applicant was certified as unfit for work and commenced workers compensation leave.⁹⁸
- In April and May 2021, concerns regarding PCard purchases and anomalies were identified with regard to a number of employees.⁹⁹
- These matters were assessed by the Fraud and Corruption Investigation Unit (FCIU) which made recommendations that further actions be undertaken when the Applicant returned to the workplace and that, if the business continued to have concerns around those matters, they could be referred to the Professional Standards and Conduct Unit (PSCU) for further review or assessment.¹⁰⁰
- In March and April 2022, further concerns were identified regarding the Applicant’s conduct, including in relation to PCard purchases and an anonymous report claiming that the Applicant was operating a business while on a period of workers’ compensation.¹⁰¹
- An assessment was undertaken by PSCU Manager Emily Strachan in consultation with the Workplace Conduct and Investigations Unit (WCIU) and recommendations were

submitted to the Conduct Assessment Panel (CAP) for consideration, with the CAP comprised of subject matter experts from WCIU, legal, PSCU and People & Change Business Partnering.¹⁰²

- On 4 May 2022, following consideration by the CAP, a decision was made by the Director of the PSCU to refer the matter for commencement of a disciplinary process.¹⁰³

[182] Ms Greenwood's evidence was that:

- the disciplinary process that has led to these proceedings was initiated in response to the matters assessed and reviewed by independent and impartial teams including PSCU and FCIU;
- recommendations and decisions regarding proceeding with a disciplinary investigation were made by the CAP and endorsed by an independent decision-maker who had no knowledge of nor involvement in any prior disciplinary matters or reports of misconduct made by or concerning the Applicant;
- the disciplinary investigation canvassed a number of allegations of misconduct some of which were not substantiated;
- the disciplinary investigation was undertaken by an independent third party; and
- decisions regarding disciplinary action taken against the Applicant in 2020 were made by a different decision-maker than the disciplinary outcome determined in 2023.¹⁰⁴

[183] Ms Greenwood also gave evidence that the Applicant's concerns regarding Mr Wybron and Mr Hookey were appropriately assessed and managed by PSCU and recommendations were made to address any relevant misconduct either by way of formal local level action and/or formal disciplinary action in line with the relevant policies and procedures.¹⁰⁵

[184] Mr Devitt indicated that he did not accept the Applicant's assertions that he became the subject of the disciplinary investigation because he reported an incident regarding covert workplace surveillance and said he commenced in his role after the matter involving the workplace surveillance and subsequent disciplinary action occurred.¹⁰⁶ Mr Devitt said he considered the Applicant's disciplinary matter solely on its merits and the information relevant to it.¹⁰⁷

Disciplinary action in relation to other employees

[185] It is apparent that the Respondent's concerns relating to PCard usage were not limited to its concerns regarding the Applicant. As noted above, Ms Greenwood's evidence was that in April and May 2021, concerns regarding PCard purchases and anomalies were identified with regard to a number of employees.¹⁰⁸ It is not clear what disciplinary action all other employees faced in relation to these concerns and anomalies. However Mr Addouj also gave evidence that he was informed that his "P-Card supporting documents were insufficient" and explained that his manager Mr Watson:

- had instructed him to give his login details to an administration employee so she could do his online PCard training;
- approved every single purchase;
- never rejected a purchase;
- never counselled or warned him regarding his purchase or supporting documents.¹⁰⁹

[186] Mr Addouj said he was also subjected to an allegation that he had secondary employment and the Respondent ‘move to terminate his employment’ despite him having explanations in response to the allegations.¹¹⁰ However during the hearing Mr Addouj indicated he was still employed by the Respondent and had been for close to 18 years.

[187] The Applicant’s evidence was that at all times, each of the transactions he made using his PCard were approved by Mr Watson.¹¹¹ Mr Devitt’s evidence was that Mr Watson was also the subject of disciplinary action in respect of his failure to comply with PCard requirements in respect of approving expenses.¹¹²

Applicant’s disciplinary history

[188] Ms Camilla Greenwood gave evidence for the Respondent. Ms Greenwood is the Senior Manager – Professional Standards at TfNSW, a role she has held since 20 September 2021.¹¹³ Ms Greenwood has been employed in the Transport Service since 24 August 2020 and previously held the positions of Manager – Professional Conduct Unit within Sydney Trains and Manager – Professional Standards and Conduct within TfNSW.¹¹⁴

[189] Ms Greenwood gave evidence that in 2020 a disciplinary process was conducted into allegations that the Applicant had breached the Code of Conduct by:

- between 1 March 2019 and 20 September 2019, failing to be honest and/or accurate in his timekeeping in relation to the work he performed, by failing to work the actual work hours claimed (Timekeeping Allegation); and
- between 1 March 2019 and 12 September 2019, using his work vehicle for non-work related purposes (Work Vehicle Allegation).¹¹⁵

[190] Ms Greenwood’s evidence was that in respect of the Timekeeping Allegation, the Respondent had found that the Applicant had engaged in 80 separate instances of substantiated misconduct and had claimed approximately 192 hours of work that he did not work during the relevant period and that in relation to the Work Vehicle Allegation, the Respondent’s investigation substantiated 35 separate instances of misconduct.¹¹⁶

[191] Ms Greenwood’s evidence was that:

- as a result of the findings of the investigation and following a disciplinary process in which the Applicant had the opportunity to respond to proposed disciplinary outcomes, the Applicant was regressed to the role of Area Manager for 12 months and his use of a work vehicle was withdrawn for up to 12 months;¹¹⁷
- the decision maker was Peter O’Connor (then Deputy Executive Director, Fleet Maintenance);¹¹⁸
- although the Applicant had the opportunity to request a review of the final disciplinary outcomes by TfNSW, the Applicant declined this opportunity and accepted the disciplinary outcome.¹¹⁹

[192] Ms Bellette gave evidence that on 3 July 2020, she responded to the preliminary determination on behalf of Mr Ali, highlighting multiple errors contained in the Respondent’s

investigation and allegations.¹²⁰ Ms Bellette attached a lengthy letter to her statement as evidence of this. In that letter Ms Bellette indicates that the RTBU “is not challenging the preliminary determination of proposed Re-training on Conduct of Conduct and relevant Sydney Trains policies and procedures” which made up part of the preliminary determination but had concerns in relation to the proposed permanent regression to Area Manager and withdrawal of use of the company vehicle and home garaging for up to 12 months. Among the concerns raised in the letter are concerns that not all evidence was considered, about lack of training, and inconsistencies in the investigation report.

[193] The Applicant’s evidence was that he did not agree with the findings of the investigation but had been off work for 8 months at that time, wanted to return back to work and chose not to appeal the decision beyond an initial appeal made in relation to a permanent demotion.¹²¹

Findings – was there a valid reason for the Applicant’s dismissal (s.3897(a))?

[194] It is apparent that Mr Devitt was the key decision maker in relation to the Respondent’s decision to dismiss the Applicant. While I accept that the Applicant has raised earlier concerns about the conduct of other employees in the Respondent’s workplace and suggests he has been targeted as a result I am satisfied that Mr Devitt did not know or work with the Applicant personally and the evidence before me does not establish that his decision to dismiss the Applicant was made on a capricious, spiteful or prejudicial basis. The processes surrounding the instigation of the disciplinary process as described by Ms Greenwood in her evidence also suggests that that the process was not initiated in order to unfairly target the Applicant.

[195] The Applicant was a relatively senior employee in a management position where he may have been responsible for approximately 20 employees on any given shift. One of the “complementary capabilities” in relation to the Applicant’s role is the ability to “Demonstrate Accountability” at an “adept” level which is described as being “proactive and responsible for own actions, and adhere to legislation, policy and guidelines”. The records produced by the Respondent indicate that the Applicant undertook training in relation to requirements concerning the PCard and signed a cardholder agreement regarding its usage. The Applicant confirmed during cross examination that while an administrative employee had ‘ticked the box’ in relation to the online PCard training he attended in person training in a briefing room. The Applicant also confirmed during the hearing that he read the Cardholder’s Agreement before signing it. Given the Applicant’s own evidence indicates he raised concerns about issues associated with accountability and record keeping in relation to the PCard practices adopted, it seems likely he was familiar with key aspects of the policy and procedure regulating PCard usage, whether through training, the Cardholder Agreement or the policy and procedure framework itself. Based on the evidence before the Commission, it seems likely that the Applicant delegated his Expense8 activities to someone else however I am satisfied that he at least knew that receipts for purchases would be required and failed to act diligently to ensure these were obtained so they could be recorded in the Respondent’s systems. There are very sound governance and taxation reasons underpinning the Respondent’s need for compliant receipts regarding PCard purchases and in the context of a clear policy framework around this requirement, the Applicant needed to be proactive and responsible for adhering to that framework.

[196] Further, it is apparent that the Applicant didn't upload receipts because at times someone else made the purchase, sometimes without his knowledge. The Applicant gave his PCard details to another person to use. Such an approach is in clear breach of the PCard Policy and Procedure, which both make it abundantly clear that the card is not transferable and is not to be used by others, and the Applicant should not have allowed others to use his card and make purchases without his prior knowledge and without having compliant records in relation to the purchases.

[197] Even though his manager may have asked the Applicant to provide the PCard details to others, the Applicant should have known this was wrong and his own evidence suggests he did know that the way in which the PCard was being used was wrong. In particular, the Applicant said he raised concerns about issues associated with accountability and record keeping with Mr Watson and was told to be a "team player" and to pay the amount owing using his PCard.¹²² The Applicant also said during the hearing that he raised at meetings a concern that his card was getting used too much, he was getting too many invoices and he couldn't keep up with it and that managers needed to get their own PCards and that his card could not continue to be used in the way that it was. The Applicant said he was told that it was an operational requirement, he was there to support the business and "the trains need to get out." The Applicant indicated that after the concerns were raised managers did end up getting their own PCards.

[198] While it is apparent to me that the Respondent's manager seems to have enticed or encouraged policy breaches through his own conduct this does not mean that the Applicant should have complied with a direction that he would have known was in breach of his employer's policy. Rather than continuing practices that he knew were wrong, he should have escalated the matter to an appropriate person, particularly in a large organisation such as the Respondent where there were multiple ways he could have done so. Indeed the 'manager responsibilities' in section 4 of the Code of Conduct include the requirements for managers to set an example and to take preventative or corrective action where unacceptable behaviour or practices are identified. There is no suggestion in the Code of Conduct that taking such action is limited to the behaviour of less senior staff or direct reports. The Applicant was asked whether he reported misconduct before and he indicated that he had reported misconduct involving covert surveillance to Mr Wybron and Mr Watson in 2019. It was put to the Applicant that "he knew what to do when things were not right" to which the Applicant responded "correct". While it may have been uncomfortable to report the conduct of his managers, the Applicant was not a young and inexperienced employee in the junior stages of his career, rather he held a management position with over 20 years' experience and significant responsibility for up to 20 employees. The Applicant needed to take preventative or corrective action rather than engaging in practices he knew were wrong.

[199] The Applicant took me to the Full Bench's consideration of the question of a valid reason for dismissal in *B v Australian Postal Corporation*¹²³ in circumstances where policy breaches were considered in the context of workplace culture. The Applicant noted that the Full Bench's approach in that matter was to ensure that where disciplinary action is taken against employee's it must be done in a fair and equitable manner. The Full Bench also said that regard must be had to the circumstances of each individual employee.¹²⁴ In the circumstances of this matter, the Respondent had clear policies and procedures regarding the usage of PCards and associated record keeping requirements. It made efforts to ensure employees were aware of the requirements through training and by requiring that cardholders sign an agreement dealing with

PCard usage. The Applicant's admission that other persons conducted the online component of his training does not assist him and constitutes unacceptable conduct in itself. There is no evidence among the Applicant's responses that the Applicant has taken any responsibility for failing to comply with the PCard Policy and Procedure and when expressly asked during the hearing whether he took responsibility for his failings in this regard he instead indicated that his transactions had been approved and there "were no issues with it". The Applicant's conduct in failing to comply with the PCard Policy and Procedure served to foster what would appear to be a management culture of poor governance regarding PCard usage within the Fleet Presentation team and this conduct was unacceptable, particularly given his level of seniority and knowledge that the practices being adopted were wrong, and the Applicant has not taken any responsibility for his role in this. I find that this in itself constitutes a valid reason for the dismissal related to the Applicant's conduct.

[200] In relation to Allegation 2, I note that section 5.6.2 of the PCard Policy states that a PCard cannot be used for certain types of purchases including but not limited to Sydney Trains fleet motor vehicle expenses, including fuel, oil, repairs and spare parts, see Fleet Management. During cross examination the Applicant confirmed he understood this.

[201] The purchase of fog lights was in breach of this policy and this ought to have been known by the Applicant despite his manager's apparent endorsement of the purchase. During the hearing the Applicant indicated that he was also given an invoice to pay for spot lights that were installed on his care. The purchase of spot lights using the PCard also amounts to a breach. This compounds the unacceptable conduct regarding record keeping and usage.

[202] During the hearing the Applicant confirmed that there were times where he paid for the washing of cars of other managers who had fleet vehicles but did not have PCards. The Applicant said that sometimes he would pay the bill for the car washes and at other times another manager would pay the bill for the car washes for those who did not have PCards.

[203] In relation to the suggestion that motor vehicle expenses cannot be incurred using PCards the Applicant said there is a conflicting TfNSW policy which allows use of PCards for payment of car washing.¹²⁵I note that in this regard Mr Devitt's evidence during the hearing was that this policy did not apply to the Applicant and only applied to senior executives. A copy of the document, being the TfNSW Purchasing Card Procedure was ultimately produced during the hearing and section 1 of that document indicates that the Procedure applies to Ongoing /Temporary/ Seconded /Casual staff of TfNSW and Transport Service Senior Managers and Executives. This indicates that its application is broader than senior executives as asserted by Mr Devitt. However I do not accept that the Applicant was under the misapprehension that the Respondent's PCard Policy and PCard Procedure applied to him, being a document that was specifically relevant to employees of the Respondent.

[204] While Appendix A of the PCard Procedure indicates that car washing services cannot be purchased using a PCard and that 'Washing of Sydney Trains fleet vehicles is paid through a fuel card', I accept the Applicant's evidence that the fuel card may not be able to be used for car washing in a practical sense. The fact that the Applicant used the PCard as a substitute might be considered as 'splitting hairs' given there was an obligation to maintain fleet vehicles and the expense was still incurred for business purposes, however he should have sought clarification as the Code of Conduct requires him to do so if unsure. The Applicant should also

have sought clarification if he genuinely held the view that there was a conflict between the Respondent's procedure and the TfNSW procedure and he was unsure which one to follow. In particular, the Code states: 'All staff are responsible for knowing and complying with these policies [being the current policies and procedures] – and asking questions if unsure. Managers have extra responsibilities to act ethically and lead by example'. It also seems likely that the Applicant knew or at least suspected that the car washing practices using the PCard were wrong. During the hearing the Applicant indicated that this was one of the issues he raised due to the number of vehicles being washed and that he had a conversation with Mr Watson about the provision of vouchers to managers for car washing.

[205] While the use of the PCard for car washing considered in isolation would have been unlikely to tip the scales in favour of a finding that there was a valid reason, it further evidences the Applicant's poor attitude toward compliance with the policies and an unwillingness to seek clarification or escalate if unsure which he should have done, particularly in his role of manager.

[206] In relation to Allegation 5 I am not satisfied on the evidence before me that the Applicant was engaging in paid employment or that the Applicant had a business that was actually trading, despite some limited social media activity and registration of the new business name Landscapes NSW in January 2022. The website 'landscapesnsw.com.au' did not have any content other than a landing page that said 'Landscapes NSW. Coming Soon'. The social media posts do not show evidence of any completed work or jobs being carried out but show uniforms being embroidered and suggests a business that is being established. During re-examination the Applicant's evidence was that the image of the truck with the signage 'Landscapes NSW' was an image of his brother in law's truck and that his nephew had created a photo and put the logo on it and created a website for the Applicant.

[207] A letter from the Applicant's representative to the Respondent dated 15 March 2023 suggests that the Applicant was performing tasks at his family property and had obtained the ABN to "gain maximum tax relief for any farm and landscaping expenses associated with the property." During cross examination the Applicant confirmed that he owned a property with his family involving farm and landscaping work. It was put to the Applicant that if he was claiming expenses for tax purposes then he must be running a business to which the Applicant said "correct". The Applicant was asked whether he declared the "farm business" to the Respondent to which the Applicant responded that "it's not a business, it's just a property of ours, we just maintain it." When it was put to the Applicant that he was claiming expenses the Applicant proceeded to respond that there had been a flood, the ABN for the farming business has been inactive since 2014 and he indicated that when building supplies such as animal stock having an ABN makes it easier.

[208] The Applicant's evidence in relation to the propositions put to him about a farming business is confusing. It seems to me that the Applicant is not necessarily actively running a farming business but is using an ABN to make purchases for his family farm and to potentially claim some taxation relief as a result. In relation to the business name 'Landscapes NSW', in light of the social media activity indicating a business that is 'Coming Soon' and the recent registration of the business name 'Landscapes NSW' it seems likely that the Applicant was contemplating a new business venture. The Applicant had been off work for some time, had a poor experience and had been subjected to disciplinary action, including a demotion, before his period of absence and it seems likely that the Applicant was concerned about his job security

which has promoted him to explore other possibilities for work. However there is not enough evidence to establish that the business was actually operational. It does however seem likely, on the balance of probabilities, that the Applicant was assisting his family members in aspects of their business. This is evident in his own declaration made on 12 May 2022 which indicates he would be “helping with passing/packing equipment picking up rubbish on site washing down tools and equipment driving etc”. The photographs taken of him on 16 May 2022 by the contractor engaged by the Respondent to undertake surveillance are not inconsistent with this.

[209] Section 3 of the Secondary Employment Procedure provides that the term ‘Secondary Employment’ ‘is used to describe:

- any paid office or paid employment or
- any business or private practice of any profession or
- any voluntary emergency services work,

undertaken outside the duties of an employee’s position at Sydney Trains, including when on paid or unpaid leave.’

[210] Section 3 goes on to say this includes:

- ‘any permanent, temporary, casual, part time or full time work with another employer, agency or organization;
- all self-employment (see note below);
- all independent contracting or consulting (see note below);
- operating or being involved in any capacity in a business, including but not limited to: occasional duties such as bookkeeping; employment as an employee; engagement as a contractor/consultant; being a partner, sole trader, majority shareholder or officeholder (such as a director or secretary - see note below)
- operating or being involved in any capacity in a private business (excluding self-managed superannuation funds) including being a partner, sole trader, director, secretary or majority shareholder (see note below)
- all emergency services work (whether paid or voluntary)
- holding any office or engaging in any paid employment for which an employee is entitled to be paid, but where they choose not to accept payment or accept only an honorarium or allowance for their services’.

[211] The note under Section 3 states:

‘an employee must declare their involvement in a company or business even if that company or business is inactive, i.e. if their Australian Business Number is still current the employee must declare their involvement in this business’.

[212] Section 5.2 of the Secondary Employment Procedure states that employees ‘who undertake Secondary Employment and/or emergency services work are required to complete an online *Secondary Employment Request* via Transport Equip or the paper version of the *Secondary Employment and Emergency Services Application* on an annual basis (these will be referred to as the ‘application form’ for the remainder of the procedure’. It goes on to say that employees ‘who do not obtain written approval to undertake Secondary Employment or do not

adhere to the conditions outlined in the approval will be in breach of [the Secondary Employment Procedure] and the Code of Conduct and may be subject to disciplinary action’.

[213] During the hearing it was put to the Applicant that his involvement in a business was ‘Secondary Employment’ regardless as to whether it was paid or not and whether it was ‘active or inactive’. The Applicant indicated that he understood this and indicated that he understood he needed to declare it. It is clear that the Australian Business Number for Moscaples and Landscapes NSW was still current. Ms Bellette did write to the Respondent after the Applicant was put on notice that potential breaches of the Secondary Employment Procedure were being looked into and advised the Respondent that the Applicant held an ABN. Ms Bellette also clarified that the Applicant was not engaged in any paid office or employment. The Applicant had completed an application in the past and obtained approval in relation to Secondary Employment which indicates that he was familiar with the Secondary Employment Procedure. However the Applicant had not submitted an application annually.

[214] There is a question as to whether the Applicant was ‘involved in’ a ‘private business’ as contemplated by the Secondary Employment Procedure as I am satisfied that he was helping out in the manner described in his application dated 11 May 2023, i.e. helping with passing/packing equipment picking up rubbish on site washing down tools and equipment driving etc. Such activities are consistent with the activities depicted in the photographs taken on 16 May 2023 and the Applicant’s evidence of him being on site for a ‘few hours’ one day and a short time the next day in respect of the property at which he was photographed. While I am not satisfied that his involvement was necessarily that of ‘project manager’, or that he was either paid or entitled to be paid, he was doing some things to help out his family with their work activities. It seems the Applicant attempted to declare this on 11 May 2023, however his application was unclear in that it didn’t actually identify the business which he was helping with the activities he declared and rather names the business as ‘volunteering’. While Mr Devitt originally indicated that he did not need to complete an application for these activities, it seems likely that he formed this view because the Applicant had not indicated that he was doing these activities for a business, whether owned by a family member or otherwise. In this regard, the Applicant’s application was misleading. When Mr Devitt reflected on the application together with Ms Bellette’s correspondence he identified inconsistencies and sought clarification as to the nature of the activities by way of an application or applications that included the relevant details. This was not forthcoming and while the Applicant said during the hearing that he stopped the activity to “avoid the headaches” he should have complied with Mr Devitt’s direction to provide the necessary clarification. While the Secondary Employment Procedure indicates that ‘Secondary Employment’ includes ‘operating or being involved in any capacity in a business, including but not limited to: occasional duties such as bookkeeping...’ I appreciate that the policy is confusing with regard to other activities such as the nature of those described by the Applicant in his application. This is likely because helping out family members with their business or work, without payment or an entitlement to payment, is not something commonly encountered and the procedure is unlikely to have been drafted in a way that contemplated this.

[215] While ‘Landscapes NSW’ may not have been actively trading, the Applicant was the owner of the ABN registered to it and the social media activity suggests that he was at least considering activating it and taking steps to do so. The Secondary Employment Procedure defines ‘secondary employment’ to include ‘operating or being involved in any capacity in a

business, including but not limited to: occasional duties such as bookkeeping; employment as an employee; engagement as a contractor/consultant; being a partner, sole trader, majority shareholder or officeholder (such as a director or secretary - **see note below**)’(emphasis added). While it might be said it could be unclear if a person is ‘involved in’ a business if it is not active or operational, the note under section 3 addresses this by clarifying that ‘an employee must declare their involvement in a company or business even if that company or business is inactive, i.e. if their Australian Business Number is still current the employee must declare their involvement in this business’. The Applicant had, at the very least, registered a business in his name, being the owner of the ABN. He needed to declare this and did not do so on an annual basis as required by the policy.

[216] This matter does not concern an isolated oversight or omission that amounts to a technical breach of a policy. When the Applicant’s breaches of the Respondent’s PCard Policy and Procedure, Secondary Employment Procedure and Code of Conduct are considered together it establishes a pattern of conduct involving a failure of the Applicant to comply with the Respondent’s policies and procedures in multiple respects after having been trained in those policies and procedures and with the knowledge or at the very least suspicion that some of the practices he was engaged in were wrong. The Applicant’s previous disciplinary history suggests a pattern of non-compliance with the Respondent’s policies and procedures that extends beyond the breaches that gave rise to the dismissal. In all the circumstances I find that there was a valid reason for the dismissal related to the Applicant’s conduct.

Findings - Was the Applicant notified of the valid reason (s. 387(b)) and was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct (s. 387(c))?

[217] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant “was notified of that reason”. Contextually, the reference to “that reason” is the valid reason found to exist under s.387(a).¹²⁶

[218] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,¹²⁷ and in explicit¹²⁸ and plain and clear terms.¹²⁹

[219] An employee protected from unfair dismissal should also be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee’s employment.¹³⁰ Where the employee is aware of the precise nature of the employer’s concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.¹³¹

[220] The Applicant submitted that the Respondent did not comply with ss.387(b) and (c) of the Act¹³² for the following reasons:

- the TfNSW Appeal Panel remitting the disciplinary decision back to Mr Devitt for determination denied the Applicant any true prospects of changing the Respondent’s mind;¹³³and

- while the Applicant was advised of the reason for his dismissal was and given an opportunity to respond to the allegations he was at all times disadvantaged because:
 - of the effluxion of time in respect of the investigation period;
 - he was denied access to his work emails to assist him in preparing a comprehensive response to the allegations and to retrieve records that were material to the scope of the investigation.¹³⁴

[221] The Respondent submitted that the Applicant was given an ample opportunity to respond by way of the letters dated 14 July 2022, 17 August 2022, 28 September 2022 and on 8 March 2023.¹³⁵

[222] The letter from the Respondent to the Applicant dated 28 September 2022 sets out reasons for the dismissal that I have found constitute a valid reason for the dismissal including breaches of the PCard Policy and/or Procedure. The letter states that before coming to a final decision in relation to the disciplinary outcome, the Applicant has an opportunity to respond. The Applicant did have such an opportunity and responded in detail to the allegations made against him. On 14 February 2023, the Applicant received correspondence informing him that the TfNSW Disciplinary Panel had decided that the original decision would be set aside and the matter would be referred back to the original decision maker to have further information obtained and a new decision made.

[223] The letter of 8 March 2023 focuses on the breach of the Secondary Employment Policy. While I have found that the Applicant should have declared his ABN for his inactive business and this amounted to a technical breach of the Secondary Employment Procedure I have not substantiated breaches of the Secondary Employment Procedure of the gravity alleged by the Respondent. However I note that the breach of the Secondary Employment Procedure was only one of the reasons the Respondent provided for the dismissal. The Applicant was notified of the valid reason that I have found existed under s.387(a) of the Act. Further, the Applicant provided a detailed response to the letter via his representative on 15 March 2023 addressing all of the reasons that the Respondent held for dismissing the Applicant, including the reason that I have found to be a valid reason for the dismissal.

[224] In all the circumstances, I find that the Applicant was notified of the valid reason (s. 387(b)) and was given an opportunity to respond to any valid reason related to his conduct (s. 387(c)).

Findings - Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal (s.387(d))?

[225] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[226] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer

unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”¹³⁶

[227] There is no positive obligation on an employer to offer an employee the opportunity to have a support person.

[228] In relation to this consideration the Applicant submitted that he was represented by the union and legal representatives throughout the process but was denied access to work emails to assist to prepare his response to the investigation and this factor therefore weighs against the dismissal being valid.¹³⁷ These latter considerations relate to process rather than the substantive question as to whether the Respondent unreasonably refused to allow the Applicant to have a support person present to assist at discussions relating to the dismissal.

[229] The Respondent submitted that the Applicant was supported by his union and a legal representative at various times throughout the investigation and disciplinary process, at no stage did the Applicant request any other support person to be involved and the Applicant declined to participate in the investigation interview process and was not unreasonably refused an opportunity to have a support person with him.¹³⁸

[230] There is no evidence that the Respondent unreasonably refused to allow the Applicant to have a support person present to assist at discussions relating to the dismissal and in all the circumstances, I find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal.

Findings - Was the Applicant warned about unsatisfactory performance before the dismissal (s.387(e))?

[231] The Applicant submitted that he was not provided with any warnings concerning the alleged conduct prior to his dismissal and this factor weighs against the dismissal being valid.¹³⁹

[232] However as the dismissal related to the Applicant’s conduct and did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

Findings - To what degree would the size of the Respondent’s enterprise the absence of dedicated human resource management specialists or expertise in the Respondent’s enterprise be likely to impact on the procedures followed in effecting the dismissal (ss.387(f) and (g))?

[233] The Applicant submitted that the Respondent is a large company with access to human resources expertise, both internally and externally, and that unfair procedures adopted by the Respondent in dismissing the Applicant is all the more concerning and weighs against the validity of the dismissal.¹⁴⁰

[234] The Respondent submitted that it is a large entity and the considerations at ss.387(f) and (g) of the Act are neutral given the extensive nature of the investigation and the Applicant being provided the opportunity to respond during the disciplinary process.¹⁴¹

[235] The Respondent is a large employer with access to dedicated human resource management specialists. Where an employer is substantial and has dedicated human resources personnel and access to legal advice, there will likely be no reason for it not to follow fair procedures.¹⁴² It is apparent that the investigation into the Applicant's conduct was extensive and the disciplinary process thorough. However I observe that the disciplinary process was very protracted and this would appear to be in part attributable to the size of Respondent and the processes it has implemented for dealing with such matters.

Findings - What other matters are relevant (s.387(h))?

[236] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[237] In relation to this consideration the Applicant submitted that if the Commission is satisfied that there was a valid reason for the dismissal, the Applicant's dismissal was, in any event harsh for reasons set out below.

Length of service

[238] The Applicant submitted that he had a record of continuous employment with the Respondent for 19 years and during that time had been promoted from the position of Transit Officer to Operations Manager.¹⁴³

[239] In relation to this consideration the Respondent submitted that the Applicant had been employed by the Respondent for 8 years¹⁴⁴ and that the Applicant's length of service was not so long such that any particular leniency is warranted or appropriate.¹⁴⁵

Workplace culture

[240] The Applicant submitted that his purchases were sanctioned by senior managers in his team and there existed a culture, led by senior managers, wherein transactions for expenses such as car washing and catering was condoned.¹⁴⁶

Procedural fairness

[241] The Applicant appealed the preliminary decision to dismiss him to the TfNSW Appeal Panel and the TfNSW Appeal Panel remitted the matter back to the original decision maker, Mr Devitt. The Applicant submitted this denied him procedural fairness.¹⁴⁷ In his reply submissions the Applicant further submits that he was denied a further opportunity to re-agitate and appeal against the Respondent's final decision by way of appeal to TfNSW disciplinary appeal panel, in contravention of his industrial rights pursuant to clause 33.13 of the Enterprise Agreement.¹⁴⁸

[242] The Applicant also made a number of other submissions addressing other considerations in the Act that relate to procedural fairness. These included that the Applicant was denied procedural fairness:

- as he was not provided with access to emails and other records held by the Respondent during the course of the investigation;¹⁴⁹
- due to the gap in time between the scope of the investigation to when he was presented with the letter of allegations, being approximately 18 months;¹⁵⁰
- because of the effluxion of time in respect of the investigation period.¹⁵¹

Workplace injury

[243] The Applicant submitted that he has suffered a workplace injury arising out of managerial actions taken by the Respondent in retaliation of his reporting unauthorised surveillance devices in the workplace and made a workers' compensation claim which was accepted.¹⁵²

Personal and economic circumstances

[244] The Applicant submitted that:¹⁵³

- he commenced employment with the Respondent at the age of 19 years, is now 40 years of age and has limited experience outside railway operations;
- he is the primary wage earner for his family with responsibility for providing care and education for his children;
- his income has been reduced as a consequence of managerial action in August 2020 but which has not been restored to his correct pay grade and his financial detriment has been ongoing and considerable.

The Applicant gave evidence that his total income prior to the dismissal was \$2,500 per fortnights and his current fortnightly expenses totalled \$2,680 including food, council rates, utilities, mortgage payments, car registration and running costs inclusive of insurance¹⁵⁴. The Applicant said he has other recurring expenses including phone, internet, school fees and other miscellaneous expenses.¹⁵⁵ The Applicant also gave evidence that his wife had suffered a stroke in May not long after he was dismissed and has no income coming in. However the Applicant confirmed during cross examination that he was deriving income from an investment property and that was how he was getting by.

Similar conduct

[245] The Respondent noted that the Applicant and his witnesses referred to other instances of similar misconduct and submitted that the Respondent reviews any instance of misconduct on a case by case basis and determines the outcome based on all of the relevant facts.

[246] The Respondent submitted that the following further matters should be taken into consideration.

Training and work experience

[247] The Respondent submitted that during the Applicant's employment with the Respondent, spanning over eight years, the Applicant underwent the following training:

- (a) Code of Conduct – Online training, completed on 19 January 2015
- (b) Purchasing Card for Cardholders - Online, completed on 19 November 2018;
- (c) Purchasing Card Overview for Authorising Officers - Online, completed on 18 September 2019;
- (d) Ethics and Probity in Procurement – Online, completed on 10 February 2021.¹⁵⁶

Fair go all round

[248] The Respondent submitted that the dismissal of the Applicant is consistent with the object of Part 3-2 of the Act of providing a ‘fair go all round’ to the parties as:

- (a) the Applicant knew, or ought to have known, the conduct was contrary to the Respondent’s policies and procedures;
- (b) the Applicant did not report the deviation from/breaches of the Respondent’s policies; and
- (c) other employees engaged in similar conduct were also disciplined.¹⁵⁷In this regard the Applicant relied on the evidence of Ms Greenwood who said that other employees including, for example, Mr Watson and Mr Addouj who have been found to have engaged in misconduct of this nature have been subject to serious disciplinary outcomes.¹⁵⁸

Consideration

[249] An employee’s long and satisfactory work performance or history may be taken into consideration under s.387(h) of the Act and, depending on all the circumstances, may weigh in favour of a conclusion that the dismissal of the employee was harsh, unjust or unreasonable.¹⁵⁹ However in more recent years the Applicant’s work performance was not satisfactory and prior to the events directly related to the dismissal, the Applicant had been disciplined for other breaches of the Respondent’s policies.

[250] It has long been established that the effects of dismissal on the personal or economic situation of the dismissed employee may be taken into consideration under s.387(h) of the Act.¹⁶⁰ I am satisfied that the dismissal will likely have an adverse economic effect on the Applicant and that his concentration of time spent in the industry may make it more challenging to secure alternative employment and this needs to be balanced with other relevant considerations in reaching a conclusion about whether the dismissal is unfair.

[251] As noted above, the Applicant submitted that his purchases were sanctioned by senior managers in his team and there existed a culture, led by senior managers, wherein transactions for expenses such as car washing and catering was condoned.¹⁶¹ I consider that the cultural problem was broader than this. In the circumstances of this matter, the Applicant was a part of a poor management culture within the Fleet Maintenance Division in which managers adopted a poor attitude toward compliance with the Respondent’s policies and procedures regarding PCard use. It was a culture in which non-compliance with policies was encouraged and the Applicant, as a manager, contributed to this when he had obligations to do something to prevent or address it and in doing so perpetuated it.

[252] The Applicant's prior history is also a relevant consideration and Ms Greenwood's evidence was that the Applicant was also the subject of a disciplinary process in 2020 concerning allegations that he had breached the Code of Conduct by:

- between 1 March 2019 and 20 September 2019, failing to be honest and/or accurate in his timekeeping in relation to the work he performed, by failing to work the actual work hours claimed; and
- between 1 March 2019 and 12 September 2019, using his work vehicle for non-work related purposes.¹⁶²

[253] Ms Greenwood's evidence was that in respect of the first allegation above the disciplinary investigation found that the Applicant had engaged in 80 separate instances of substantiated misconduct and had claimed approximately 192 hours of work that he did not actually work during the relevant period and in relation to the second allegation above the investigation substantiated 35 separate instances of misconduct.¹⁶³ Ms Greenwood's evidence was that as a result of the disciplinary process, in which the Applicant had the opportunity to respond to the proposed disciplinary outcomes, the Applicant was subject to the disciplinary outcomes of regression to the role of Area Manager for 12 months and withdrawal of the use of a work vehicle and home garaging for up to 12 months.¹⁶⁴ The Respondent provided copies of the preliminary decision letter dated 15 June 2020 and the final decision letter dated 25 August 2020 in respect of these matters. Ms Greenwood's evidence was that although the Applicant had the opportunity to request a review of the final disciplinary outcomes by TfNSW, he did not do so and accepted the disciplinary outcome as outlined.¹⁶⁵

[254] The Applicant denies that the conduct occurred and said during the hearing that due to the length of time the disciplinary process took he did not challenge the disciplinary outcome and was happy to move on. However based on the Respondent's evidence and the conduct I have substantiated as being the valid reason for the dismissal, I am satisfied that the Applicant has demonstrated a poor attitude toward compliance with the Respondent's policies since 2019 and that non-compliance with policies was not an isolated occurrence but a part of a broader concern about the Applicant's approach to compliance.

[255] It is however important to note that I am not satisfied that the Applicant has engaged in fraudulent or corrupt conduct and I am satisfied that he did not use the PCard for his personal benefit. I also acknowledge that administrative and compliance tasks can sometimes be tedious and cumbersome for persons employed to utilise other skills however in the modern workforce they are a key part of many roles, particularly management roles, and in a large, publicly funded organisation high level of accountability for expenditure and requirements for sound governance mean that these processes are of particularly high importance. As a manager compliance with policies and leading by example were important parts of his role and his conduct meant that he did not meet his obligations in this regard and did not demonstrate that he accepts any responsibility for this.

[256] Procedural fairness is one factor that the Commission may take into consideration when deciding if a dismissal has been harsh, unjust or unreasonable. It concerns the decision-making process followed or steps taken by a decision maker, rather than the actual decision itself.

[257] In the context of administrative decision-making, the rules of natural justice are flexible and require fairness in all the circumstances, including the nature of the power exercised and the statutory provisions governing its exercise.¹⁶⁶ Ordinarily, procedural fairness requires that an allegation be put to a person and they be given an opportunity to answer it before a decision is made.¹⁶⁷This has occurred in the present matter.

[258] However I do consider aspects of the process adopted by the Respondent to be problematic. The allegations of misconduct concerning PCard usage spanned a period between March 2019 and April 2022. Ms Greenwood's evidence was that the Respondent identified concerns regarding PCard purchases and anomalies in relation to a number of employees, including the Applicant in April and May 2021.¹⁶⁸ However allegations of wrongdoing were not put to the Applicant until over a year later in May 2022. While the Applicant was off work and in receipt of workers' compensation payments between 15 April 2021 and 10 May 2022, it should not have been assumed that this precluded him from participating in an investigation process about the concerns that had been identified much earlier. I accept that the Applicant would have faced some difficulty recalling transactions more than three years prior to the date concerns about these transactions were raised with him and in the circumstances he should have been put on notice about them at the earliest opportunity. While it delayed the presentation of the concerns it had identified in April and May 2021, the Respondent took the step of engaging surveillance services to look into an 'anonymous complaint' about the Applicant engaging in secondary employment shortly before the time the Applicant was due to return to the workplace. Given the Applicant's return to work was imminent, it suggests someone in the organisation may have been seeking to prevent his return. However I am not persuaded that this was the decision maker Mr Devitt, who had not actually met the Applicant, and there is no evidence to suggest that Mr Devitt had a particular vendetta in relation to the Applicant. I am not persuaded that the remittance of the decision to Mr Devitt by TfNSW for reconsideration resulted in a denial of procedural fairness or that the Applicant was denied a right of appeal under the Enterprise Agreement.

[259] Despite the procedural shortcomings I have identified, I note that given the systemic nature of the issue concerning the PCard usage, even if the Respondent had brought the identified concerns to the Applicant's attention earlier, it is unlikely that any response provided by the Applicant would have changed the outcome for the Applicant.

[260] I further note that the period from the initial presentation of the allegations in May 2022 to the Applicant's dismissal in April 2023 spanned over 11 months. While some of this delay was attributable to the Applicant's election to utilise internal appeal processes, and there were multiple points of engagement with the Applicant across the period, this is a very long time in which to conclude a disciplinary process. I acknowledge that the allegations of wrongdoing and responses to them went into considerable detail and this is evident in the volume of materials before the Commission which are in excess of 2000 pages. I accept that such detail takes time for decision makers to absorb and process and procedural fairness should not be sacrificed for the sake of expediency. However the allegations and information underpinning them were not so complex that the end to end disciplinary process should have taken almost a year to bring to closure, leaving the Applicant in a state of uncertainty regarding his future across this period. These factors turning to the investigation and disciplinary process weigh in favour of a finding that the dismissal was harsh.

[261] I acknowledge that in the year prior to his suspension in relation to the allegations of conduct which led to his dismissal the Applicant was off work in receipt of workers' compensation as a result of a work-related injury. I am also conscious that the Applicant has a long tenure in the industry, has family responsibilities and outgoings and that his spouse has health issues as a result of a stroke. While the Applicant indicated he would be able to get a certificate of capacity to enable his return to work if reinstated indicating he will be able to work, I acknowledge the combination of the Applicant's personal circumstances may give rise to some challenges in the near term. However the Applicant did indicate that he has an income from an investment property that is helping him get by. The Applicant has earned valuable experience across his tenure in the industry that could be utilised elsewhere and also appears to have some infrastructure and family support in place should he wish for his landscaping business to become operational in the future.

[262] While it may be a relevant matter under s.387(h) to consider whether employees in comparable cases have been treated differently, it is the case, as has previously been observed by the Australian Industrial Relations Commission, that "...the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable... In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing 'apples with apples'. There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made. ... Specifically, the Commission must be conscious that there may be considerations subjective to the circumstances of an individual that caused an employer to take a more lenient approach in an alleged comparable case."¹⁶⁹ While there is evidence that other employees subjected to a disciplinary process in relation to PCard usage have remained employed and that Mr Watson, the manager who condoned the breaches regarding PCard usage remained employed, I am not persuaded that there is sufficient evidence before the Commission to enable a finding of differential treatment comparing 'apples with apples', particularly considering the Applicant's breaches beyond those related to the PCard and previous disciplinary record which indicates policy breaches other than those that ultimately led to his dismissal.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[263] I have made findings in relation to each matter specified in section 387 as relevant.

[264] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.¹⁷⁰

[265] I am satisfied that there was a valid reason for the dismissal of which the Applicant was notified and afforded an opportunity to respond. The Respondent did not unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal. The dismissal was for reasons related to the Applicant's conduct and not related to unsatisfactory performance. While I consider that there were deficiencies in the Respondent's approach to the investigation and disciplinary process, including the delay in putting the allegations to the Applicant and significant length of time taken to bring the process to conclusion, and that the Applicant's circumstances will mean that he will face some challenges

in the near term, when I weigh all the factors that I am to have regard to pursuant to s.387 of the Act, I am not persuaded that these factors outweigh my findings that there was a valid reason for the dismissal of which the Applicant was notified and afforded an opportunity to respond such that they tip the scales in a finding that the dismissal was harsh, unjust or unreasonable. Having considered each of the matters specified in s.387 of the Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable.

Conclusion

[266] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the Act. The Applicant's application is therefore dismissed.



COMMISSIONER

Appearances:

Mr *J Hart* of the Australian Rail, Tram and Bus Industry Union on behalf of the Applicant.
Ms *M Brooks* of Counsel instructed by Ms *S Westcott* (Lander & Rogers) on behalf of the Respondent.

Hearing details:

2023.
Sydney.
September 4 and 5.

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¹ *Warrell v Fair Work Australia* [2013] FCA 291.

² *Ibid.*

³ *Urbanski v MSS Security Pty Ltd* [2012] FWC 1789 at [8].

⁴ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

⁵ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁶ Ibid.

⁷ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁸ *Edwards v Justice Giudice* [1999] FCA 1836, [7].

⁹ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

¹⁰ Applicant's Outline of Submissions at [29] – [30].

¹¹ Applicant's Outline of Submissions at [21].

¹² *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at [373].

¹³ Submissions of the Respondent at [5].

¹⁴ Submissions of the Respondent at [32].

¹⁵ Witness Statement of Ronald Devitt at [8].

¹⁶ Witness Statement of Ronald Devitt at [14].

¹⁷ Witness Statement of Ronald Devitt at [15].

¹⁸ Witness Statement of Ronald Devitt at [16].

¹⁹ Witness Statement of Ronald Devitt at [17].

²⁰ Witness Statement of Ronald Devitt at [19].

²¹ Witness Statement of Ronald Devitt at [20].

²² Witness Statement of Ronald Devitt at [20].

²³ Witness Statement of Ronald Devitt at [21].

²⁴ Witness Statement of Ronald Devitt at [22].

²⁵ Witness Statement of Ronald Devitt at [23].

²⁶ Witness Statement of Ronald Devitt at [25] – [26].

²⁷ Witness Statement of Ronald Devitt at [27].

²⁸ Witness Statement of Ronald Devitt at [28].

²⁹ Witness Statement of Ronald Devitt at [28].

³⁰ Witness Statement of Ronald Devitt at [34].

³¹ Witness Statement of Ronald Devitt at [34].

³² Witness Statement of Ronald Devitt at [35] – [38]

³³ Submissions of the Respondent at [33].

³⁴ Submissions of the Respondent at [35].

³⁵ Submissions of the Respondent at [29].

³⁶ [\[2018\] FWC 4288](#).

³⁷ Witness Statement of Ronald Devitt at [9].

³⁸ Respondent, Purchasing Card Technical Policy, s. 1.

³⁹ Witness Statement of Ronald Devitt at [33].

⁴⁰ Respondent, Purchasing Card Technical Policy, s. 2.

⁴¹ Witness Statement of Ronald Devitt at [33].

⁴² Witness Statement of Ronald Devitt at [39].

⁴³ Applicant's Witness Statement dated 8 August 2023 at [19].

⁴⁴ Applicant's Witness Statement dated 8 August 2023 at [20].

⁴⁵ Attachment L to Applicant's Witness Statement dated 8 August 2023.

⁴⁶ Applicant's Witness Statement dated 8 August 2023 at [21], Applicant's Witness Statement dated 1 September 2023 at [10].

⁴⁷ Applicant's Witness Statement dated 1 September 2023 at [11].

⁴⁸ Applicant's Witness Statement dated 8 August 2023 at [22].

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- ⁴⁹ Attachment P.1 to Applicant's Witness Statement dated 8 August 2023.
- ⁵⁰ Attachment P.2 to Applicant's Witness Statement dated 8 August 2023.
- ⁵¹ Attachment P.3 to Applicant's Witness Statement dated 8 August 2023.
- ⁵² Attachment P.4 to Applicant's Witness Statement dated 8 August 2023.
- ⁵³ Applicant's Witness Statement dated 8 August 2023 at [24].
- ⁵⁴ Attachment P.6 to Applicant's Witness Statement dated 8 August 2023.
- ⁵⁵ Attachment P.7 to Applicant's Witness Statement dated 8 August 2023.
- ⁵⁶ Attachment P.11 to Applicant's Witness Statement dated 8 August 2023.
- ⁵⁷ Applicant's Witness Statement dated 8 August 2023 at [25].
- ⁵⁸ Attachments P.8.1, P.8.2, P.10.1, P.10.2 and P.10.3 of Applicant's Witness Statement dated 8 August 2023.
- ⁵⁹ Applicant's Witness Statement dated 8 August 2023 at [27].
- ⁶⁰ Applicant's Witness Statement dated 8 August 2023 at [27].
- ⁶¹ Applicant's Witness Statement dated 1 September 2023 at [13].
- ⁶² Applicant's Witness Statement dated 1 September 2023 at [14].
- ⁶³ Witness Statement of Mr Ronald Devitt dated 29 August 2023 at [53].
- ⁶⁴ Applicant's Witness Statement dated 1 September 2023 at [16].
- ⁶⁵ Applicant's Witness Statement dated 1 September 2023 at [16].
- ⁶⁶ Applicant's Witness Statement dated 1 September 2023 at [17].
- ⁶⁷ Applicant's Witness Statement dated 1 September 2023 at [17].
- ⁶⁸ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [13].
- ⁶⁹ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [18].
- ⁷⁰ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [20] – [21].
- ⁷¹ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [22].
- ⁷² Witness Statement of Mr Tod Ryman dated 8 August 2023 at [25] – [26].
- ⁷³ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [27].
- ⁷⁴ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [29].
- ⁷⁵ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [38] – [40].
- ⁷⁶ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [30].
- ⁷⁷ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [32].
- ⁷⁸ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [35] – [37].
- ⁷⁹ Witness Statement of Mr Ahmand Addouj dated 3 August 2023 at [6].
- ⁸⁰ Witness Statement of Mr Ahmand Addouj dated 3 August 2023 at [7].
- ⁸¹ Applicant's Witness Statement dated 1 September 2023 at [19].
- ⁸² Applicant's Witness Statement dated 1 September 2023 at [19].
- ⁸³ Applicant's Witness Statement dated 1 September 2023 at [19].
- ⁸⁴ Applicant's Witness Statement dated 1 September 2023 at [20].
- ⁸⁵ Applicant's Witness Statement dated 1 September 2023 at [20].
- ⁸⁶ Witness Statement of Mr Ronald Devitt dated 29 August 2023 at [83].
- ⁸⁷ Witness Statement of Mr Ronald Devitt dated 29 August 2023 at [83].
- ⁸⁸ Witness Statement of Mr Ronald Devitt dated 29 August 2023 at [85].
- ⁸⁹ Witness Statement of Mr Ronald Devitt dated 29 August 2023 at [86].
- ⁹⁰ Applicant's Witness Statement dated 1 September 2023 at [21] – [22].
- ⁹¹ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [3].
- ⁹² Witness Statement of Mr Tod Ryman dated 8 August 2023 at [5].

- ⁹³ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [6].
- ⁹⁴ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [7].
- ⁹⁵ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [8].
- ⁹⁶ Witness Statement of Mr Tod Ryman dated 8 August 2023 at [11].
- ⁹⁷ Witness Statement of Mr Ahmad Addouj dated 3 August 2023 at [2].
- ⁹⁸ Witness Statement of Camilla Greenwood dated 30 August 2023 at [18].
- ⁹⁹ Witness Statement of Camilla Greenwood dated 30 August 2023 at [19].
- ¹⁰⁰ Witness Statement of Camilla Greenwood dated 30 August 2023 at [19].
- ¹⁰¹ Witness Statement of Camilla Greenwood dated 30 August 2023 at [20].
- ¹⁰² Witness Statement of Camilla Greenwood dated 30 August 2023 at [21].
- ¹⁰³ Witness Statement of Camilla Greenwood dated 30 August 2023 at [22].
- ¹⁰⁴ Witness Statement of Camilla Greenwood dated 30 August 2023 at [31].
- ¹⁰⁵ Witness Statement of Camilla Greenwood dated 30 August 2023 at [32].
- ¹⁰⁶ Witness Statement of Mr Ronald Devitt dated 29 August 2023 at [94].
- ¹⁰⁷ Witness Statement of Mr Ronald Devitt dated 29 August 2023 at [94].
- ¹⁰⁸ Witness Statement of Camilla Greenwood dated 30 August 2023 at [19].
- ¹⁰⁹ Witness Statement of Mr Ahmad Addouj dated 3 August 2023 at [4].
- ¹¹⁰ Witness Statement of Mr Ahmad Addouj dated 3 August 2023 at [4] – [5].
- ¹¹¹ Applicant’s Witness Statement dated 8 August 2023 at [19].
- ¹¹² Witness Statement of Mr Ronald Devitt dated 29 August 2023 at [49].
- ¹¹³ Witness Statement of Camilla Greenwood dated 30 August 2023 at [1].
- ¹¹⁴ Witness Statement of Camilla Greenwood dated 30 August 2023 at [1].
- ¹¹⁵ Witness Statement of Camilla Greenwood dated 30 August 2023 at [11].
- ¹¹⁶ Witness Statement of Camilla Greenwood dated 30 August 2023 at [12] – [13].
- ¹¹⁷ Witness Statement of Camilla Greenwood dated 30 August 2023 at [14].
- ¹¹⁸ Witness Statement of Camilla Greenwood dated 30 August 2023 at [15].
- ¹¹⁹ Witness Statement of Camilla Greenwood dated 30 August 2023 at [16].
- ¹²⁰ Witness Statement of Helen Bellette dated 31 August 2023 at [5].
- ¹²¹ Applicant’s Witness Statement dated 1 September 2023 at [25].
- ¹²² Applicant’s Witness Statement dated 8 August 2023 at [27].
- ¹²³ *B, C and D v Australian Postal Corporation T/A Australia Post* [\[2013\] FWCFB 6191](#).
- ¹²⁴ *B, C and D v Australian Postal Corporation T/A Australia Post* [\[2013\] FWCFB 6191](#) at [150].
- ¹²⁵ Applicant’s Witness Statement dated 1 September 2023 at [14].
- ¹²⁶ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#), [55].
- ¹²⁷ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.
- ¹²⁸ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).
- ¹²⁹ *Ibid.*
- ¹³⁰ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].
- ¹³¹ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.
- ¹³² Applicant’s Outline of Submissions at [33].
- ¹³³ Applicant’s Outline of Submissions at [31].
- ¹³⁴ Applicant’s Outline of Submissions at [32].
- ¹³⁵ Submissions of the Respondent at [38].

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- ¹³⁶ Explanatory Memorandum, *Fair Work Bill 2008* (Cth), [1542].
- ¹³⁷ Applicant's Outline of Submissions at [34] - [35].
- ¹³⁸ Submissions of the Respondent at [39].
- ¹³⁹ Applicant's Outline of Submissions at [36].
- ¹⁴⁰ Applicant's Outline of Submissions at [37].
- ¹⁴¹ Submissions of the Respondent at [41].
- ¹⁴² *Jetstar v Meetson-Lemkes* [2013] FWCFB 9075, [68].
- ¹⁴³ Applicant's Outline of Submissions at [38].
- ¹⁴⁴ Submissions of the Respondent at [45].
- ¹⁴⁵ Submissions of the Respondent at [44].
- ¹⁴⁶ Applicant's Outline of Submissions at [38].
- ¹⁴⁷ Applicant's Outline of Submissions at [38].
- ¹⁴⁸ Applicant's Reply Submissions at [18].
- ¹⁴⁹ Applicant's Outline of Submissions at [30], [32] and [35].
- ¹⁵⁰ Applicant's Outline of Submissions at [30].
- ¹⁵¹ Applicant's Outline of Submissions at [32].
- ¹⁵² Applicant's Outline of Submissions at [38].
- ¹⁵³ Applicant's Outline of Submissions at [38].
- ¹⁵⁴ Applicant's Witness Statement dated 8 August 2023 at [32] and [34].
- ¹⁵⁵ Applicant's Witness Statement dated 8 August 2023 at [33].
- ¹⁵⁶ Applicant's Outline of Submissions at [45].
- ¹⁵⁷ Applicant's Outline of Submissions at [46].
- ¹⁵⁸ Witness Statement of Camilla Greenwood dated 30 August 2023 at [29].
- ¹⁵⁹ *Telstra Corporation v Streeter* [2008] AIRCFB 15, [27].
- ¹⁶⁰ *Ricegrowers Co-operative v Schliebs* [PR908351](#) (AIRCFB, Duncan SDP, Cartwright SDP, Larkin C, 31 August 2001), [26].
- ¹⁶¹ Applicant's Outline of Submissions at [38].
- ¹⁶² Witness Statement of Camilla Greenwood dated 30 August 2023 at [11].
- ¹⁶³ Witness Statement of Camilla Greenwood dated 30 August 2023 at [12] – [13].
- ¹⁶⁴ Witness Statement of Camilla Greenwood dated 30 August 2023 at [14].
- ¹⁶⁵ Witness Statement of Camilla Greenwood dated 30 August 2023 at [16].
- ¹⁶⁶ *Kioa v West* [1985] HCA 81, [11] (per Gibbs CJ).
- ¹⁶⁷ *Kioa v West* [1985] HCA 81, [22] (per Wilson J).
- ¹⁶⁸ Witness Statement of Camilla Greenwood dated 30 August 2023 at [19].
- ¹⁶⁹ *Sexton v Pacific National (ACT) Pty Ltd* [PR931440](#) (AIRC, Lawler VP, 14 May 2003), [36].
- ¹⁷⁰ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].