



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Greg Healy

v

Wage Inspectorate Victoria
(U2023/9623)

DEPUTY PRESIDENT COLMAN

MELBOURNE, 8 FEBRUARY 2024

Unfair dismissal claim – incapacity for work – absence from work for 18 months – unreasonable to expect employer to follow doctor’s advice to mediate – second valid reason for dismissal – public political statements in breach of code of conduct – dismissal not unfair

[1] This decision concerns an application for an unfair dismissal remedy made by Greg Healy under s 394 of the *Fair Work Act 2009* (Act). From 21 June 2021 until 13 September 2023 Mr Healy was employed by Wage Inspectorate Victoria (WIV) as a child employment authorised officer. Mr Healy was dismissed after WIV concluded that he did not have capacity to perform the inherent requirements of his position. Mr Healy contends that his dismissal was unfair because WIV refused to follow medical advice that the parties engage in mediation of his workplace complaints, including allegations of numerous workplace safety contraventions by WIV, some of which led to injuries that rendered him unfit for work. Mr Healy contends that his complaints were never properly addressed and that it was not safe for him to return to work until mediation and consultation had occurred. He says that there was no valid reason to dismiss him and that in any event his dismissal was unfair.

[2] WIV contends that the dismissal was not unfair because Mr Healy did not have capacity to do his job and had been unfit for work for 18 months. It submits that Mr Healy’s many complaints were considered and found to be unsubstantiated, and that it was not reasonable to expect it to engage in mediation with him about these matters. It further contends that Mr Healy was the subject of misconduct allegations, including that he had made public statements of a political nature that contravened the *Code of Conduct of Victorian Public Sector Employees* (Code of Conduct), and that although the investigation into these matters had not concluded because of his lengthy absence, these statements constituted a further valid reason for dismissal.

[3] Mr Healy gave evidence that he commenced employment with the Victorian public service in January 2019 as a child employment officer in the Department of Economic Development. In April 2019 he transferred to the Department of Premier and Cabinet (DPC). In June 2021 his employment was transferred to WIV, which had recently been established as a statutory authority. From July 2019 to June 2021 Mr Healy was a CPSU delegate. From June 2020 to June 2021 he was a health and safety representative (HSR).

[4] Mr Healy said that in the course of his employment he sustained three workplace injuries. The first occurred on 13 November 2019, when according to Mr Healy he was subjected to *'aggressive behaviour and adverse treatment'* from Robert Hortle, who was then the director of the wage inspectorate within DPC, and is presently the Commissioner of WIV. Mr Healy said that he reported the matter to his manager who told him that she also felt bullied and advised him to take the following day off as personal leave, which he did.

[5] Mr Healy said that the second workplace injury occurred over a period from late November 2019 to April 2021, during which he was subjected to sustained *'adverse treatment'*. He said that this included bullying and discrimination, which led to forms of stress that resulted in anxiety. Mr Healy said that he reported his concerns to his manager, and took two weeks of personal leave. On 20 May 2021, he lodged a WorkCover claim in respect of the second injury.

[6] In June 2021, Mr Healy sent a letter to the Deputy Secretary of DPC, Matthew O'Connor, in which he raised various occupational health and safety concerns. In his letter, Mr Healy referred to what he said was the prevalence of negative responses to a staff survey, and said that since 2019 certain unnamed people had approached him, as the union delegate, with their concerns about workplace safety issues. His letter stated that he was not authorised to share these employees' details and that he could only speak to the general nature of the issues. He said that these matters revealed breaches of the Code of Conduct and equal opportunity laws, and that there was an *'ingrained negative culture'*. Mr Healy said that, as an HSR, his assessment of the situation was that the employer had been in breach of its duty to maintain a safe workplace since 2019, and that this had led to a high level of stress and a culture where employees could not raise concerns. Mr Healy said he would appreciate an opportunity to discuss these matters, but he received no substantive response, and no meeting occurred.

[7] Mr Healy's evidence was that his third workplace injury was sustained from October 2021 to March 2022, after he returned from a secondment to another government department. He said that during this period he was subjected to severe stress arising from *'adverse treatment'* from management, and also *'vicarious trauma'* from having colleagues and union members come to him to recount their own stressful experiences and fear of management. He said that WIV ignored his repeated attempts to raise occupational health and safety issues that were injuring employees. In December 2021, Mr Healy sent a complaint to the deputy director raising concerns on behalf of a coworker, Danielle Stephenson, relating to alleged bullying and discrimination, however he received no response. Mr Healy said that on 2 February and 10 February 2022 he reiterated his concerns about the mistreatment of Ms Stephenson, and also about his own mistreatment.

[8] On 11 February 2022, Mr Healy received a letter from the head of human resources, Margot Anderson, stating that two allegations of misconduct had been raised against him and that he was stood down pending an investigation. The first allegation was that between February and November 2021 he had posted a number of statements on Twitter, using the account '@GregGreggson', that expressed personal views on political and government matters, in contravention of the Code of Conduct. The second allegation was that during a meeting on 28 January 2022 he had divulged personal health information of a former employee who was not in attendance, and that after the meeting he had harassed another employee who had expressed concern to Mr Healy about his conduct.

[9] On 8 March 2022, an investigator sent Mr Healy a letter inviting him to attend an interview on 16 March 2022. However, from 16 March 2022 Mr Healy was unwell and took personal leave. Over the next 18 months, Mr Healy provided WIV with medical certificates stating that he was unfit to attend work, and that he was unable to participate in the investigation into the allegations against him. Mr Healy also submitted a second WorkCover claim, this time in relation to his third injury, and the claim was accepted. Mr Healy said that at various times from March 2022 WIV tried to require him to participate in its investigation into the allegations of misconduct, and that this caused him further stress.

[10] On 24 June 2022, Mr Healy received a letter from Mr Hortle responding to the workplace safety concerns that he had raised in his letter to Mr O'Connor in June 2021. Some weeks earlier Mr Healy had re-raised his safety concerns with another manager and it appears that this may have prompted Mr Hortle to reply to Mr Healy's letter from the previous year. In his letter, Mr Hortle said that he did not agree with Mr Healy's assertion that WIV had failed to provide a safe workplace. He also outlined seven measures taken by WIV in the past year to improve workplace safety. He concluded by saying that WIV did not consider that Mr Healy's complaints had any basis and that WIV would not be investigating them further. Mr Healy later referred his complaints to WorkSafe.

[11] On 22 November 2022, WorkSafe commenced an investigation into Mr Healy's workplace safety complaints. On 14 April 2023, Mr Healy received a communication from a WorkSafe investigator advising him that the investigation had found that WIV was providing a safe workplace. Mr Healy believed that the investigation had overlooked a number of important matters, including because it had not considered various safety hazards that had arisen before June 2021. He also believed that the investigation had been deficient because the investigator had spoken only to management representatives, without considering what Mr Healy regarded to be their conflicts of interest. In her evidence, Lauren Romans van Schaik, WIV's human resources manager, said that on 15 May 2023 she was told by WorkSafe that Mr Healy had sought an internal review of WorkSafe's conclusion, and that on 19 May 2023 she was told that WorkSafe's conclusion had been upheld.

[12] Mr Healy said that on 4 April 2023, his psychiatrist, Dr Russo, provided a medical report stating that he could return to work if the parties were to undertake a mediation process, but that WIV refused to agree to this and instead directed him to undergo an independent medical examination. Mr Healy complied with the direction. The report of Dr Adaji of 20 July 2023 recommended that the parties undergo a mediation process for the following three months. Mr Healy noted that Dr Adaji's report mentioned mediation eight times, and clearly identified this as a recommendation or condition for his return to work. The report also stated that there should be changes to *'reporting process or people'* and that Mr Healy was not able to return to the current management structure *'headed by his boss, ... the commissioner'*.

[13] On 17 August 2023, Mr Healy received a letter from Ms Romans van Schaik, stating that WIV had considered Dr Adaji's report and determined that it would not implement the recommendation that it engage in mediation or the suggestion that it make changes to WIV's management structure. The letter stated that WIV had already responded to Mr Healy's workplace concerns, both directly and through WorkSafe; that the doctors' reports did not detail how mediation would assist or what issues required mediation, and there was no guarantee that mediation would be successful; that WIV was concerned that participating in mediation might

be harmful to Mr Healy, as well as other persons; and that making structural changes to exclude Mr Hortle and potentially others associated with his concerns was not a reasonable measure. The letter also noted that Mr Healy had been absent from work on paid and unpaid leave for 18 months, that his most recent medical certificate dated 2 August 2023 had stated that he was still unfit for work and could not participate in the investigation into his conduct, and that WIV was now providing him with an opportunity to explain why he should not be dismissed on the basis that he was unable to perform the inherent requirements of his role.

[14] On 29 August 2023, Mr Healy replied to the show cause letter, recounting his various complaints about workplace health and safety matters, as well as the history of his injuries and those that he said had been sustained by other workers. He said that he and others had been bullied and discriminated against, that he had not been consulted about his workplace concerns or injuries, and that his complaints had not been properly addressed. He noted that the doctors had recommended mediation and that his understanding was that mediation would address the safety concerns that had led to his three injuries and the injuries of two colleagues. He said that he did not believe that WIV had made any attempt to facilitate his return to work, and that he had lost faith in its willingness to manage the safety hazards that had injured him. Mr Healy said that he was concerned that he could be injured again if he attempted to re-enter the workplace. On 13 September 2023, Mr Healy was dismissed.

[15] Mr Hortle gave evidence that he did not have regular contact with Mr Healy during his employment, and that Mr Healy was four levels removed from him in the reporting structure. One early interaction with Mr Healy occurred on 13 November 2019. At around 5.00pm, as Mr Hortle was leaving for the day, Mr Healy came to his office and wanted to discuss a message that Mr Hortle was proposing to send to staff about professional development plans. Mr Hortle said that Mr Healy was aggressive and told him that the message should not be sent. Mr Hortle replied that he would be happy to discuss the matter at a scheduled meeting. But Mr Healy remained in the doorway, blocking his exit. Mr Hortle asked Mr Healy to move out of the way so that he could leave, but Mr Healy talked over him. Mr Hortle said that he found Mr Healy's behaviour to be forceful and incoherent. Eventually Mr Healy allowed Mr Hortle to leave.

[16] Mr Hortle said that after this encounter, he had only incidental contact with Mr Healy. Then in December 2021, in the course of reviewing WIV's Twitter following, Mr Hortle noticed that one of the 16 accounts of persons following WIV appeared to belong to Mr Healy. The name of the account was '@GregGreggson'. One of the tweets on this account showed a photograph of Mr Healy. His profile also noted his engagement in industrial relations. It read: *'Politics, Economics, Industrial relations. Progressive, humanist, unionist, HFC, hispohablante. He/him/they/them. Like/rt#support'*. Mr Hortle said that some of the tweets on this account were of a political nature. He believed that if they had indeed been posted by Mr Healy, they would likely breach the Code of Conduct. Mr Hortle attached copies of the tweets to his witness statement. The tweets included the following statements:

- *'The LNP are full of dishonest degenerates.'*
- *'If you vote for the @LiberalAus or @the_nationals party, you are supporting truly cruel often evil people.'*

- *'A disgrace – how can anyone support @ScottMorrisonMP with decisions like this to delay vaccinating the most vulnerable in the community??'*
- *'More Liberal Party corruption with YOUR tax dollars.'*
- *'Any Victorian who votes for the federal LNP needs to have some serious reflection about why they are accepting a 0/10 government performance against the most important issue we have faced in most people's lifetime.'*
- *'This government is actually very dangerous to our and our children's futures. Our industries will adapt slower and be uncompetitive. Surely nothing can be more important than this and the plethora of other scandals – we need this cartel out at the next election.'* The text appeared above a picture of former Prime Minister Scott Morrison.
- The following was retweeted by GregGregson: *'VIC LIBS IN CRISIS: The Victorian Liberal Party is engulfed in crisis today as the party implodes over whether it will support gay conversion therapy – a form of child abuse being outlawed by the Andrews Gov't.'* This text appeared above a photograph of former Victorian Liberal leader Matthew Guy with the caption *'Go away you dickhead'*.
- *'Rampant corruption and protection of alleged rapists? ... But we're getting new submarines in 20 years!'* Text appears in a mock Simpsons cartoon. Hashtags then listed included: #ChristianPorterisAJoke #metoo #aukus #Submarines #notaleaderjustaliberal #Portergate #BruceLehrmann #BrittanyHiggins.
- *'Lifelong @AustralianLabor member, and BIG fan of @KKeneally (She or @ClareONeilMP would get my vote for leader).'*
- *'The LNP model is a marginal change that doesn't include everyone. The @AustralianLabor plan is more generous and fair. If you want better childcare and gender equity - don't vote for the LNP next time.'*
- *'Business: "We care about your mental health". Also business: "We don't want to actually pay anything in order to care for your mental health." This is the owner of Chin Chin – Melbourne, who was caught out stealing wages.'* Pictures apparently of the owner appeared below, together with news articles on the owner's comments objecting to a Victorian government mental health levy.

[17] Mr Hortle said that on 2 February 2022, he received a complaint from an employee, Meagan Hood, who alleged that during a workplace meeting Mr Healy had divulged personal health information of a former employee without her permission. On the same day, he received a similar complaint from another employee, Monica Okulicz, who said that she had raised her concerns about this matter with Mr Healy and that he had then sent her a series of messages that made her feel harassed, and that she had asked him to cease messaging her.

[18] Mr Hortle's evidence was that he was very concerned about the tweets that appeared to have been made by Mr Healy and the two complaints received from employees about Mr

Healy's behaviour. He considered these matters to be sufficiently serious to warrant suspending Mr Healy, given the potential impact Mr Healy could have on the health and wellbeing of his colleagues if he remained in the workplace. He was also concerned that if a member of the public saw the tweets that appeared to have been posted by Mr Healy, they could conclude that he was a public servant who held political bias. Mr Healy was advised of the allegations against him by letter dated 11 February 2022. He was stood down pending an investigation. Mr Hortle said that from mid-March 2022 until his dismissal 18 months later Mr Healy remained absent from the workplace on personal leave and submitted a series of medical certificates to WIV stating that he was *'unfit/unable to attend work/school (including participation in a discipline procedure).'* Mr Hortle said that because of Mr Healy's absence, the investigator was unable to proceed with the investigation into the allegations against him.

[19] Mr Hortle's evidence was that on 8 September 2023 he received a brief prepared by Ms Romans van Schaik which recommended that Mr Healy's employment be terminated on the basis that he was unable to perform the inherent requirements of his role. The brief noted, as Mr Hortle already knew, that Mr Healy had been absent since March 2022 and had provided a series of medical certificates stating that he was unfit for work. The brief also explained that WIV had received several medical reports concerning Mr Healy's incapacity, including most recently from Dr Adaji on 20 July 2023, which stated that Mr Healy was not able to return to work within the current management structure and proposed that the parties engage in mediation for the next three months. The brief contained Mr Healy's response to the show cause letter. Mr Hortle considered that the response failed to address the key question of whether Mr Healy had capacity to perform the inherent requirements of his position; that it did not provide any further medical information to indicate that he would be fit to perform the inherent requirements of his role either presently or in the foreseeable future; and that it did not provide any reason as to why he should not be dismissed. Instead, Mr Healy stated in his reply that he was concerned that he would be injured again if he returned to the workplace.

[20] Mr Hortle said that he decided to terminate Mr Healy's employment on the basis that he was unable to meet the inherent requirements of his role. He had been continuously unfit for work for some 18 months and Dr Adaji's report had stated that he could not return to work within the current management structure. Mr Hortle said that he was a statutory appointee and it was not reasonable or permissible to change the structure so that Mr Healy did not fall within his authority. The brief identified a number of reasons why mediation could not be implemented. These were the matters referred to in Ms Romans van Schaik's letter to Mr Healy dated 17 August 2023 (see above). Mr Hortle said that he did not consider that Dr Adaji's recommendation to engage in mediation was reasonable. By letter dated 13 September 2023, WIV terminated Mr Healy's employment.

[21] Mr Hortle rejected Mr Healy's suggestion that he had a conflict of interest in connection with the decision to terminate his employment. He was not aware of any current complaints made by Mr Healy against him. Mr Hortle also said that in considering whether to dismiss Mr Healy, he consulted with Ms Romans van Schaik, as well as the Deputy Commissioner of WIV, and WIV's legal counsel. He said that his decision was based on a thorough recommendation that had been made to him by Ms Romans van Schaik and was endorsed by WIV's chief operating officer, Andrew Edwards.

[22] Ms Romans van Schaik's evidence addressed the various complaints that were made by Mr Healy to the DPC and then WIV in the course of his employment, including: the complaints referred to by Mr Healy in his evidence; the letter sent by Mr Healy to DPC in June 2021; complaints raised by Mr Healy in late 2021 about workload; a grievance raised by Mr Healy in August 2022 about his performance progression pay, in which he claimed that he ought to be paid at the top of his band; and a complaint raised by Mr Healy in February 2023 with WorkSafe alleging that he had been discriminated against because he was an HSR, the alleged less favourable treatment being that he had missed out on several roles from December 2020 to May 2021, and also the failure of WIV to grant him performance pay. Ms Romans van Schaik also addressed in her evidence Mr Healy's various complaints, commencing in November 2022, that his privacy had been breached, and his claims that those dealing with his complaints, including Mr Hortle, had conflicts of interest when it came to the resolution of those matters.

[23] Ms Romans van Schaik gave evidence that in the course of March and April 2023 she received a number of telephone calls and emails from Mr Healy in relation to his various complaints in which he sought responses from her and WIV. On one occasion Mr Healy said that he expected Ms Romans van Schaik to afford his privacy complaint *'top priority'*. On 27 April 2023, she received another telephone call from Mr Healy who told her that he had sent her two more emails and that he required a response. Ms Romans van Schaik's evidence was that as a result of these calls, and the frequency and nature of the emails, she began to experience an adverse impact on her health and wellbeing. On 28 April 2023, she sent a message to Mr Hortle about her concerns for her wellbeing and that of others. She said that her interactions with Mr Healy left her feeling rattled and panicky, and that during Mr Healy's two most recent calls he had been demanding and manic. She said that she had then tried to limit telephone calls with Mr Healy as much as possible.

[24] Ms Romans van Schaik said that all of Mr Healy's complaints and grievances had been responded to and were addressed either by DPC or WIV. She said that, although she joined WIV only in July 2022, she was aware of the responses prior to this time from the content of his file, including the letter that Mr Hortle sent to Mr Healy in June 2022.

[25] Ms Romans van Schaik's evidence also addressed the various medical certificates received from Mr Healy during his absence from work, as well as correspondence between WIV and Mr Healy regarding medical assessments, and the reports received from a number of doctors, including most recently from Dr Russo and Dr Adaji. She noted that Dr Russo's report of April 2023 had stated that it was *'very difficult to see how Mr Healy could return to the workplace in his current role'* and that *'a return to the current workplace could only be achieved through undertaking a mediation process between Mr Healy and his employers'*; and that Dr Adaji's report of July 2023 stated that Mr Healy was *'not able to return in the current management structure, headed by his boss'* and that the parties should engage in mediation for the next three months, after which time Mr Healy would be reassessed.

Brief summary of the submissions

[26] Mr Healy said that during his employment he had been subjected to adverse treatment and exposed to safety hazards that had led to his three injuries, and that his many complaints about workplace safety issues were not properly investigated. Mr Healy said that both Dr Russo and Dr Adaji had indicated that mediation was a condition for his return to the workplace, but

WIV had refused to accept the doctors' advice. Mr Healy said that it was unfair of WIV to dismiss him in these circumstances and that he did in fact have capacity to return to the workplace if only his employer would do the right thing and engage in mediation and consultation. He said that he had held well-founded concerns that WIV had failed to meet its occupational health and safety obligations, both in relation to him and other employees, and that he had seen multiple injuries as a result of this non-compliance, and been injured himself, which could have been avoided if he had been properly consulted about the relevant hazards and if his complaints had been listened to.

[27] Mr Healy contended that he had simply done his job and raised occupational health and safety concerns as he believed he was required to do, and that in response he was suspended from duty and ultimately dismissed. He emphasised that his suspension came one day after he had re-raised his safety concerns from December 2022, and suggested that his suspension was connected to his complaint. Mr Healy believed that Mr Hortle had a conflict of interest because he had been involved in making decisions about his suspension and termination when Mr Healy had earlier raised complaints about Mr Hortle and the organisation that he led. In his application to the Commission, Mr Healy said that he believed that his dismissal had been constructed to prevent Mr Hortle having to acknowledge that he had bullied him and others. He said that the reason for dismissal provided to him by WIV was that he was medically unable to do his job, but he had simply had a distressed reaction to being told to return to a dangerous workplace, in circumstances where no consultation or mediation was being offered to him, contrary to the medical advice. Mr Healy contended that in these circumstances there was no valid reason for his dismissal, but that even if there was such a reason, his dismissal was unfair. He asked the Commission to order reinstatement or alternatively compensation.

[28] WIV contended that it had a perfectly valid reason for dismissing Mr Healy: he was not fit to do his job. He had been unfit for 18 months. There was no imminent prospect of a return to work. Mr Healy had been notified of the valid reason for his dismissal and had been given an opportunity to respond to it. His response to the show cause letter did not contain any information demonstrating that he was fit for work. On the contrary it confirmed that he was not able to return to work. WIV submitted that the suggestion of Dr Russo and Dr Adaji that it engage in mediation with Mr Healy was not reasonable in the circumstances. Mr Healy's various complaints had been considered by WIV and by WorkSafe and found to be unsubstantiated. The reasons for WIV deciding not to engage in mediation had been explained to Mr Healy and were sound. WIV submitted that it also had a second valid reason to dismiss Mr Healy, namely his misconduct in posting statements on Twitter expressing strong political opinions and relating to government matters. Mr Healy admitted in the proceeding that he had been the author of the tweets made on the account of '@GregGreggson'. These displayed political bias. WIV contended that there was nothing unfair about the circumstances of Mr Healy's dismissal and that his application should be dismissed.

Consideration

[29] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account the matters set out in s 387 of the Act. In my opinion it is clear that WIV had a valid reason to dismiss Mr Healy (s 387(a)). I find that at the time he was dismissed, Mr Healy did not have capacity for work and was unable to do his job. This was the opinion of his treating psychiatrist, Dr Russo, and the independent medical examiner, Dr

Adaji. At the hearing, Mr Healy contested the proposition that he had no capacity to work. What Mr Healy really meant was that he had a potential capacity for work which could be realised if certain things occurred. Mr Healy did not dispute that, without these things, he could not return to the workplace, and in this sense he had no present capacity for work at the time he was dismissed, because the conditions for his return had not yet been met.

[30] What were these conditions? One was that WIV engage in mediation with Mr Healy about his various workplace complaints. Another was that it consult with him about these matters and his return to work. It is not clear to me what the basis for, or content of, this second condition is said to be. Mr Healy often appeared to use the concepts of mediation and consultation interchangeably. Mr Healy rejected the suggestion that these were *his* conditions for returning to work, and contended that they were rather conditions that flowed from medical advice or that were established by or arose from the operation of occupational health and safety legislation. However I find that they were Mr Healy's conditions insofar as he expected them to be met before he would be able to return to work. A third condition for his return to work concerned the management structure of WIV. Mr Healy said that for his own part, he would not consider it necessary for there to be any changes in the management structure in order to return to work. However, it is clear that the report of Dr Adaji suggested such changes because the doctor considered that Mr Healy could not presently work with Mr Hortle.

[31] In unfair dismissal cases where an employee has been dismissed for incapacity, it is relevant to consider both past and future incapacity. In my view, these factors should be considered under s 387(h) as other relevant matters. Demonstrated present incapacity is a valid reason for dismissal, but in some cases, a dismissal for this reason might nevertheless be harsh or unreasonable because, for example, the incapacity has lasted only a short time and the dismissal was hasty, or because the dismissal was premature in light of clear indications of a reasonable prospect of an imminent return to capacity. Another point of view might be that these circumstances affect the question of whether the reason for dismissal, incapacity, was in fact a valid one. In any event, I consider that in this case, both approaches lead to the same outcome: considerations of past and future incapacity support the conclusion that the dismissal of Mr Healy occurred for a valid reason and was not unfair in all the circumstances.

[32] As to past incapacity, Mr Healy had been absent from work for a very long time indeed. He had not done a day's work in the past year and a half. WIV was far from hasty. It was very patient. It put its investigation into Mr Healy's alleged misconduct on hold. It waited. But it could not wait forever. Then in July 2023 it received the independent medical examination report of Dr Adaji. Its conclusion was that Mr Healy had no present capacity for work. This aligned with the assessment of Mr Healy's own psychiatrist, Dr Russo.

[33] In relation to future incapacity, the doctors' reports contained opinions about steps that could be taken that they believed might affect the prospects of Mr Healy's return to work. Both Dr Russo and Dr Adaji recommended that Mr Healy and WIV engage in mediation. In his report of 4 April 2023, Dr Russo stated several times that Mr Healy could only be fit to return to work and to participate in the investigation once '*some form of mediation*' had occurred. Dr Adaji said in his report of 20 July 2023 that '*without successful mediation [Mr Healy] is unable to return to his current workplace under the same management structure*'. He suggested '*mediation for the next three months between relevant parties*', followed by a re-assessment to determine whether Mr Healy was fit to participate in the investigation process. In response to a

question as to what adjustments might be required to support Mr Healy to carry out the inherent requirements of his role, Dr Adaji said that Mr Healy could become fit for work if there were *'changes to reporting process [sic] or people'*. He said that Mr Healy was *'not able to return to the current management structure, headed by his boss'*; that he did not anticipate that any treatment would change Mr Healy's *'perception about his boss'*; and that *'as such there is no timeline plausible for him to perform all of the inherent requirements in his role – specifically working under his boss.'* Elsewhere, in answer to a question whether Mr Healy was fit to return to work in a reasonable timeframe, Dr Adaji said: *'No, he is not able to return to the current management structure, headed by his boss (referred to as the "commissioner" in this report).'*

[34] I find that WIV's decision not to engage in mediation was reasonable.

[35] First, in my view, mediation would likely have been futile. WIV had already considered all of Mr Healy's complaints. I accept Ms Romans van Schaik's evidence to this effect. Based on my own review of all of the evidence, I find that this was the case. It is not necessary to recite here the various ways in which this was done. It is true that Mr Healy's letter to DPC from June 2021 was not responded to in substance for over a year. However, that letter was hopelessly general. It spoke in catchwords and stated conclusions rather than providing details of alleged facts. Mr Healy would not have needed to disclose employees' identities in order to provide particulars of his alleged safety concerns. Mr Hortle acknowledged in his evidence that the delay in providing a formal response was regrettable, which it was; but given the generality of the matters raised in Mr Healy's letter, I do not regard this as a major failing. In any event, a formal response was ultimately provided which stated that WIV did not agree with Mr Healy's assessment and noted various improved safety measures taken in the last 12 months. Both in relation to the letter of June 2021 and generally, WIV did not consider Mr Healy's complaints to have merit. Mr Hortle was clear in his evidence that he did not believe that Mr Healy's complaints gave rise to any substantive issue to mediate. Yet mediation would have had the parties go over these matters with a view to arriving at some outcome with which Mr Healy might be satisfied. This was unrealistic. Dr Adaji's report stated that without *successful* mediation Mr Healy would be unable to return to the workplace. The show cause letter stated, euphemistically in my view, that there was no *'guarantee'* that mediation would be successful. Based on the evidence, I find that there was no reasonable prospect of a successful outcome.

[36] Secondly, mediation would have been unreasonably burdensome on WIV, both in its scope and recommended duration. The doctors' suggestions that the parties engage in mediation were very general. Which parties should engage in mediation? What complaints or issues should be addressed? The reports of Dr Russo and Dr Adaji did not identify any particulars. Mr Healy said that if WIV did not know what the mediation should deal with, it could have asked him. But Mr Healy did not offer any clearer picture during the hearing. In his reply to the show cause letter, he said that he understood the doctors' recommendation for mediation related to all of the many safety concerns that had led to his injuries. But the doctors' recommendations do not confine themselves even to this. On the face of the recommendations, all of Mr Healy's complaints could form part of the suggested mediation. This might help explain why Dr Adaji recommended that a *'mediation process'* should last for three whole months. A wide-ranging and lengthy mediation process would likely require a significant commitment of effort and resources from WIV that was not warranted in the circumstances.

[37] Thirdly, WIV submitted, and I accept, that it held concerns about the wellbeing of workers who might be required to participate in mediation. Such workers might have included Ms Okulicz and Ms Romans van Schaik. Both had been involved in circumstances that were relevant to aspects of Mr Healy's complaints. Both had expressed concerns for their welfare as a result of Mr Healy's behaviour. WIV was right to be concerned about the wellbeing of its staff in the event that a mediation process were to occur. This was another factor telling against mediation.

[38] Fourthly, for WIV to participate in mediation when it regarded Mr Healy's complaints as having had no substance would have been disingenuous. It would also have been misleading. It would have held out the prospect of compromise when none existed. Mr Healy said that any dispute should be capable of mediation. I disagree. Mediation is not always appropriate. That was the case here.

[39] I imply no criticism of the doctors for recommending mediation. Their task was to focus on Mr Healy's health, address his capacity for work, and identify things that might be conducive to his return. But the fact that the doctors might have believed that mediation could be clinically helpful for Mr Healy or might enhance his prospects of a return to work does not mean that WIV needed to agree to it. It had to consider subjects other than Mr Healy, including the authority itself and the staff who worked there. WIV was not required to put the interests of Mr Healy ahead of all others. Mr Healy had been absent from work for 18 months because he repeatedly claimed to have no capacity for work. He remained the subject of serious allegations, including claims that he had mistreated coworkers, which WIV had been unable to investigate because of his protracted absence. For time to be invested in a mediation exercise did not make sense when all of the relevant interests and circumstances were considered.

[40] Among the reasons cited by WIV for not agreeing to mediation was the concern that mediation might have an adverse effect on the health and wellbeing of Mr Healy. In my view this was a matter for his doctors to determine. Evidently they saw no medical risk to Mr Healy associated with his participation in mediation. However, this does not detract from the validity of the other factors referred to above or the overall reasonableness of WIV's decision not to engage in mediation. Mr Healy said that it was unfair that he was dismissed without mediation when WIV had agreed to mediation with another injured worker. I reject this. The circumstances of this other worker are not before the Commission. No conclusions can be drawn from this.

[41] Plainly in the present case, to review in mediation the many complaints that had been raised by Mr Healy during his employment would not have been reasonable. WIV's decision not to participate in mediation was appropriate. It did not undermine the validity of the reason for dismissal. It did not render the dismissal unfair in the circumstances.

[42] Mr Healy said that he did not share the doctors' view that WIV should make structural or managerial changes to accommodate his return to work. Nevertheless, I record my view that WIV acted reasonably in declining these proposals. Dr Adaji's report stated that he believed Mr Healy could not work with his 'boss', the Commissioner. Mr Hortle is a statutory appointee. He is required to run the authority. He cannot remove himself from the organisational structure. He must remain Mr Healy's ultimate 'boss'. Moreover, nothing in the materials suggests that Mr Hortle ought to have removed himself from the structure, even if it were legally possible.

[43] WIV had a valid reason to dismiss Mr Healy. He could not do his job. His incapacity had lasted a year and a half. In my assessment, there was no reasonable and imminent prospect of Mr Healy's return to capacity. Even if Mr Healy had been able to return after 3 months, it was not reasonable to expect WIV to invest such time in Mr Healy's return to work in addition to the 18 months that had already been devoted to this end. When considering the fairness of a dismissal for reason of incapacity, there is often an inverse relationship between periods of past incapacity and expected future incapacity. How far one might endeavour to look into the future for a realistic possibility of return to capacity depends in part on how far one can look back on a history of past incapacity. The longer the period of past incapacity, the shorter the period that an employer might reasonably wait for a return to capacity. Of course, length of service and other factors are also relevant here. But in the present case I find that, after 18 months of incapacity, WIV did not need to wait for three more months, or three more days, to have a valid reason to dismiss Mr Healy. Whether one regards the issues of past and future incapacity as matters relevant to the validity of the reason for dismissal under s 387(a), or as factors to be considered under s 387(h), they do not assist Mr Healy. They point instead to a conclusion that he was dismissed for a valid reason, in circumstances that were not unfair.

[44] In my opinion, WIV had a second valid reason to dismiss Mr Healy. This reason was the fact that he had made public statements on Twitter expressing strong personal views about political and government matters. Many of these statements were highly partisan and critical of the Liberal Party and Victorians who might happen to belong to or vote for the Liberal Party. According to Mr Healy, the *'LNP are full of dishonest degenerates'*, and people who vote for the Liberal Party are *'supporting truly cruel often evil people'*. Did these and other tweets contravene the Code of Conduct?

[45] Clause 2.2 of the Code of Conduct states that public sector employees *'conduct themselves in an apolitical manner'*. Mr Healy's tweets were plainly not apolitical. On one view however, this direction is to be read in the context of the concern of clause 2 with conduct that occurs in the course of employment whereas his tweets were arguably private matters. Similarly, clause 3.5 states that public sector employees should only make public comments when authorised to do so and confine comments to facts, but this may refer to comments on work that public servants are undertaking.

[46] However, it is clear that Mr Healy's tweets contravened other parts of the Code of Conduct. The second paragraph of clause 3.5 states the following: *'When making a comment in a private capacity, public sector employees ensure their comments are not related to any government activity that they are involved in or connected with as a public sector employee'*. On any view, Mr Healy's 'Chin Chin' tweet (see [16], point 11) related to government activity that Mr Healy was connected with as an employee of WIV. Although Mr Healy was a child employment officer, dealing with wage theft was core business for WIV. The comments in the post related to wage theft and a particular employer. It *'named and shamed'* the employer and criticised both the owner and employers in general.

[47] The second paragraph of clause 3.5 also states that public sector employees are to ensure that their personal comments *'do not compromise their capacity to perform their public sector role in an unbiased manner.'* What does the Code mean by this statement? Strictly speaking, a biased *comment* would not ordinarily affect a person's capacity to *act* in an unbiased way.

Rather, it would affect their capacity to be perceived as acting in an unbiased manner. In my view, this is the intended meaning of the statement, or at least part of that meaning. The ‘Chin Chin’ tweet displayed bias of a kind that was relevant to Mr Healy’s daily work, which involved dealing with employers and employees: he cast an aspersion on employers generally, to the effect that they profess to care about workers’ mental health but do not really do so. The tweet plainly suggests that Mr Healy holds an anti-employer prejudice which in turn could make people apprehend that he would behave in a manner that reflected this bias. To make matters even worse, the tweet targeted a member of the public in connection with that person’s criticism of Victorian government policy, namely its mental health levy. The ‘Chin Chin’ tweet was a clear contravention of clause 3.5 of the Code of Conduct. In addition, anyone reading Mr Healy’s strident political statements could reasonably doubt his ability to conduct himself in an unbiased way when dealing with Victorians who might support the Liberal Party.

[48] Then there is clause 3.9 of the Code of Conduct, which states that public sector employees seek to build and maintain a high level of trust with government, the community and other public sector employees, and that in the performance of their duties *‘and in their private life, public sector employees avoid conduct that may adversely affect their standing as a public official or which may bring their public sector employer or the public sector into disrepute.’* Mr Healy’s political tweets contravened this provision. Several of the tweets displayed contempt and vitriol towards the Liberal Party and its supporters. His conduct had every prospect of affecting his standing as a public official and risked bringing WIV into disrepute. Members of the public who identified Mr Healy, as Mr Hortle did and as others might have done, may have concluded that he was a politically biased individual whose views could affect his work. This in turn posed a risk to the reputation of the WIV and the public service. Members of the public might have suspected that others at WIV had similar views. They may have thought that because Mr Healy was politically outspoken online, he was also politically outspoken at work, and that he may have affected the perspective of coworkers. Of course, the fact that Mr Healy has strident political views does not mean that anyone else at WIV in fact shares those views. However, the repute of the public sector is affected not just by facts but by perceptions and public confidence.

[49] Public servants are entitled to their political views like everyone else. However, public statements expressing strident political opinions, particularly when made in the disrespectful tones used in some of Mr Healy’s tweets, are liable to corrode public confidence in the impartiality of the public service. Public servants like Mr Healy are engaged to serve all of the public. In order to do so effectively, they should avoid behaving in a manner that may reasonably lead any members of the public to perceive them to be prejudiced against them.

[50] Mr Hortle said that he was concerned that if members of the public saw Mr Healy’s tweets, they may conclude that he was a public servant who had political bias, and that he was also concerned about the impact on WIV’s reputation. Mr Hortle was right to be concerned about these things. He was right to suspend Mr Healy. And he was right to terminate his employment, even though he did not rely on the tweets as a reason for dismissal at the time. The investigation had not concluded, and it appears that WIV did not know with certainty that Mr Healy was the author of the tweets until he openly admitted it in cross-examination. It is well-established that a valid reason need not be one that was relied on by the employer at the time of dismissal. The Commission must decide for itself whether there was a valid reason or reasons for dismissal, and these may include facts that existed at the time of the dismissal, even

if they were not relied on by the employer at that time. Mr Healy's tweets were a second valid reason for dismissal. It is clear in particular that the 'Chin Chin' tweet contravened the Code of Conduct and that it was a serious matter that also amounted to misconduct.

[51] It will not be necessary for me to consider the question of remedy, but had it been, this conduct would have rendered reinstatement wholly inappropriate. Mr Healy could have apologised for his conduct at the hearing. He did not do so. Instead, he defended it by stating that his political criticisms had been directed only at the federal Liberal Party, not the state party. This is not the case. But in any event, it would not be an excuse. The most Mr Healy could muster by way of regret was that his posts were '*not ideal*', perhaps because they had landed him in trouble. In my opinion, Mr Healy's conduct was incompatible with employment as a Victorian public servant.

[52] The Commission is required to consider whether a person was notified of a valid reason for dismissal and given an opportunity to respond to any reason for dismissal related to capacity or conduct (ss 387(b) and (c)). Both of these things occurred in this case. WIV provided Mr Healy with the letter of 17 August 2023 in which he was asked to show cause why his employment should not be terminated. WIV did not consider that any of the matters raised in Mr Healy's response warranted a different course. Neither do I. Mr Healy restated in his letter his disagreement with the way in which WIV had reacted to his many complaints during his employment. None of this was new information. There was no basis to conclude from Mr Healy's response that he now had capacity to return to work. He did not show cause why his employment should not be terminated for incapacity.

[53] Mr Healy was not notified of the second valid reason for dismissal or given an opportunity prior to his dismissal to respond to it as a reason for dismissal (although the allegation relating to his tweets was put to him in the suspension letter). However, I attribute little weight to these matters, given the gravity of the second valid reason for dismissal.

[54] As to the other considerations in s 387, Mr Healy was not unreasonably refused a support person to assist at discussions relating to dismissal (s 387(d)); he was not dismissed for unsatisfactory performance and therefore did not need to be warned (s 387(e)); and ss 387(f) and (g), which are relevant primarily to small employers, carry no weight in this matter.

[55] Mr Healy raised a number of contentions in connection with s 387(h), '*any other matters that the FWC considers relevant*'. Some of these I have addressed above in connection with the valid reason for dismissal. In addition, Mr Healy submitted that, even if there was a valid reason to end his employment, it was unfair to do so because of his length of service. I reject this. His length of service, either alone or together with any other circumstances, is not a factor that outweighs either of the valid reasons for dismissal. Mr Healy said that it was unfair of WIV not to consider alternatives to dismissal. But it did consider an alternative to dismissal. The alternative was not to dismiss him. For the purpose of considering this alternative, Mr Healy was invited to provide any reasons as to why he should not be dismissed. The reasons that he provided were not persuasive. Mr Healy said that he had been a good employee who had tried to do the right thing by raising occupational health and safety concerns about WIV's treatment of him and of others. I accept that Mr Healy genuinely believed that he was doing the right thing in raising what he regarded to be safety issues. But this is not sufficient to outweigh either of the valid reasons for his dismissal.

[56] Mr Healy suggested that there was a connection between his re-raising of safety concerns on 10 February 2022 and his suspension on 11 February 2022. I reject this suggestion. The matters were unrelated. I find that the reasons for which WIV suspended Mr Healy were those in the suspension letter dated 11 February 2022. These are clear and compelling reasons to suspend an employee.

[57] Mr Healy suggested that another dimension of unfairness was that he was entirely innocent of the allegation that he had publicly raised sensitive information about Ms Stephenson without her permission. He produced an email message from her confirming that she had authorised him to raise the matter. There is no reason to doubt the accuracy of this message. But that does not mean that the concern underpinning the allegation that WIV put to Mr Healy was not genuinely held. Plainly it was. Of course, no determination was ever reached about this allegation because the investigation into all of the allegations against Mr Healy was put on hold as a result of Mr Healy's unfitness to work. The fact that he may have been innocent of one of the allegations is not a circumstance that renders his dismissal unfair.

[58] Mr Healy stated in his application that his dismissal was constructed to prevent Mr Hortle from having to acknowledge that he had bullied Mr Healy and other staff. I reject this. There was an obvious and entirely convincing reason for WIV to dismiss Mr Healy that had nothing to do with his workplace complaints about WIV or Mr Hortle. He could not do his job. He had not worked for 18 months. And there was no reasonable prospect of an imminent return. Mr Hortle was a credible witness and I accept his evidence about his decision to dismiss Mr Healy, which was based on Ms Romans van Schaik's brief. I also accept his evidence about his dealings with Mr Healy, including that he generally had only incidental contact with him. Moreover, the materials filed by Mr Healy do not provide even a *prima facie* case that Mr Hortle bullied him. Generalised assertions of aggressive behaviour, adverse treatment, discrimination and a failure to consult or mediate, do not found an apparent case of bullying or harassment warranting forensic examination. He provided little detail of the alleged bullying. He said for example that on 13 November 2019 Mr Hortle spoke aggressively to him at a meeting. He made no attempt to explain this. On the other hand, Mr Hortle did explain in detail what occurred on this day, as outlined earlier. He gave a clear, precise and persuasive account of this incident and I accept it. In particular, I find that Mr Healy stood at Mr Hortle's door and prevented him from leaving the office.

[59] In one particular respect, Mr Healy did provide clear details of an alleged instance of bullying. Prior to the hearing, Mr Healy sent to my chambers a recording of a Microsoft Teams meeting in which he participated on 17 May 2021. In the recording, Mr Hortle addressed a change that was being proposed by WIV and explained to employees that it was not the case that the change was being proposed in order to save \$57,000 in wages, which was a tiny percentage of the wages budget. Before the meeting, Mr Healy had distributed a document to union members identifying this \$57,000 saving. Mr Healy took Mr Hortle's comments as a personal criticism. It was Mr Healy's contention that the video showed Mr Hortle speaking in a derogatory manner about his \$57,000 figure. He said that it was at this moment that he understood that Mr Hortle had a very adverse opinion of him and of his role as a union delegate, and that Mr Hortle was willing to '*brazenly intimidate*' him. Mr Healy said that Mr Hortle had used a sarcastic tone, and had threatened, bullied and denigrated him.

[60] Mr Healy could not be more wrong. In the video, Mr Hortle simply explains WIV's position, and says that it would not make sense for it to make the change in order to save such a small amount. Far from being derogatory, the video shows Mr Hortle speaking in an entirely friendly and respectful tone. He is not sarcastic. He is not threatening or intimidatory in any way. I find it difficult to conceive how it would have been possible for Mr Hortle to express himself more politely. The fact that Mr Healy could find some basis to criticise Mr Hortle's conduct in this video, let alone to describe it as bullying, suggests that Mr Healy has a thoroughly distorted picture of Mr Hortle. He has lost perspective.

[61] I explained to Mr Healy at the hearing that I would not be conducting an inquiry into all the grievances that he had raised during his employment. Had WIV not considered these matters at all, or had Mr Healy produced a prima facie case of bullying, it might perhaps have been different, but this was patently not the case. The fact of the matter was that Mr Healy was dismissed because he could not do his job, a state of affairs that had persisted for 18 months.

[62] Mr Healy said in his submissions that Mr Hortle had a conflict of interest in respect of various decisions he made that affected Mr Healy, including the decision to terminate his employment. This is wrong. There were no current complaints against Mr Hortle at the relevant times. Mr Healy believed that Mr Hortle had a conflict of interest when he responded to the letter that Mr Healy had sent to DPC in June 2021. This too is wrong. That letter complained only generally about management and the WIV. Mr Hortle had since become the head of the agency and it was appropriate that he respond to the contention that the employer was not maintaining a safe working environment. It is not a conflict of interest for the head of an organisation to respond to an allegation about the organisation he leads.

[63] Mr Healy said that WIV had made no attempt to facilitate his return to work. Aside from WIV's rejection of the doctors' proposals relating to mediation, and Mr Healy's general claim that WIV was not consulting him, it is unclear how Mr Healy believes WIV fell short in this regard. For 18 months Mr Healy had been submitting medical certificates telling WIV that he was unfit for work and could not participate in its investigation into his behaviour.

[64] As I understand it, Mr Healy contends that what he regarded as WIV's failure to consult with him about his workplace safety complaints and other concerns was itself a dimension of unfairness to which he was subjected in the course of his employment and in connection with his dismissal. These contentions were neither specific nor coherent. As with his many references to conflicts of interest, Mr Healy appeared to use the word '*consultation*' as if it were some form of legal incantation that could win any argument by its very utterance.

[65] It is relevant to note another matter that in my opinion reinforces the conclusion that the dismissal of Mr Healy was not unfair, namely his treatment of Ms Okulicz. Her complaint about Mr Healy, as well as the messages that passed between the two, were attached to Mr Hortle's statement. In her complaint Ms Okulicz stated that over the course of one hour she received seven messages from Mr Healy, whom she did not know personally, concerning an issue she had raised during a meeting they had attended at which Ms Okulicz had told Mr Healy that she thought it inappropriate that he had discussed Ms Stephenson's personal circumstances in her absence. In Mr Healy's lengthy first message to Ms Okulicz, he said that he had in fact been authorised by Ms Stephenson to raise her case at the meeting, that he had not been unprofessional, and that he did not appreciate what Ms Okulicz had said about him. He

proposed a meeting to discuss the matter. In her reply, Ms Okulicz stated succinctly that she stood by her assessment of him and that she was *'not at all interested'* in meeting him. To this Mr Healy sent several successive messages in reply. Ms Okulicz then responded, stating that before sending a long message to a colleague whom he did not know, he should consider how it may be perceived. Mr Healy responded with three further messages, one of them lengthy, in the course of which he told Ms Okulicz that she formed opinions quickly and with little context or information. Ms Okulicz then replied, stating yet again that she had no interest in a dialogue with Mr Healy and that he should refrain from messaging her unless it was case-related.

[66] It is understandable that Ms Okulicz felt harassed by this exchange. She was subjected to an unsolicited barrage of messages because Mr Healy objected to her complaint about his conduct. In my opinion, Mr Healy mistreated Ms Okulicz. It was clear that she did not want to talk to him. His messages were persistent and insistent and plainly unwelcome. During the hearing, I asked Mr Healy whether he was concerned that his conduct had driven Ms Okulicz to ask him to stop messaging her. He replied that she had been wrong to criticise him for raising the circumstances of Ms Stephenson. Mr Healy did not express any concern for her. Ms Romans van Schaik also attested to the negative impact that Mr Healy's repeated calls and emails had had on her, including making her feel rattled and panicky. Mr Healy had nothing to say about this in his evidence.

[67] Mr Healy appears to see himself as a champion of workplace safety and a defender of those who have been injured at work. He is quick to identify anything that might pose a safety hazard to workers, except when that hazard is caused by his own conduct. He lacks insight into the effect of his behaviour on other people.

[68] I am satisfied that there were two valid reasons for Mr Healy's dismissal, each of which justified termination of employment. Taking into account all of the matters in s 387, the dismissal was not harsh, nor was it unjust or unreasonable. It was not unfair. Had I somehow reached a different conclusion, I would have considered that reinstatement was inappropriate in light of Mr Healy's expectation that mediation occur prior to his return to work, a condition to which WIV will not agree and which I have no power to order. Reinstatement would also be inappropriate in light of Mr Healy's tweets. Any compensation would have been significantly reduced, pursuant to the Commission's residual discretion in relation to remedy, in order to reflect Mr Healy's contravention of the Code of Conduct.

Conclusion

[69] Mr Healy's dismissal was not harsh, unjust or unreasonable. It was not unfair. Mr Healy's unfair dismissal application is dismissed.



DEPUTY PRESIDENT

Appearances:

G. Healy for himself

A. Denton of counsel for Wage Inspectorate Victoria

Hearing details:

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Melbourne

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