DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Julian Rodney-Hansen
v
Ventia Australia Pty Ltd
(U2023/6532)

DEPUTY PRESIDENT O'KEEFFE PERTH, 13 MARCH 2024

Application for relief from unfair dismissal – valid reason for dismissal but dismissal nevertheless harsh – compensation awarded

[1] On 18 July 2023, Julian Rodney-Hansen (the Applicant) made an application to the Fair Work Commission (the FWC) under s.394 of the *Fair Work Act 2009* (Cth) (the FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Ventia Australia Pty Ltd (the Respondent).

Background

[2] The Applicant was engaged by the Respondent as a Custody Officer. While his work locations had changed over the course of his employment, at the time of his dismissal he was engaged at the Fremantle Justice Complex (the FJC) in Perth, Western Australia. On 28 April 2023 the Applicant was involved in an incident with a Person in Custody (PIC) at the FJC. As part of this incident, the Applicant head-butted the glass portion of the PIC's cell door. The Respondent conducted an investigation into the Applicant's behaviour towards the PIC and, as a result of this investigation, terminated the Applicant's employment via a letter dated 3 July 2023 and provided to the Applicant on that day, notwithstanding that the letter itself purported to terminate the employment on 28 June 2023.

Permission to appear

[3] The Applicant was represented by the Transport Workers Union (the TWU). As the Applicant is a member of the TWU and the TWU is a registered organisation, then under s 596(4)(b)(i) of the FW Act leave to be represented was not required.

[4] The Respondent sought leave to be represented by Kingston Reid and the Applicant did not object to such representation. In addressing s596(2)(a) of the FW Act the Respondent noted in its submissions that the matter would involve some level of complexity and submitted that the ability to marshal the evidence and submissions in a way that assisted the Commission in hearing and considering the matter in a timely manner would benefit both parties. The Respondent also made relevant submissions with respect to 596(2)(c). However, as I only need

to find one of the circumstances in s596(2) to be applicable, I was persuaded that the complexity of the matter was such that the efficient conduct of the hearing would be best served by the Respondent being granted permission to be represented.

Witnesses

[5] The Applicant gave evidence on his own behalf and the following witnesses also gave evidence on his behalf:

- Mr Frazer Sturgeon – a work colleague of the Applicant; and
- Ms Grace Bowman – a work colleague of the Applicant.

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

- Ms Rebecca Camm – People and Capability Business Partner for the Respondent; and
- Ms Linda Mkulo – Metro Court Group Manager for the Respondent; and
- Mr Jonathon Snow – Director for Court Security and Custodial Services for the Respondent.

Has the Applicant been dismissed?

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

[8] Section 386(1) of the FW 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.

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

[10] There was no dispute and I find that the Applicant was an employee of the Respondent and his employment was terminated at the initiative of the Respondent.

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

Initial matters

[12] Under section 396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy.

Was the application made within the period required?

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

[14] The Applicant claims that he was advised of his termination on 3 July 2023 and the letter of termination provided by the Respondent is dated as at that date. The Respondent, both in that letter and in its Form F3 response, claims the termination date was 28 June 2023. It is well established that a dismissal does not take effect until it is communicated to an employee. As such, I find that the Applicant was advised of his termination on 3 July 2023, and it took effect on that date. As such, the application was required to be lodged by 24 July 2023. Given that the application was lodged on 18 July 2023 I am 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?

[15] Section 382 of the FW 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.

Minimum employment period

[16] 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. It was not in dispute and I find that the Applicant commenced his employment with the Respondent on 18 January 2021 and was dismissed on 3 July 2023, a period in excess of 6 months.

[17] 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

[18] It was not in dispute and I find that, at the time of dismissal, the *Ventia WA & TWU Enterprise Agreement 2022* applied to the Applicant's employment.

[19] 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*?**

[20] Section 388 of the FW 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.

[21] As mentioned above, I find that the Respondent was not a small business employer within the meaning of s.23 of the FW Act at the relevant time. 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 FW Act.

Was the dismissal a case of genuine redundancy?

[22] Under s.389 of the FW 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.

[23] 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.

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

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

Was the dismissal harsh, unjust or unreasonable?

[26] Section 387 of the FW 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.

[27] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[1]

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

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[29] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[2] and should not be "capricious, fanciful, spiteful or prejudiced."[3] 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.[4]

[30] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[5] "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."[6]

Submissions and Evidence

[31] The Applicant did not deny that he had head-butted the cell door or that he had made a subsequent comment to the effect that he should have head-butted the PIC but submitted that his termination was nevertheless unfair. The Applicant advanced the proposition, citing *Joshua*

Nash and Nathan Jago v Tasmanian Water and Sewage Corporation[7], that where allegations on which a dismissal are based are not substantiated, then the reason for the dismissal cannot be sound, defensible and/or well founded. The Show Cause Letter from the Respondent alleged that the Applicant purposely banged his head against the cell door as if to head-butt the PIC. The Applicant submitted that his head-butt was not directed at the PIC but rather a venting of his frustration against the door. As his actions were not carried out in a manner to suggest he was seeking to harm the PIC, he submitted that this particular allegation by the Respondent could not be made out.

[32] The Applicant further submitted that following the head-butt, he removed himself from the situation to ensure that the situation was not exacerbated. As such, his conduct towards the PIC was limited to one very short interaction. Given this, he submitted that while his conduct was wrong, it was not sufficiently serious to warrant immediate dismissal for misconduct, and a reprimand or warning would have been a more appropriate course of action for the Respondent to take.

[33] The Applicant also drew my attention to the finding of Deputy President Asbury, as she then was, in *Smith v Bank of Queensland* [8], where the Deputy President stated as follows:

> *"While the gravity of the conduct must be considered and assessed, in my view, there are some mitigating factors which may also go directly to the validity of a reason for dismissal by mitigating the seriousness of the conduct for which a person was dismissed. Examples of some of these factors may be lack of training or the dismissed employee being placed under undue pressure by some failure on the part of the employer, which contributed to the conduct for which the employee was dismissed…"*

It was the Applicant's submission that he had for some months prior to the incident with the PIC faced undue pressure in his role with insufficient support from the Respondent. He submitted that there had been significant turnover of experienced staff, and that some of the new replacement staff were inexperienced and hesitant in performing their duties. Further, the FJC did not have a regular Custody Security Manager (CSM) to manage staff and deal with issues. Instead, the CSM from the Mandurah Courthouse, Larry Burgess, was relieving in the role albeit doing so while he was still working at Mandurah. In addition to these issues, the Applicant submitted that the FJC Custody Officers (COs) had difficulty in securing a response or at least a prompt response to requests for more COs when the situation at the FJC required extra staff. Finally, it was submitted that there was a particularly difficult Person of Interest (POI) at the FJC on the day of the incident and the requirement to guard against misconduct by this POI had added to the levels of pressure felt by the Applicant.

[34] It was the Applicant's further submission that the factors outlined above represented a failure on the part of the Respondent to provide a safe working environment. As such, it was submitted that this was a mitigating factor that should be considered when deciding on the issue of a valid reason for termination.

[35] In his evidence, the Applicant stated that, based on his experience at other court locations in Western Australia, the FJC was a particular hotspot for bad PIC and POI behaviour and that the staff at Fremantle deal with more such incidents than other courts. The Applicant gave evidence that the ideal number of COs to be stationed at the FJC was twelve and he

provided a breakdown of where these COs would ideally be located. His further evidence was that one of these locations, being the Primary Security Checkpoint (PSC), was previously staffed by COs from another company. However, this company had lost its contract with the FJC and as such the Respondent had been required to divert two of its COs to the PSC but did this by re-distributing the existing COs rather than increasing its overall number of COs.

[36] The Applicant stated that when the previous CSM Paula Green left her job in around August 2022, a number of other experienced staff left or were transferred to other locations, resulting in what he claimed was understaffing. As an example, he stated that the FJC averaged between eight and nine COs each day, which was below the twelve COs he believed were required. In addition, it was the Applicant's evidence that a number of the replacement staff who were employed were inexperienced and had difficulties dealing with troublesome POIs and PICs. It was his further evidence that as a result of this, the level of argument and conflict from POIs and PICs increased.

[37] The Applicant gave evidence that the CSM for the FJC at the time of his dismissal was Larry Burgess, who held dual roles with as CSM for the FJC and also for the Mandurah complex. As a result, Mr Burgess was often absent from the FJC, meaning that the COs had to effectively manage themselves. It was the Applicant's evidence that he had, on many occasions, tried to get additional staff from the Respondent and been unsuccessful and told to simply work it out himself. He further claimed that he had accessed the Electronic Prisoner Event Monitoring System and E-Courts Server when in the control room at the FJC and from the data available had been able to determine that the staff to court matters ratio at the FJC was lower than other courts. It was his evidence that the lack of adequate staffing caused him to feel that the Respondent was not providing a safe workplace.

[38] As to the events of 28 April 2023, the Applicant's evidence was that he began his shift observing a POI who was known to be difficult and considered a safety risk for female staff in the Registry, and one female staff member in particular. On that day, the POI had again been difficult and refused to comply with security protocols and had been abusive towards the Applicant. The POI through some other behaviours had created some additional issues for the Applicant and his evidence was that he was quite stressed and tense as a result.

[39] The Applicant states that at a certain point he became aware that the PIC with whom he would have the incident was being dropped off at the FJC. From the noise coming over his radio, the Applicant stated that he could tell the PIC was being very difficult. The Applicant's evidence is that the PIC was being abusive, threatening to assault the COs, threatening to commit suicide, punching walls, kicking the cell door, performing handstands to put his head in the toilet, putting his shirt in the toilet to flood the cell and throwing hot coffee away. The Applicant states that eventually the control room operator called him to deal with the PIC. When he arrived, he states that the PIC immediately began to abuse him. As a result, the Applicant's evidence is that he began to employ de-escalation techniques.

[40] Notwithstanding this, the Applicant's evidence is that the PIC continued to be belligerent, at one point saying to him: "fuck you fat cunt when I get out of here I'll slit your fucking throat." The PIC continued in this vein and the Applicant states that he continued to try and calm him and advised the PIC that the magistrate, before whom he was scheduled to appear, would be able to hear the altercation and that there was no intention to keep the PIC in

custody overnight. At this point, the PIC said: "fuck you fucking liar" and spat at the cell window. The Applicant states that at this point he said: "don't you fucking listen" to the PIC and banged his head on the secure cell door window. He further states that he did not direct the head-butt to the PIC and was aware that there was a window in front of him. The Applicant's evidence is that at this point he removed himself from the situation and went to the breakout room.

[41] Some time later that day the Applicant received a phone call from Ms Jenny Carroll (Ms Carroll), the Respondent's Operations Support Manager. During this conversation, the Applicant concedes that he said that it was a shame that he had head-butted the door rather than the PIC's head, but states that this was merely the venting of his frustrations and that he had no desire to actually harm the PIC.

[42] In his reply witness statement, the Applicant refuted the claim by Ms Linda Mkulo (Ms Mkulo) regarding appropriate staffing levels at the FJC and repeated his own assertions on that issue. He also refuted a number of the claims made by Ms Mkulo relevant to the operation and staffing of the FJC and the level of threat represented by the POI. In response to the statement of Ms Rebecca Camm (Ms Camm), the Applicant refuted the notion that there was no need for him to be involved with the PIC and noted that he had been called by the control room operator to attend. He also refuted the suggestion, found in the witness statement of Mr Snow, that he had intended to intimidate or harm the PIC.

[43] Under cross-examination the Applicant maintained his position that he had not directed his head-butt at the PIC. He was asked by the Respondent how, given that the PIC was standing directly behind the window and quite close to it, that the head-butt could be seen as other than directed at the PIC. The Applicant's response was that his motivation was frustration because he felt like he was speaking to "deaf ears". The Respondent put to the Applicant that his action in head-butting the cell door had clearly escalated the situation, but the Applicant did not concede this, offering the response that the situation was already escalated. The Applicant under cross-examination also conceded that he had made the comment about the PIC's head.

[44] I questioned the Applicant regarding his assessment that the FJC was understaffed, and he conceded that this was his personal assessment based on experience rather than an official policy of the Respondent. He nevertheless stated that it was his view that it was always difficult to get extra staff allocated by the Respondent, particularly on occasions such as when COs called in sick. He also stated that on occasions his calls for extra staff went unanswered. In response to my further question, the Applicant advised that he had spoken to the Respondent about understaffing but conceded he had not raised his concerns about stress and pressure.

[45] I questioned the Applicant further about procedures and training for dealing with circumstances where a CO might feel they are about to lose control emotionally. His evidence was that there was a short session in training lasting between half an hour to an hour about that issue and that essentially the practice was for COs to remove themselves from the workplace and call the Respondent's Employee Assistance Program.

[46] The evidence of Mr Frazer Sturgeon (Mr Sturgeon) was that the FJC needed eleven to twelve COs to run security. His evidence was that when he had worked at the FJC for Serco prior to the Respondent being awarded the contract in 2019, there had been eleven to twelve

experienced COs working each shift. Mr Sturgeon stated that since 2022 there had been high levels of turnover of COs at the FJC and that many of the replacement staff were inexperienced, under-trained and less inclined to provide support in difficult or dangerous situations. Mr Sturgeon's evidence is that it often fell to himself and the Applicant to deal with difficult PICs. It was Mr Sturgeon's further evidence that the FJC was frequented by a number of persons experiencing homelessness and also those under the influence of drugs such as methamphetamine and heroin.

[47] Mr Sturgeon stated that he had experienced difficulties in securing extra staff when they were needed and, as the Applicant had done, complained that his calls often went unanswered. It was his evidence that he had noticed that there had been an increase in the number of incidents and this, coupled with high turnover, inexperienced staff and understaffing was creating stress for the experienced staff. It was Mr Sturgeon's further evidence that he had noticed that the Applicant was visibly stressed at work.

[48] With respect to the events of 28 April 2023, it was Mr Sturgeon's evidence that he did not witness the Applicant head-butting the cell door as he had been in another section of the FJC at the time. However, he did state that there had been difficulties with the POI and noted that the COs had experienced some difficulty in processing the POI through security as he was in possession of a number of items such as needles that were not permitted in the FJC but had been reluctant to surrender those items to the COs. Mr Sturgeon also stated that he had heard the commotion caused by the PIC over his radio.

[49] In his reply witness statement, Mr Sturgeon refuted the claims made by Ms Mkulo regarding the appropriate levels of staffing required for the FJC and repeated his own assertions.

[50] Under cross-examination, Mr Sturgeon confirmed that his evidence regarding the number of staff required at the FJC was based on his own experience, including experience working at the FJC with twelve COs under the previous contract-holder, and not any policy of the Respondent.

[51] The evidence of Ms Grace Bowman (Ms Bowman) was that the people attending the FJC were often affected by drugs and alcohol, and the COs often had to deal with regular entry by homeless persons who would disrupt proceedings and often be in possession of knives and hypodermic needles. It was Ms Bowman's evidence that ten to eleven COs was the minimum staffing level needed for sufficient security and that thirteen COs was the ideal number. Ms Bowman's evidence was that from around September 2022 the staffing resources at the FJC became increasingly over-stretched, primarily due to a high turnover of COs.

[52] It was Ms Bowman's further evidence that at some times the staffing levels were so low the PSC went unstaffed for periods of time. She stated that the FJC was operating with a high number of inexperienced and new staff and that some of these COs were scared of the PICs and POIs. Ms Bowman further stated that the number of violent incidents at the FJC had increased since September 2022. It was Ms Bowman's evidence that she had attempted to bring these concerns to the attention of the Respondent but had been told that the Respondent was trying to address it and was increasing the number of courses for training new COs. Ms Bowman's further evidence was that due to the lack of experienced COs and his size, the Applicant was

regularly called upon to deal with the more physical aspects of dealing with PICs and the Applicant had communicated to her that he was frustrated and stressed as a result of his work.

[53] With respect to the events of 28 April 2023, it was the evidence of Ms Bowman that she had been stationed in the control room on that day. She confirmed that the POI had been difficult and had been argumentative when asked to hand over an object – being a screwdriver or multi-tool - that was potentially dangerous. She also confirmed that the PIC had been very difficult and had been making threats to kill the COs and to kill himself. She confirmed that he had been engaging in destructive behaviour and had also been doing hand-stands over the toilet, which was explained to be a tactic used by PICs to get attention due to the risk of the PIC breaking his or her neck. Ms Bowman states that at this point she contacted Ms Mkulo to request extra staff, but her evidence is that Ms Mkulo's response was "what do you want me to do about it?"

[54] Ms Bowman states that given the difficulties with the PIC she called the Applicant to come and deal with him. Her evidence is that the Applicant tried to calm the PIC down and de-escalate the situation. At some point she heard the other CO in the area say "no Julian don't" and then walk the Applicant away from the PIC's cell. Ms Bowman did not see the Applicant head-butt the door but she noticed he had a lump on his head. It was her evidence that she called the Respondent's head office again later that day but got no response.

[55] In her reply witness statement, Ms Bowman disagreed with a number of the contentions made by Ms Mkulo regarding appropriate staffing levels for particular tasks and her assessment of the threat posed by the POI.

[56] Under cross-examination Ms Bowman conceded that two additional COs had been sent to the FJC at approximately 11am, being a time after her phone call to Ms Mkulo. She also confirmed that there had been no cell breach required with the PIC on 28 April 2023. She further confirmed that there had been an altercation at the PSC with the POI and the Applicant over the surrendering of a potential weapon. Ms Bowman also confirmed that her assessment of ideal staffing numbers was based on her own assessment and not any document or policy of the Respondent.

[57] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant's conduct because the Applicant had committed two breaches of the Respondent's Code of Conduct (the Code). The Respondent set out the relevant sections of the Code as follows:

a. *"**Conduct Principle 1**: Maintaining a safe and healthy workplace meaning everyone takes responsibility for safety when performing their role, engaging with others and operative (sic) our business.*
b. ***Conduct Principle 3**: Our Value "Integrity, do what's right" reflects our commitment to operate our business in compliance with all applicable laws and regulations.*
c. ***Conduct Principle 16**: We do not tolerate bullying or harassment of any kind and are committed to putting "safety and health above all else" by keeping our workplace free of intimidating or abusive behaviour."*

[58] The two incidents of conduct that represented breaches of the code were submitted to be the head-butting of the cell door and a comment made subsequent to the head-butting incident where the Applicant stated, in reference to the head-butt, that it was a shame it had been the cell door and not the PIC's head. As noted by the Respondent, the Applicant did not dispute that either of the incidents had taken place. Rather, the Applicant sought to claim mitigation by way of lack of support, understaffing and his admission of the conduct.

[59] The Respondent submitted that these mitigating factors did not excuse or justify the Applicant's conduct. It submitted that the staffing levels at the Fremantle Courthouse on the day of the incidents was appropriate for the workload on that day, and there was nothing out of the ordinary on that day to provoke his behaviour. The Respondent further submitted that it was important to be mindful of the nature of the Applicant's role, which included dealing with difficult persons irrespective of their demeanour or conduct, discharging a duty of care to those in custody, de-escalating difficult situations and ensuring peace, order and security in a high-risk environment.

[60] The evidence of Ms Mkulo was that the FJC was not treated less favourably than other centres by the Respondent in terms of staffing levels and resources. It was her evidence that staffing levels were managed to cope with what is a dynamic and fluid environment and it was her role to ensure an effective and equal spread of resources. Ms Mkulo stated that the Respondent took care to assess the variables involved in managing PICs and POIs and would allocate resources where there were heightened risks of self-harm, known mental health problems, risks of troublesome associates and history of assaulting COs and other persons.

[61] Ms Mkulo also gave evidence that the Respondent provides a range of training courses to its employees, including courses on de-escalating and mental health awareness and resilience. In her evidence she refuted the views of the Applicant and the witnesses for the Applicant regarding reasons for labour turnover, the actual level of turnover. She also refuted the claims regarding calls for additional staff being ignored. It was Ms Mkulo's evidence that the issues likely to arise on 28 April 2023 were known to the Respondent and factored in. For example, she assessed the risks posed by the POI as low, given her previous interactions with him and was aware that while the PIC could be aggressive and threaten self-harm his history suggested that he was unlikely to engage in either violence against the COs or himself. With respect to the comment made by the Applicant to Jenny Carroll regarding the PIC's head, Ms Mkulo's evidence was that she was shocked and disgusted.

[62] Under cross-examination, Ms Mkulo was questioned at length about staffing issues. While Ms Mkulo maintained her position in most instances, in some cases, she was forced to make some concessions. For example, she conceded that the Standard Operating Procedure (SOP) for the PSC, which she had stated suggested one staff member for this job, was "not ideal". She conceded however that she was aware of understaffing concerns at the FJC and that staff at the FJC including the Applicant had raised this with her.

[63] I asked Ms Mkulo about the process of setting staff numbers within the SOPs. I asked her specifically about who had set the numbers in the SOPs and on what basis they had been set. She explained that there was a minimum contractual requirement but that the SOPs are based on risk profiles and did have some flexibility of implementation. I also put to her that the Applicant's comments about the PIC's head were made in private to a colleague and

appeared to be a “letting off steam” reaction to a tense situation. Ms Mkulo was of the view that the comments were highly unusual in the custody environment. I also questioned Ms Mkulo about her view that the head-butt by the Applicant was meant to intimidate and was directed towards the PIC. She confirmed that this was her assessment given the proximity of the PIC to the glass portion of the cell door.

[64] The evidence of Ms Rebecca Camm was primarily concerned with matters occurring after the head-butting incident and went to the processes followed by the Respondent in investigating and deciding on the outcome of that investigation. It was her evidence that she believed that the Applicant had intentionally tried to intimidate the PIC and that she had concerns regarding the comment made by the Applicant to Ms Carroll regarding the PICs head.

[65] In cross-examination Ms Camm was taken to a letter that she wrote summarising the situation and particularly to a section where she claimed that the Applicant had admitted that he would have shown the same behaviour had the door not been in place. It became clear through questioning that the basis of this statement in Ms Camm’s letter was the comment made by the Applicant to Ms Carroll during a phone call that he wished it had been the PICs head.

[66] I put to Ms Camm that the Applicant’s head-butt may have been just frustration and not a deliberate attempt intimidate the PIC but Ms Camm did not agree. I questioned Ms Camm about her statement that the Applicant showed no remorse or contrition, pointing out her own evidence that he had admitted doing the wrong thing and his letter to the Company accepting that he had done the wrong thing and apologising to the Respondent. Specifically, given her statement about lack of remorse, I asked what weight if any this contrition from the Applicant was given. Unfortunately, her answer did not provide any further insight, as Ms Camm simply stated (and repeated) that the Respondent had considered all of the relevant information.

[67] I further questioned Ms Camm about her statement that the comment made about the PIC’s head to Ms Carroll was evidence of his intent to harm or intimidate the PIC. I put it to Ms Camm that the comment, which was not made to the PIC but to a colleague sometime later could be seen as just a case of the Applicant “letting off steam”. I asked her if she had even considered this as a possibility. Initially, Ms Camm took the position that she couldn’t comment because she did not know what his intentions were. I pointed out to her that she in fact inferred an intention by saying the comment was evidence of his desire to intimidate or harm the PIC. I then rephrased the question somewhat and put it to Ms Camm again and she again suggested that because she did not know the Applicant, she did not know if it was just him letting off steam or whether he had other intentions. In re-examination, the Respondent asked Ms Camm why it had been so important to consider the comment made to Ms Carroll and she explained that it gave the Respondent concerns about what the Applicant might do in the future.

[68] The evidence of Mr Jonathon Snow (Mr Snow) was directed to events occurring after the head-butting incident and was concerned mainly with the procedures followed in dealing with the Applicant. It is clear from that evidence that Mr Snow was not involved in any investigation but was instead regarded by the Respondent as someone who could review all of the information gathered and then make a decision. It was also clear that Mr Snow had been given a version of events that had at least some of the relevant issues pre-determined. For example, at paragraph 52 of his statement he states that he had been told the Applicant had intended to strike or at least intimidate the PIC.

[69] Under cross-examination, Mr Snow was questioned about instances of understaffing at the FJC and he conceded that he was aware of an incident on 4 April 2023 where the FJC had to be closed due to a shortage of COs. He also conceded that he had not been made aware that the Applicant had been complaining about understaffing by the people who carried out the investigation into the head-butting incident. He further conceded that he had not been briefed that the acting CSM had not been on site on 28 April 2023, he had not been made aware of how many COs were on site on that day or that the COs had requested extra staff.

[70] With the respect to the head-butt, Mr Snow agreed that the PIC seemed agitated and also agreed that the Applicant removed himself from the situation directly after head-butting the door. Mr Snow confirmed that he was aware that later in the day the Applicant had assisted in loading the PIC into prisoner transport and agreed that if the Applicant had wished to harm the PIC then he had the opportunity to do so when assisting with that loading. Mr Snow also confirmed that he had not read the letter written by the Applicant wherein he apologises for the head-butt incident but had been briefed on its contents. It was put to him that certain parts of the letter evidenced contrition and an indication that the Applicant would not repeat the error, which stood in contrast to Mr Snow's statement in his evidence that there was no evidence or assurance that the Applicant would not engage in the conduct again. Mr Snow did not accept that the letter provided such assurance.

[71] I questioned Mr Snow about conversations that were had between the decision-makers for the Respondent and the extent to which issues such as the Applicant's prior record, his quick realisation of his error, the provocation he had endured and the lack of physical harm to the PIC. Mr Snow responded that there had been significant conversations about such issues but given the broader considerations the decision had been made to not in any way condone the Applicant's actions. Mr Snow's view was that given the need to de-escalate, the Applicant's actions in escalating the issue was very problematic and could have created additional risk for other COs. His evidence was that the ramifications were potentially so severe that the Respondent needed to avoid setting a precedent that could be perhaps exploited in other circumstances.

Consideration

[72] It is clear that the Applicant does not contest that the two instances of misconduct as alleged by the Respondent, being the head-butt and the subsequent comment made to Ms Carroll about the PICs head, took place. The task for the FWC is thus to determine if those two actions amount to a valid reason for termination. In the first instance, I will turn to the comment made to Ms Carroll.

[73] On balance of probability, I find that this comment was, while ill-advised, a case of the Applicant venting his frustration in a phone call with one other person. The comment was not made to the PIC, nor was it made in public. It was made to one colleague of the Applicant. The Respondent has sought to characterise it as evidence of the Applicant's violent intentions towards the PIC and suggests that it paints him as being at risk of engaging in such behaviour in the future. I cannot accept that this is a reasonable position for the Respondent to take and I must add that I am somewhat bewildered that the people in the Respondent's business responsible for the HR function have attributed to this offhand comment the gravitas that they

have. It is clear from the uncontested evidence that the Applicant assisted in the loading of the PIC into his transport sometime later on 28 April 2023 which was before he had the phone conversation with Ms Carroll. This would have provided an opportunity for the Applicant to have done harm to the PIC if indeed he harboured such feelings, yet he did not do so and his evidence is clear that he never had any intention of doing so. As such, I find that the comment made to Ms Carroll cannot be relied upon to either provide or assist in providing a valid reason for termination.

[74] I then turn to the head-butting of the cell door. The Respondent takes the view that the head-butt was an action aimed directly at the PIC and with a view to intimidating the PIC. The Applicant claims it was just frustration and there was no intent towards the PIC. From the video evidence, the PIC is very close to the door and does take a step backwards when the Applicant head-butts the door. As such, even if there was no intent to intimidate, the PIC is clearly startled by the Applicant's actions. Perhaps of more relevance is what happens next. The PIC becomes visibly more animated and begins to beat his fists against the glass of the cell door. This goes to the Respondent's expressed concern that in taking the actions that he did, the Applicant has escalated, rather than de-escalated the situation, and created a more serious situation for another CO to handle. It is also clear that the Respondent's training and Code of Conduct are all aimed at de-escalation and treating PICs with respect, for a number of reasons and the one that looms large in this case is to try to keep PICs as calm as possible to reduce the risk of them becoming violent. In summary, I find that the Applicant's actions in this case provided a valid reason for termination.

Was the Applicant notified of the valid reason?

[75] 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).[9]

[76] 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,[10] and in explicit[11] and plain and clear terms.[12]

Submissions

[77] The Applicant's submissions did not suggest that the Applicant had not been notified of the valid reasons, albeit that those submissions did question the procedural fairness of the Respondent's actions.

[78] The Respondent submitted that the Applicant was notified of the valid reason in the disciplinary allegations letter dated 22 May 2023, the show cause letter dated 22 June 2023 and in the termination letter dated 3 July 2023.

Findings

[79] Each of the documents referred to by the Respondent were entered into evidence. While the termination letter expresses the misconduct in terms of particular breaches of the Respondent's policies rather than the actual incidents, the previous letters make it clear that the

Respondent's concern is with the head-butting incident and how that incident breaches its policies. As such, I find that the Applicant was advised of the valid reason for his termination.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[80] An employee protected from unfair dismissal should 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.[13]

[81] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.[14] 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.[15]

Submissions

[82] The Applicant's submissions do not suggest that there was no opportunity provided, but rather again detail some concerns regarding procedure.

[83] The Respondent submitted that the Applicant was given an opportunity to respond to the valid reason for termination. It submitted that the Applicant had attended a disciplinary meeting on 29 May 2023 and provided responses to the allegations regarding his conduct. Further, the Applicant attended a show cause meeting on 26 June 2023 and provided, in advance of that meeting, a written response to the allegations regarding his conduct. The Respondent further submitted that the Applicant had been appraised of the matters to be discussed in writing prior to the meeting on 26 June 2023. It is also the case that the allegations had been put to the Applicant in the letter inviting him to the meeting on 29 May 2023.

Findings

[84] I therefore find that the Applicant was provided with an appropriate opportunity to respond to the valid reason for his termination prior to the decision to terminate his employment being made.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[85] 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.

[86] 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."[16]

Submissions

[87] The Applicant made no submissions on this issue.

[88] The Respondent submitted that the Applicant was permitted to and did have a support person present to assist at discussions relating to the dismissal.

Findings

[89] It is clear that the Applicant had a support person or TWU official with him at each relevant meeting. As such this matter is neutral in my considerations.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[90] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

Submissions

[91] The Respondent submitted that it was a large employer and as such this matter should be regarded as neutral in my consideration.

[92] The Applicant concurred that the Respondent was a large enterprise but made no specific submissions on this matter.

Findings

[93] I find that the size of the Respondent's enterprise is a neutral factor in my consideration.

To what degree would 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?

Submissions

[94] The Applicant submitted that the Respondent's enterprise did not lack dedicated human resource management specialists or expertise.

[95] The Respondent submitted that it had a dedicated HR function as that this matter should be neutral in my considerations.

Findings

[96] I find that the Respondent has a dedicated HR function which was heavily involved in the process of the Applicant's termination. As such, the factor is neutral in my consideration.

What other matters are relevant?

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

Submissions

[98] The Applicant made extensive submissions with respect to other matters. In the first instance, he drew my attention to the findings of McHugh and Gummow JJ in *Byrne V Australian Airlines Ltd (1995)*[17] as follows:

> *"…the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."*

The Applicant contended that the concept of termination being disproportionate to the gravity of the misconduct was applicable in the current matter.

[99] The Applicant also drew my attention to the decision of Vice President Hatcher (as he then was) in *Raj Bista v Glad Group Pty Ltd t/a Glad Commercial Cleaning* where the Vice President observed as follows:

> *"It is well established that a dismissal for misconduct may be found to be harsh on the basis that the sanction of dismissal is a disproportionate penalty to the gravity of the misconduct. The issue of proportionality is usually considered having regard to all the relevant circumstances of the dismissed employee…" (citations omitted)*

The Applicant submitted that in the current matter, the relevant circumstances were that at the time of the incident he was feeling overwhelmed, unheard and angry. His feelings were a result of the non-compliance of the PIC, other high stress matters he had been required to handle on

28 April 2023, his concerns regarding inexperienced staff and understaffing and his view that the Respondent had not provided adequate support for its workforce. The Applicant also submitted that the training provided by the Respondent did not adequately prepare him for the rigours of managing his own emotions in tense situations. The Applicant submitted that the Respondent had failed to take any of these issues into consideration when considering his termination.

[100] The Applicant also submitted that the Respondent's investigative process was procedurally unfair to the Applicant. He submitted that the first meeting held with him post the 28 April 2023 incident had been described in advance as a welfare meeting. Notwithstanding this, the Respondent asked the Applicant to provide his version of the events of 28 April 2023 and at the conclusion of the meeting advised him that he was stood down pending an investigation. The Applicant submitted that the Respondent had thus misled him about the significance and purpose of that meeting.

[101] The Applicant also submitted that the show cause letter made reference to the comment made to Ms Carroll but the Respondent had made no further reference or assessment of that comment. As such, it was submitted that it was unclear as to whether this comment was taken as confirming the Respondent's views regarding the Applicant's intent at the time of the head-butt or whether it formed a separate allegation. Given this, it was difficult for the Applicant in considering his response.

[102] The final area of concern in the Applicant's submissions was a view that he had been subjected to differential treatment by the Respondent. The Applicant submitted that a fellow employee had threatened him with harm and had not been terminated as a result. I note that there was evidence regarding this incident submitted by the Applicant and similar evidence given by Ms Bowman regarding the same individual.

[103] The Respondent submitted that the Applicant's submissions regarding other matters did not support a conclusion that the dismissal was harsh, unjust or unreasonable. It submitted that it had properly considered the mitigating factors raised by the Applicant but found that they were not able to be used to justify his conduct. It further submitted that it provided appropriate training in de-escalation. The Respondent refuted the claim of differential treatment and outlined the practical differences between the incident noted by the Applicant and his own misconduct. The Respondent also refuted suggestions that its process was improper or misleading and noted that its welfare check meeting was genuine in intent, and that the Applicant was provided with proper process and representation.

[104] The Respondent submitted that the circumstances of this matter ought to be placed in their proper perspective. Particularly, the Applicant's work regularly involved interaction with persons who are aggressive and behave in an improper manner. Notwithstanding this, COs are required, on behalf of the State of Western Australia, to show proper care and respect for persons in custody at all times. In terms of the gravity of this responsibility, the Respondent cited the decision of the New South Wales Supreme Court in *Industrial Relations Secretary v Wattie (Wattie)*[18] as follows:

> *"While there may be other occupations to which the regulatory context is largely irrelevant, the same cannot be said for the employment of correctional officers. The State*

is responsible for every inmate, having either, through its enforcement arm (the police force), arrested and taken an accused person into custody, or through its judicial arm, imposed a sentence, or refused bail. Correctional officers are centrally engaged in the obligations of the State to safeguard all persons who are in custody, either on remand following refusal of bail, or not having applied for bail, awaiting a criminal hearing, or who are serving a custodial sentence imposed by a court. When a correctional officer assaults a prisoner, he or she is doing so in the exercise of the actual or ostensible authority conferred by the State on correctional officers who are its agents…"

The Respondent submitted that although the Applicant had not physically assaulted the PIC, his conduct was nevertheless inappropriate and inconsistent with the corrective services role of the State. It submitted that for the Applicant to have engaged in a verbal altercation and escalate that matter with physical aggression and intimidation is, as per *Wattie:*

"…antithetical to that context and to the integrity of the criminal justice system."

[105] Finally, the Respondent submitted that the Applicant in fact did not need to intervene in the situation with the PIC or engage in the conduct, and he could simply have removed himself and regained his composure.

Consideration

[106] I will deal in the first instance with the Applicant's contentions regarding fair process. I am not persuaded that there were any serious flaws in the process used by the Respondent that could be said to warrant consideration regarding the fairness or otherwise of the termination. I find that the welfare meeting was in the first instance to speak to the Applicant regarding the incident and do not have any concerns that it was improper to use the information given by the Applicant in that meeting to form a view about whether the Applicant's behaviour ought to be further investigated. It might be said that calling a meeting a welfare meeting might somehow confer on it the status attracting the sort of privilege found in conversations with one's doctor, lawyer or possibly priest in a confessional. However, I am not sure that any meetings between an employee and his or her employer have that sort of status and while employers should not seek to suggest that it is otherwise, employees would be well-advised to be mindful that what they say may have consequences.

[107] I am also not persuaded that the language used by the Respondent in its various documents is such that the Applicant was misled. It seems clear to me that the central issue, being the head-butt, was clearly articulated as being a matter of concern and one on which the investigations were focused. While the Applicant seeks to pursue the matter of the comment to Ms Carroll, as noted above I do not find that that comment forms any part of a valid reason and so any confusion or lack of attention to that matter does not prejudice the Applicant's case before the FWC.

[108] On the issue of the differential treatment, I find on balance of probabilities that the punishment meted out to the employee who threatened the Applicant was less serious than that given to the Applicant in this matter. However, as always, each case must be weighed up on its merits and I am not persuaded that, on its face, the differential treatment weighs against the Respondent in this particular matter. However, while I note that the Respondent has distinguished the circumstances of that matter from the matter at hand, I find that the distinction

is unlikely to be compelling to the employees involved or indeed its employees at large. The Respondent has made much of its Code of Conduct and its witnesses before the FWC placed great stock in its words. Given that, and the stated expectations of the Respondent, it will be particularly galling for employees if they are, essentially, asked to maintain a standard of behaviour towards persons – that is to say PICs and POIs - who are insulting and threatening them that they cannot then expect from their own colleagues.

[109] I then turn to the matter of the mitigating circumstances that arise directly from the Applicant's role at the FJC. In the first instance, I find that the interaction with the POI on 28 April 2023 was a factor that contributed to the Applicant's behaviour. I find that on balance of probability the Applicant, being a larger male and one of the most experienced COs at the FJC was likely called upon to deal with a greater share of the difficult POIs and PICs and his interaction with the POI on 28 April 2023 was such that while he was not called upon to physically intervene, he would have nonetheless been "on edge". The POI had tried to get a weapon of sorts into the FJC and had been difficult when asked to surrender it. The unchallenged evidence is that the POI then moved through the FJC behaving in an inappropriate manner and causing disruption. It is reasonable to infer that this was stressful for the Applicant. While the Respondent may say that COs deal with such people every day, I think it unlikely that they become so inoculated that they have no emotional reaction to the sorts of behaviours they experience and certainly the Applicant's largely unchallenged evidence is that his interactions with the POI had put him in a heightened state.

[110] As to difficulties in getting extra staff I find, on balance of probability, that there were occasions where the COs at the FJC did not get the extra staff that they wanted. While I suspect that on some occasions this was due to an objective assessment of need by the Respondent rather than unavailability, it would appear that, given the events of 4 April 2023, there were times when extra staff simply could not be provided. While I understand the practical issues facing the Respondent, particularly in the current job market, it is nonetheless the case that the perception of staff at the FJC was that it was difficult to get extra staff. I also accept that the Applicant had been raising the issue of staffing with the Respondent for some time and he was becoming increasingly frustrated by what he saw – albeit through the lens available to him – of the Respondent's efforts to address the matter. I further find that, based on the evidence presented, it is likely that there were at least some inexperienced staff regularly working on the roster at the FJC, and further, that these COs may have been hesitant and less confident than the more experienced COs, leading to an increase in incidents of POIs and PICs behaving aggressively.

[111] I then turn to the issue of the alleged under-staffing per se. It is clear that perhaps the most significant factor in the Applicant's mind more broadly was the issue of under-staffing and its associated issues, albeit that on this particular occasion it was exacerbated by his dealings with the POI. Contemplation of this issue presents a significant challenge to the FWC. Clearly, the Applicant and his former colleagues who gave evidence are unanimous in their view that the FJC is under-staffed. The Respondent on the other hand, while perhaps conceding that there may be times – such as 4 April 2023 – where under-staffing is a problem, seems to be of the view that its staffing protocols are reasonably robust and staffing levels are usually appropriate. The question is whether or not from an objective viewpoint the FJC is understaffed. Determining this is an exercise far beyond the scope of this unfair dismissal claim. I would, however, make some observations.

[112] In the first instance, I suspect that in many if not most workplaces in Australia, there will be employees who take the view that their workplace is under-staffed. Many of these views will no doubt be valid – perhaps in some cases for some parts of the working week, perhaps in other cases for all parts. Determining the ideal staffing level is in most cases a very difficult exercise, constrained by many factors such as budget and predictability of workload. As such, it is probably rare to find a workplace where both the employees and the people who oversee labour budgets are both happy at all times and I suspect that the latter are more often happy than the former.

[113] In some workplaces a modest level of understaffing might cause inconvenience and a low level of dissatisfaction. However, I suspect that in the Respondent's workplace, which is routinely dangerous and stressful, a modest level of understaffing could have serious safety ramifications and lead to significant dissatisfaction and potentially distress amongst employees. It does not fall to me to judge the appropriate level of staffing for the Respondent, but I am mindful that of those persons who have been on the front line of the Respondent's activities at FJC and who gave evidence in this matter, there does appear to be a strong feeling that there is an understaffing problem. I note that in some cases, such as Mr Sturgeon, those staff have witnessed a reduction in staffing levels from those of the previous contractor without a concomitant reduction in workload. I note further as I set out above that there is a perception that getting additional staff when needed is difficult and that turnover and inexperienced staff are, on balance of probability, real issues and issues that impact on the understaffing concerns at the FJC. I note also the unchallenged evidence of Ms Bowman and Mr Sturgeon that the Applicant was stressed and frustrated by what he regarded as an understaffing issue that was not, in his view, being effectively addressed.

[114] The recent focus on psychosocial health in the workplace is to be welcomed, but something that presents a significant challenge for workplaces like the FJC. As I put to Mr Snow, the Respondent's employees are routinely subjected to abuse from PICs and POIs that could not be tolerated if directed by an employee towards a fellow worker in the Respondent's or any other workplace. The Respondent's employees are routinely subjected to comments that would be unlawful if made to a person walking past on the street. Further, all of this goes on with, in many instances, the underlying threat of physical violence.

[115] While I accept that the Respondent has some measures in place via its training programs to provide its employees with tools to deal with the realities of their workplace and to guide them at times when they feel they may be unable to maintain their composure, such tools are imprecise instruments. They cannot realistically be otherwise as they are trying to cope with human emotions which are incredibly complex. This is not to suggest that the Respondent does not genuinely wish to equip its employees to deal with the very real issues they face at work, nor is it to suggest that the Respondent has fallen short in its duties. What it is to suggest is that it may be unfair to apply the standards expected of angels to mere humans and in keeping with that sentiment, it may be necessary to take a very nuanced view of punishment for those employees who break the rules.

[116] In this instance, I think it is appropriate to consider that the Applicant has no prior history of this behaviour, there is evidence that he was very stressed and frustrated about what he genuinely perceived to be an understaffing problem that created genuine issues for him and

his colleagues, and that he did not commit an assault on a person. I also note that he accepted responsibility and apologised. On the other hand, I accept that he was frustrated and angry and exasperated and vented his frustrations in contravention of his training. I also accept that he should not have done what he did and that his actions did not de-escalate a difficult situation but rather inflamed it. I further accept the difficult position in which the Respondent finds itself with regards to not setting precedent and any perception that it can be seen to in any way condone or accept inappropriate behaviour towards PICs. However, such a black and white position is, in my view, problematic.

[117] Put simply, adopting such an approach leaves the Respondent with no ability to properly consider whether the outcome in a particular case can be said to be a just outcome in all of the circumstances. To be steadfastly opposed to making any allowance for genuine human frailties in very difficult circumstances where those frailties are routinely put to the test appears to me to leave no room for fairness in those – possibly rare - circumstances that may warrant a more considered approach.

[118] In addition to the cases cited by the Applicant, I am also mindful of the decision in *Qantas Airways Ltd v Cornwall*[19] where the Full Court of the Federal Court of Australia said:

> *"The question is whether there was a valid reason. In general, conduct of that kind would plainly provide a valid reason. However, conduct is not committed in a vacuum, but in the course of the interaction of persons and circumstances, and the events which lead up to an action and those which accompany it may qualify or characterize the nature of the conduct involved."*

I am particularly persuaded by the notion that conduct is not committed in a vacuum but rather in the course of the interaction of persons and circumstances. In the matter before me, I find that looking at those interactions and circumstances leads me to the conclusion that the mitigating circumstances highlighted by the Applicant are such that they weigh in favour of a finding that the dismissal was harsh.

[119] I should make two further comments. The first is regarding the Respondent's submission that the fact that the Applicant did not physically assault the PIC ought not weigh in his favour. I find that this proposition cannot be accepted. To do so seems to suggest that proportionality is irrelevant. This does not seem to leave much room for the concept of a "fair go all round" which is a fundamental consideration for the FWC. I find that the fact that the Applicant did not commit any act of violence to the person of the PIC is relevant, as is the fact that later in the day he had a further opportunity to harm the PIC but did not do so. I find on balance that the Applicant was probably showing frustration rather than trying to intimidate the PIC and he took this frustration out on the cell door rather than the Applicant. I further find that a distinction must be drawn between physical assault on a person and expressing frustration upon an inanimate object. This then leads to my second comment.

[120] The Respondent made much of the duties of a CO and the responsibility to represent, as it were, the State of Western Australia. Further, it cited case precedent about COs and the integrity of the criminal justice system. To that I say that firstly, the case cited (*Wattie)* involved physical assault and I therefore draw a distinction between that matter and the current matter. Secondly, in the *Wattie* case, the employee was an employee of the government. The State of

Western Australia has chosen to outsource its responsibilities for at least part of the criminal justice system in Western Australia – as it is perfectly entitled to do. In doing so however, it has largely absolved itself of the responsibility, particularly given the new Western Australian legislation dealing with psychosocial welfare at work, of dealing with the WHS issues in a very difficult workplace. As such, I find the Respondent's appeals to the integrity of the State criminal justice system in support of a what appears to me to be, in effect, a rigid "one strike and you're out" approach to employee misconduct are not particularly compelling.

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

[121] In making this decision, I am mindful of the decision of the Full Bench of the FWC in *B, C and D v Australian Postal Corporation T/A Australia Post*[20] where the Bench said:

> *"Reaching an overall determination of whether a given dismissal was "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" involves a weighing process. The Commission is required to consider all of the circumstances of the case, having particular regard to the matters specified in s.387, and then weigh: (i) the gravity of the misconduct and other circumstances weighing in favour of the dismissal not being harsh, unjust or unreasonable; against (ii) the mitigating circumstances and other relevant matters that may properly be brought to account as weighing against a finding that dismissal was a fair and proportionate response to the particular misconduct.*
>
> *It is in that weighing that the Commission gives effect to a 'fair go all round.'"*

[122] I have made findings in relation to each matter specified in section 387 as relevant and I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[21]

[123] I find that notwithstanding the Respondent had a valid reason to terminate the Applicant, notified the Applicant of that reason and gave him an opportunity to respond, the dismissal was harsh in the circumstances. I find that the gravity of the misconduct, taken together with the mitigating circumstances discussed above, are such that termination of the Applicant's employment was an excessive punishment.

Conclusion

[124] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[125] Being satisfied that the Applicant:

- made an application for an order granting a remedy under section 394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of section 385 of the FW Act,

I may, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[126] Under section 390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

(a) I am satisfied that reinstatement of the Applicant is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

[127] Following the hearing, I directed the parties to make submissions on remedy and I have relied upon those submissions in my consideration of an appropriate remedy in this case.

Is reinstatement of the Applicant inappropriate?

Submissions

[128] The Applicant did not seek reinstatement.

[129] The Respondent submitted that reinstatement is inappropriate. It noted that the Applicant was not seeking reinstatement and proposed that there were a number of issues that counted against reinstatement in any case. Specifically, the Respondent noted that the Applicant's Department of Justice security permit had been revoked as a result of his actions. Further, there was a loss of trust and confidence in the Applicant's ability to perform his duties in an appropriate manner.

Findings

[130] In circumstances where an applicant does not seek reinstatement and a respondent vigorously opposes reinstatement, it would clearly be inappropriate for the FWC to order reinstatement. As such, I find that reinstatement of the Applicant is not appropriate.

Is an order for payment of compensation appropriate in all the circumstances of the case?

[131] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[22]

[132] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.[23]

Submissions

[133] The Applicant submitted that if the FWC found the dismissal to be unfair then payment of compensation would be appropriate in lieu of reinstatement.

[134] In its submissions, the Respondent maintained that the dismissal was not unfair and noted that an award of compensation is not an automatic right in the absence of reinstatement. However, the Respondent's submissions on compensation went to what it considered an appropriate quantum rather than an argument against the award of compensation.

Findings

[135] Given the above, I am of the view that an award of compensation is appropriate given the harshness of the dismissal.

Compensation – what must be taken into account in determining an amount?

[136] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

(a) the effect of the order on the viability of the Respondent's enterprise;

(b) the length of the Applicant's service;

(c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

(d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;

(e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;

(f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the Commission considers relevant.

[137] I consider all the circumstances of the case below.

Effect of the order on the viability of the Respondent's enterprise

[138] There is no dispute between the parties on this issue, and I find, that an order for compensation would not have an effect on the viability of the employer's enterprise.

Length of the Applicant's service

[139] The Applicant's length of service was approximately two years and five months.

Submissions

[140] The Applicant submitted that the Applicant's length of service was "not insignificant" but made no submission as to how this might impact any award of compensation. The Respondent made no submissions on this matter.

[141] I consider that the Applicant's length of service does not support reducing or increasing the amount of compensation ordered.

Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

[142] As stated by a majority of the Full Court of the Federal Court, "[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[24]

Submissions

[143] The Applicant submitted, albeit without supporting argument, that the Applicant's employment would have been likely to continue for a further period of twenty six weeks and the amount of remuneration that the Applicant would have received or would have been likely to receive during that period is $27,681.42 plus $2,887.82 in superannuation.

[144] The Respondent submitted that the Applicant's employment would likely only have continued for a further period of eight to twelve weeks, given the Applicant's evidence regarding his workplace. Specifically, the Respondent noted that the Applicant was suffering from work-related stress, was generally unhappy about the workplace, held the view that the Respondent was not making the changes needed to rectify the problems he was experiencing and had previously resigned his employment in February 2023. The Respondent submitted that the amount of remuneration that the Applicant would have received or would have been likely to receive during such a period is between $9,402.72 and $14,104.08.

Consideration

[145] I find that the Respondent's arguments as to the possible length of the Applicant's employment are persuasive. It is difficult to see the Applicant having much more than twelve weeks' service with the Respondent, given the difficulties he was experiencing as set out in his evidence. I therefore find that the Applicant's employment would not have continued for more than twelve weeks after termination and this period is his anticipated period of employment. The appropriate figure to use to calculate the Applicant's weekly rate of pay is his hourly rate,

being $30.93 multiplied by 38 hours for a total of $1,175.34. Twelve weeks at this rate equals $14,104.08.

Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal

[146] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.[25] What is reasonable depends on the circumstances of the case.[26]

Submissions

[147] The Applicant submitted that the Applicant had taken reasonable steps to minimise the impact of the dismissal by starting his own business and providing services to clients through the National Disability Insurance Scheme. The Applicant had also sought to gain employment in an Indigenous Support Role through the Department of Justice, but had been denied this position due to failing the integrity requirements as a result of the report made to the Department by the Respondent.

[148] The Respondent submitted that the Applicant had not made any submissions at the hearing regarding his efforts to mitigate his loss. The Respondent further submitted that while it might be the case that the Applicant had made some effort to mitigate his loss, there was no evidence that his efforts were reasonable in all of the circumstances. As such, the Respondent submitted that a deduction of at least thirty percent was warranted.

Consideration

[149] I note that the Respondent's submissions were made without the benefit of the further evidence submitted by the Applicant as regards the earnings from his business. Those earnings, for the period of twelve weeks post-dismissal amounted to a total of $8,804.66, or an average of $733.72 per week. Given the practical difficulties the Applicant will have in securing work within the auspices of the Department of Justice, I accept that his efforts to mitigate his loss are reasonable in the circumstances and I do not propose to make a deduction from his compensation for failure to mitigate his loss.

Amount of remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation

[150] The Applicant's evidence is that the Applicant has earned $8,804.66 from employment or other work between the time of his dismissal and the end of the anticipated period of employment. I accept the Applicant's evidence in this regard.

[151] The Respondent by virtue of its calculations submitted that I should include the Applicant's annual leave payout and notice period in the monies earned since termination. I am not inclined to accept this view. The Applicant's annual leave is an entitlement that if not utilised in the anticipated period of employment, would have been payable to him on resignation. As such, I do not regard it as appropriate to discount his compensation by the value of this leave. As regards his notice, I take the view that at the end of the twelve week period of anticipated employment the Applicant would have provided notice. The relevant enterprise

agreement requires that he give two weeks' notice. As such, he would have either worked this two week period or been paid it in lieu. In either case, I do not regard it as appropriate to deduct this payment from his compensation.

Amount of income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation

[152] Given that the order for compensation encompasses a period that ends prior to the making of the order, there is no amount to be calculated at this step.

Other relevant matters

[153] Neither party drew my attention to any other relevant matters and there are no such matters of which I am aware.

Compensation – how is the amount to be calculated?

[154] As noted by the Full Bench, "[t]he well-established approach to the assessment of compensation under s.392 of the FW Act… is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (***Sprigg***).[27] This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[28]."[29]

[155] The approach in *Sprigg* is as follows:

> Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[156] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated the employment to be $14,104.08 on the basis of my finding that the Applicant would likely have remained in employment for a further period of twelve weeks. This estimate of how long the Applicant would have remained in employment is the "anticipated period of employment".[30]

Step 2

[157] I have found that the amount of remuneration earned by the Applicant from the date of dismissal to the end of the anticipated period of employment was $8,804.66, and there is no amount to be earned subsequent to the making of an order for compensation.

[158] Only monies earned since termination for the anticipated period of employment are to be deducted.[31] I therefore deduct the sum of $8,804.66 from $14,104.08, leaving a total of $5,299.42.

Step 3

[159] I now need to consider the impact of contingencies on the amounts likely to be earned by the Applicant for the remainder of the anticipated period of employment.[32] Given the short period of anticipated employment, I do not find that I should make a deduction for contingencies.

Step 4

[160] I have considered the impact of taxation but have elected to settle a gross amount of $5,299.42 and leave taxation for determination.

[161] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."[33] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the FW Act.

Compensation – is the amount to be reduced on account of misconduct?

[162] If I am satisfied that misconduct of the Applicant contributed to the employer's decision to dismiss, I am obliged by section 392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

Submissions

[163] The Applicant did not address the issue of a deduction for misconduct in his submissions. The Respondent submitted that as the Applicant had engaged in misconduct that had the effect of heightening the safety risk to fellow employees, a deduction of no less than twenty percent was appropriate.

Consideration

[164] I accept that there was an element of misconduct in the Applicant's actions and it is therefore appropriate to make a deduction for that misconduct. However, I am mindful that I have accepted that there were mitigating circumstances and as such I am not of the view that the deduction should be set at twenty percent. I will instead apply a deduction of ten percent to

reflect that while there was misconduct, it occurred in particular circumstances and those circumstances must be taken into account. As such, the compensation figure is set at $4,769.48.

Compensation – how does the compensation cap apply?

[165] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

(a) the amount worked out under section 392(6); and

(b) half the amount of the high income threshold immediately before the dismissal.

[166] The amount worked out under section 392(6) is the total of the following amounts:

(a) the total amount of the remuneration:

(i) received by the Applicant; or

(ii) to which the Applicant was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the Applicant was on leave without pay or without full pay while so employed during any part of that period – the amount of remuneration taken to have been received by the Applicant for the period of leave in accordance with the regulations.

[167] The Applicant was not on leave without pay or without full pay during the 26 weeks immediately before the dismissal.

[168] I find that the total amount of the remuneration to which the Applicant was entitled during the 26 weeks immediately before the dismissal was $30,558.84, being $1,175.34 multiplied by 26.

[169] The high income threshold immediately before the dismissal was $167,500. Half of that amount is $83,750.

[170] The amount of compensation ordered by the Commission must therefore not exceed $30,558.84.

[171] In light of the above, I will make an order that the Respondent pay $4769.48 gross less taxation as required by law, plus 11% superannuation being $524.64 to the Applicant in lieu of reinstatement within 14 days of the date of this decision.

DEPUTY PRESIDENT

Appearances:
L Slaney of the Transport Workers' Union of Australia for the Applicant.
J Parkinson of Kingston Reid for the Respondent.

Hearing details:
2024.
Perth (via Microsoft Teams)
February 12, 13.

Final written submissions:
Applicant, 5 March 2024.
Respondent, 5 March 2024.

Printed by authority of the Commonwealth Government Printer

<PR772171>

---

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

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

[3] Ibid.

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

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

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

[7] *Joshua Nash and Nathan Jago v Tasmanian Water and Sewage Corporation* [2020] FWC 3221 at [55-56].

[8] *Smith v Bank of Queensland* [2021] FWC 4 at [126].

[9] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

[10] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[11] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[12] Ibid.

[13] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[14] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[15] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[16] Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

[17] *Byrne V Australian Airlines Ltd* (1995)185 CLR 410 at page 465.

[18] *Industrial Relations Secretary v Wattie* (2017) 271 IR 458 at [56].

[19] *Qantas Airways Ltd v Cornwall* (1998) 84 FCR 483.

[20] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 at [58-59].

[21] *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].

[22] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [9].

[23] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171, [5]-[7].

[24] *He v Lewin* [2004] FCAFC 161, [58].

[25] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

[26] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[27] (1998) 88 IR 21.

[28] [2013] FWCFB 431.

[29] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [16].

[30] *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

[31] Ibid.

[32] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].

[33] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].