



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Robert Smith

v

Qube Ports Pty Ltd

(U2025/1254)

COMMISSIONER CONNOLLY

MELBOURNE, 5 SEPTEMBER 2025

Application for an unfair dismissal remedy – valid reason – dismissal found to be harsh, unjust and unreasonable – reinstatement ordered.

Introduction and outcome

[1] On 5 February 2025, Robert Smith (the **Applicant**) made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that he was unfairly dismissed from his employment with Qube Ports Pty Ltd (**Qube** or **Qube Ports**) on 15 January 2025.

[2] Mr Smith commenced working with Qube as a Stevedore in 2009. He is 62 years old.

[3] The reasons he was given for his dismissal were that Qube was satisfied he had engaged in misconduct. That his conduct was inconsistent with Qube’s Workplace Behaviour Policy, Code of Conduct and Ethics, and the Qube Employee Handbook, as well as its values of Integrity, Reliability, Inclusion and Zero Harm.¹

[4] Two specific allegations of misconduct were put to Mr Smith on 18 December 2024. The allegations concerned his conduct “*on or around Wednesday 27th November 2024*” and “*on or around September 2024*”.

[5] He received his termination letter on 15 January 2025. This letter advised him that Qube considered the allegations against him had been substantiated and that “*your employment is no longer tenable with us*”.

[6] His employment ended on the same day. He was paid 4 weeks’ pay in lieu of serving out his notice period.

[7] Qube denies these allegations. Their position is that there were valid reasons for Mr Smith’s dismissal, including serious instances of misconduct, and that he was provided procedural fairness.

[8] Following the allocation of Mr Smith’s application to my Chambers, I issued directions for the matter to be considered by way of a Hearing on 5 and 15 May 2025.

[9] In summary, having considered all the submissions and evidence submitted by the parties I have found there was a valid reason for dismissal arising from an incident involving showing pictures of co-workers in March 2024.

[10] However, due to other factors, including that Mr Smith had already been issued a final warning in relation to this incident and that I have not been satisfied that allegations Mr Smith was a “*known bully in the workplace*” are supported by the evidence before me, I have determined his dismissal was harsh and unjust and made orders for reinstatement, lost remuneration and continuity of employment.

When can the Commission Order a Remedy for unfair dismissal?

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

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

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

When is a person protected from unfair dismissal?

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

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high-income threshold.

When has a person been unfairly dismissed?

[14] Section 385 of the Act provides that a person has been *unfairly dismissed* if the FWC is satisfied that:

- (a) the person has been dismissed; and

- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.”

Background

[15] The relevant factual background to this matter is as follows:

- Qube is a port terminal operator at the Port of Melbourne.
- Approximately 180 people working for Qube from this facility, around 150 of them are Stevedores.²
- It is well established that work on the waterfront is robust and often a place where otherwise inappropriate language is commonplace. Qube’s facility at the Port of Melbourne is such a workplace.
- Up until early 2024, Mr Smith’s employment has been without significant incident. By this time, he had moved up to be a senior level 6 stevedore and was an employee of skill, ability and experience valued by Qube.³
- On 29 February 2024, Mr Smith was issued a formal warning for a drug and alcohol policy breach following a positive TCH test result on 18 December 2023.⁴
- On 27 March 2024, Mr Smith was involved in an incident where he showed photos of work colleagues in bikinis to male co-workers, including Mr Churchward (**the Facebook incident**).
- On 17 April 2024, Mr Smith was required to attend a meeting with Mr Jamieson and Ms Vicki Tsirepas (Qube’s Human Resources Manager) to discuss his conduct on 27 March 2024. Construction, Forestry, and Maritime Employees Union (MUA) Victorian Branch Secretary Mr Robert Lumsden was present at this meeting as Mr Smith’s support person.
- On 19 April 2024, Mr Smith was issued with a first and final warning for his conduct on 27 March 2024, obtaining and showing an image of two co-workers to others during work hours which was inappropriate conduct inconsistent with Qube’s policies and values.
- Mr Smith’s final warning letter relevantly advised him as follows:

“This final warning is serious. You need to understand that if your conduct does not improve, or if you otherwise behave in a manner that is inconsistent with Qube policies, values and expectations, further disciplinary action will result and will likely involve the termination of your employment with Qube. This is because Qube’s trust and confidence in you to conduct yourself appropriately has been severely diminished.”⁵

- Following this incident, Qube directed the rostering team to avoid rostering Mr Smith, Ms Cogger and Ms Sheldon on together. Mr Smith was also directed to avoid contact with them.⁶
- On 3 May 2024, Mr Smith received a notice of investigation letter from Ms Tsirepas advising him Qube had received a formal complaint of an incident that took place on 23 April 2024. The allegations against Mr Smith were that he victimised an employee (Mr Churchward) that had been involved in a previous investigation of his workplace misconduct.⁷
- On 8 May 2024, Mr Lumsden forwarded Mr Jamieson an email from Mr Smith making a formal complaint alleging he was being victimised. Mr Smith alleged he was being discredited, had his confidentiality breached, was being called a *sexual predator* and *stalker*. It also said he felt people at work were trying to get him terminated, and indicated he was happy to provide names and details in a meeting hoping:

“...you can get to the bottom of all this Jay as its starting to take a toll on me and the last thing I want is it to affect my work performance. I love my job and just want things to return to normal.”⁸

- At or around the same time, the MUA and Qube began engaging in discussions for the renewal of the enterprise agreement covering stevedores at the Port of Melbourne. In July 2024, the MUA and Qube exchanged correspondence in relation to the conduct to these negotiations.⁹ As negotiations continued, employees (including Mr Smith) were involved taking protected industrial action in pursuit of a new enterprise agreement.
- On 5 October 2024, employees were engaged in industrial action that involved employees driving at a maximum speed of 15km.
- On night shift on 5 October 2024, Mr Smith and Mr Churchward were involved in an incident that involved them swearing at each other about a request to move a toilet car on site (**the Toilet car incident**). Mr Smith was working as the Team Leader on shift and made a report of the incident to the shift manager, Ms Heveren. Mr Churchward did not make any report or complaint.
- On 27 November 2024, Mr Smith was involved in an incident where a passing comment was made on what another stevedore, Mr Aquilina, was having for lunch. Mr Aquilina made an initial report of what occurred to Ms Heveren. After this, he left the workplace before the end of his shift and did not return to work the next day (**the Sandwich incident**). On his return to work, Mr Aquilina made clear he did not make a further report or complaint regarding what occurred on 27 November 2024.
- At 7.59am on Sunday, 1 December 2025, Qube Operations Superintendent Mr Mascarenhas advised Ms Heveren he had allocated Mr Smith and Ms Cogger to the same shift that evening in the following terms:

“Hello Seva & Bree,

I had to allocate the two to work the Penguin Arrow this EVE shift.

However, they are both in different teams and there is no interaction between them.

Kindly ensure to leave it that way.

During their meal break they will be in different rooms.”¹⁰

- At 10.24am on the same day, Ms Heveren replied as follows:¹¹

“Hi Myron,

Just a heads up, I know how this is going to play out before it happens.

Paige is going to turn up and hear or see R SMITH, come to me and say that she isn't meant to be on the same shift as him and go home. This is assuming she makes it into the smoko rooms. She may see his car in the car park, and struggle to go in, if at all.

I think what a lot of people don't understand is when you have been violated by someone, especially a male who bigger and older than you, it can be traumatic hearing his voice or seeing his face. Even though they may not be in the same gang, they are on the same shift.

So to say there will be no interaction between them, that would be from Paige's point of view, as she can't stand the man for obvious reasons, however the narcissistic, gaslighting bully that R SMITH is, won't stop him from going into the other smoko room where Paige is and just 'be there'.

In saying all that, they will be put in separate gangs, and I won't bring it to Paige's attention, however like I said, I imagine Paige will want to go home.”

- At 10.30am the same day, Mr Mascarenhas advised Ms Heveren that Ms Cogger was free to go home if she felt the need to. And at 3.20pm, Ms Heveren informed him that Ms Cogger had gone home from her shift after coming into the office “*visibly upset, red in the face and shaking, saying that she can't do her shift due to R SMITH being there.*”
- On 2 December 2024, Ms Cogger sent the following email to Mr Jamieson and Ms Tsirepas:¹²

“I'm writing another email addressing the continuing concern of being rostered on with Robert Smith. This weekend I was rostered on both days 30/11/24 and 1/12/24 with R. Smith however luckily I was unwell on the 30th and went sick.

On the 1st I drove in the gate and instantly felt sick to my stomach seeing his car. When I walk past him in the smoko rooms I could feel myself shaking and my anxiety levels were increased, even though he was on a separate gang. I went into the shift manager and asked to go home as I felt physically sick being at work. I should not have to feel like this going in to work, it has been stated I don't have to work with him and this should be easily avoided.

Even being on different gangs and different smoko rooms won't stop him just walking in to make me uncomfortable. He is a known bully in our workplace and having been harassed by him I know the lengths he goes to, to make someone uncomfortable and unsafe. Knowing that he's in another room 10m away, makes my anxiety go through the roof. Please put in a better system to ensure this doesn't keep happening. It is extremely unfair to me."

- The same day, Ms Tsirepas responded to Ms Cogger advising "*Robert being a "known bully" has not previously been conveyed to HR*" and asked her to provide examples of incidents/behaviour that led to Mr Smith being characterised as a "bully". And also, if Mr Smith had taken steps to make her feel "uncomfortable" after being directed by management not to approach her.¹³
- Ms Cogger replied to Ms Tsirepas on 5 December 2024 and confirmed Mr Smith had not approached her "as such". But adding that on 12 November 2024 when she had not been allowed to go home, Mr Smith had made her feel very uncomfortable by glaring her, stopping her cab and getting in her drive path.
- Ms Cogger also advised Ms Tsirepas as follows:¹⁴

"I feel like a target to him.

I know previously he had been reported with taking unwanted photos of people at work and posting them online without consent.

He has had another incident bullying someone recently that I have heard of, which caused a colleague to go home early, however not sure if it was reported or not.

He recently targeted Jeremy, calling him names in front of multiple people for coming forward about this situation. Which is another reason why I think people stay quiet and don't report him as they don't want to be targeted like Jeremy has.

- I also class what he did to Charlotte and I as bullying as he targeted us personally, as well as sexual harassment..."
- Later that day, Ms Tsirepas advised Ms Cogger that Qube's HR team had commenced a confidential investigation into Mr Smith's conduct and that she had ensured they would not be rostered on the same shift going forward.¹⁵
- On 13 December 2024, Mr Smith was provided with a letter from Qube standing him down from work on pay following reports that he may have engaged in unacceptable workplace behaviour. Qube's letter advised Mr Smith:¹⁶

"As you know, Qube values include Integrity, Reliability and Inclusion. Qube expects all employees to embody these values in everything that we do. In this instance, Qube is concerned that you may have failed to act consistently with Qube's values and fallen short of the behaviour expected of Qube employees.

It is important for you to understand that, while no decisions have been made about your conduct or any associated consequences, this matter is very serious,

and the investigation may lead Qube to contemplate taking disciplinary action against you up to dismissal in the event the allegations are substantiated.

You will be provided with a full list of allegations in writing after the investigator has had the opportunity to obtain full details of the complaints made. After the list is provided to you, you will be afforded an opportunity to put forward your response to the allegations and to advise of any relevant witnesses or other people that you consider have information that will assist the investigation.”

- On 17 December 2024, Mr Smith received a further letter from Qube directing him to attend a meeting the following day with Ms Tsirepas and Mr Jamieson to discuss the allegation against him as follows:¹⁷

“As you know, Qube wrote to you on 13th December 2024, informing you Qube has received reports that indicate you may have engaged in unacceptable workplace behaviour. It has been alleged:

- On or around Wednesday 27th November 2024, you asked another employee “What’s for lunch?” to which they replied “Subway”. You then told that employee “Well I spat in it and put my cock in it”.
- On or around September 2024, you requested another employee drive the toilet car but this employee was unable as they were already driving the breakout cab off the ship. You then called the employee a “condescending cunt” and “a useless piece of shit”.

This conduct is in contravention to the Qube Workplace Behaviour Policy, Qube Code of Conduct and Ethics, and the Qube Employee Handbook.”

- On 18 December 2024, Mr Smith attended a show cause meeting with Ms Tsirepas and Mr Jamieson to provide a response to these allegations. Mr Lumsden attended this meeting as his support person.
- At the commencement of this meeting, Ms Tsirepas reminded Mr Smith he was on a final warning. That this was his 3rd recorded disciplinary matter in the last 12 months and that it was his final opportunity to show cause why his employment should continue if the allegations against him were substantiated.¹⁸
- In response to this statement, Mr Lumsden raised a concern that Mr Smith’s grievance to his final warning had not been resolved. Ms Tsirepas undertook to follow up this concern. On 19 December 2024, she emailed Mr Lumsden confirming Mr Oritz had advised on 17 May 2024 that the final warning stands and that Mr Smith’s grievance had not been taken further.
- Mr Smith denied he had engaged in the alleged conduct. He also raised concerns in this meeting that Ms Heveren was openly out to get him sacked.
- Ms Tsirepas also asked Mr Smith to respond to allegations he was a known bully in the workplace at this meeting and identified the allegations against him as two specific incidents of bullying. Mr Smith denied the allegations that he was a bully.¹⁹

- On 15 January 2024, Mr Smith was advised that the allegations against him had been substantiated and that his employment with Qube was no longer tenable. He was terminated with immediate effect and paid 4 weeks in lieu of notice.

The Hearing

[16] There being contested facts involved, the Commission is obliged by s.397 of the Act to conduct a conference or hold a hearing. In the circumstances of this case, I determined a hearing was the most effective and efficient way to resolve the matters of contention.

[17] A hearing was conducted on 5 and 15 May 2025. Mr Smith was represented by Mr Bond of the MUA. The Respondent was represented by Ms Preston (Of Counsel) whom I granted leave to appear pursuant to s.596 of the FW Act.

Witnesses and submissions

[18] Mr Smith filed written submissions and provided a witness statement, in addition to his F2 application form in support of his application to the Commission. MUA Victoria Branch Secretary, Mr Robert Lumsden also provided supporting witness statements. Both Mr Smith and Mr Lumsden provided sworn evidence during proceedings.

[19] The Respondent filed written submissions, and a series of documents in support of its position in addition to its F3 employer response. The Respondent's submissions were supported by the sworn evidence of Ms Tsirepas, Ms Heveren and Mr Churchward.

[20] A court book, containing all materials filed by the parties was compiled and distributed to the parties prior to the Hearing. I received the entirety of the court book into evidence, subject to appropriate weight being given to the evidence that was tainted by opinion, irrelevance or hearsay.

Initial matters to be considered

[21] Section 396 of the Act sets out the following:

“The FWC must decide the following matters relating to an application for an order under Division 4 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.”

[22] As set out above in s.396 of the Act, consideration as to whether the dismissal was unfair cannot occur unless the Commission is first satisfied that the provisions of s.396 have been met. In the present case, it is not contested, and I am satisfied that Mr Smith has made his application within the requirements of the Act. It is not contested, and I am satisfied that Mr Smith was

earning below the high-income threshold and is a person protected from unfair dismissal. It is also not contested, and I am satisfied, that the Respondent is not a small business. Nor is it asserted, and I am satisfied this is not a case of genuine redundancy.

[23] As I have been satisfied that the requirements of s.396 are met, I am required to consider the merits of whether Mr Smith's dismissal was harsh, unjust or unreasonable.

Summary of positions

The Applicant's case

[24] Mr Smith contends he has been unfairly dismissed. That he did not engage in the conduct that is alleged and that the Respondent has not provided a valid reason for termination.

[25] He accepts he engaged in some misconduct, but that this does not justify the termination of his employment in his circumstances. That the Respondent has already investigated and given him a final warning for his conduct in relation to the Facebook incident. That he is not a workplace bully. And that he has had no warnings, allegations or findings made against him about bullying in the workplace after 15 years employment.

[26] Mr Smith also argues that he has not been provided procedural fairness in an opportunity to review or respond to details of the specific complaints against him, including the alleged bullying conduct or the "hatch incident", until after the decision to bring his employment to an end was made.

[27] Furthermore, that as an employee of 15 years' service, with a good employment history, his termination is harsh in the circumstances where he is 62 years of age, has limited prospects of re-employment and has engaged in conduct that is regularly engaged in by other stevedores and managers across the workplace.

[28] On this basis, Mr Smith submits the Commission should find he was unfairly dismissed. That his termination was harsh, unjust and unreasonable and make an order for reinstatement and compensation.

Observations on the Applicant's evidence

[29] My assessment of Mr Smith's evidence is that of someone clearly out of his depth, uncomfortable with the position he has found himself in and unable to accept why, after 15 years of service, only now are his actions and conduct being called into account.

[30] His evidence of his conduct in relation to the Facebook incident is less than convincing and inconsistent. Under examination, he accepted he "zoomed" into the pictures of his two female co-workers. He also accepted, when pressed, that the conversation in relation to his female co-workers was inappropriate for the workplace and that he should not have been using his phone while on shift to show pictures of colleagues to other workers.

[31] When asked to explain why showing pictures of female co-workers was inappropriate, I am not satisfied Mr Smith yet understands the gravity of his conduct. At no stage did Mr Smith accept or acknowledge an appreciation of the perspective of the two females in the image. I accept Mr Smith is genuinely sorry for his conduct. However, I am not satisfied he fully appreciates the inappropriateness of his actions in objectifying these women.

[32] I accept his evidence that he genuinely sought to apologise to the two women in the photo. I also accept that his actions in showing the pictures were not intended to cause harm, nor were they maliciously motivated. Consistently however, his evidence from “zooming in” to his familiarity with Facebook, the origin of the picture and the nature of the conversation about the photos was unreliable. In short, I am satisfied this evidence supports a conclusion that he showed the photos of two female coworkers, zooming into their bodies in a suggestive manner, in a conversation with male co-workers urging they “*take a look at this*”.

[33] Similarly, I am satisfied, that it is more likely than not that Mr Smith had an interaction with Mr Churchward where he said words to the effect that “*I don’t want to work with you*”. I do not, however, accept that the evidence supports the incident described as the Hatch incident occurred in the way described by Mr Churchward.

[34] I accept Mr Smith was genuinely concerned about the future of his employment relationship and that he genuinely believed there were people, including Ms Heveren, out to get him.

[35] I also accept that he clearly understood his employment relationship was at risk because of the first and final warning he received following the Facebook photos incident. That he sought to dispute the first and final warning and that he made a formal complaint of being targeted and victimised to Mr Jamieson that was not acted on, nor considered by Ms Tsirepas.

[36] I accept Mr Smith regularly called co-workers names and used swear words in the workplace. However, I am not satisfied he used the specific words alleged.

[37] I accept Mr Smith was involved in an incident involving Mr Aquilina on 27 November 2024. I am not, however, satisfied he engaged in the alleged conduct.

[38] I am satisfied Mr Smith did not reveal the whole truth in his responses with Human Resources about the Facebook Photo and Subway Sandwich incidents.

[39] I am not satisfied Mr Smith is a bully or that he has engaged in conduct justifying the termination of his employment in the circumstances of this case.

Observations on Mr Lumsden’s evidence

[40] Mr Lumsden provided evidence of the Commission from his position as MUA Victorian Branch Secretary and Mr Smith’s support person in disciplinary meetings. Mr Lumsden was also involved in representing Mr Smith and his fellow stevedores in EBA negotiations with Qube’s national management team.

[41] I accept Mr Lumsden’s evidence of the robust nature of the workplace and the regular and common use of swear words by both stevedores and members of management at Qube.

[42] I accept that following his representation of Mr Smith in relation to the Facebook photos incident, he formed an awareness that there continued to be issues with the people involved at the worksite. I accept Lumsden’s evidence that he did not receive any complaint or request for assistance from any other member at the workplace about this except Mr Smith.

[43] In terms of his representation of Mr Smith, I am satisfied Mr Lumsden considered each issue and allegation against him on face value and genuinely did not consider the findings against him warranted a final warning or termination.

[44] I do not accept that Mr Lumsden was not aware Qube considered his request for a review of Mr Smith's final warning as closed and that he was not told the final warning would stand. I accept it is more likely than not, as Mr Lumsden accepted, his failure to take this matter further and formalise an appeal pursuant to the terms of the enterprise agreement was something that "slipped through the cracks" in a busy period of his work on behalf of Qube employees.

[45] Mr Lumsden accepted in proceedings that Mr Smith's conduct in showing the photos of female colleagues was not acceptable and misconduct. I also accept he acted genuinely when he made Mr Jamieson aware of Mr Smith's concerns he was being targeted and victimised and that people were trying to get him sacked. That he has not heard previous complaints of Mr Smith being a bully. And that he was not aware of any action taken by Qube to follow up Mr Smith's complaint of being victimised.

The Respondent's case

[46] The Respondent's position is that Mr Smith was terminated with cause for gross misconduct. That he was provided with procedural fairness and due process. That the employer conducted a fair and thorough investigation into allegations against him. That they made sound and defensible findings he engaged in the alleged conduct. And that his conduct was highly inappropriate, contrary to company policy and damaging to others in the workplace.

[47] Furthermore, that Mr Smith was dismissed with notice even when the conduct he was found to have engaged in was sufficiently seriously to constitute serious misconduct. And that that there were multiple valid reasons for Mr Smith's termination – including the Facebook incident, Hatch incident, Toilet car and Subway sandwich incidents presented in evidence to the Commission.

[48] The Respondent opposes Mr Smith's reinstatement and the provision of any form of compensation by order of the Commission. They submit his application should be dismissed.

Was the dismissal harsh, unjust or unreasonable?

[49] I must consider all the circumstances of the case along with the relevant authorities.²⁰ A dismissal may be unfair, when examining if it is 'harsh, unjust or unreasonable' by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:²¹

"It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, 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."

[50] Section 387 of the Act provides for the criteria for consideration whether a dismissal was harsh, unjust or unreasonable as follows:

“387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

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

[51] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me.²²

[52] I have set out my consideration of each below.

s.387(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)

[53] In order to be a valid reason, the reason for the dismissal should be “sound, defensible, or well founded”²³ and should not be “capricious, fanciful, spiteful or prejudiced.”²⁴ 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.²⁵

[54] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.²⁶ 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 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.²⁷

[55] Deputy President Asbury (as she was then) summarised the relevant principles in relation to an employer’s onus of establishing that there was a valid reason for a dismissal on the balance of probabilities as follows in *Mellios v Qantas Airways Limited*, which was confirmed on appeal by the Full Bench:²⁸

“[17] In considering whether there is a valid reason for the Applicant’s dismissal, I am required to be satisfied on the balance of probabilities that he engaged in the alleged misconduct or in misconduct to which dismissal was a valid, sound and defensible response. I must be conscious of the gravity of the allegations and the ramifications for the Applicant if they are made out. However, the standard of proof does not change and the issues in dispute must be determined on the balance of probabilities. Put another way, it must be more probable than not that the Applicant engaged in the relevant misconduct.”

[56] Relevantly to the circumstances of the present case where the valid reasons for dismissal are not limited to those advanced at the time of dismissal, in *Newton v Toll Transport Pty Ltd* the Full Bench to the Commission has made clear as follows:²⁹

“[65] The Commission is bound to determine whether, on the evidence provided, facts existed at the time of termination that justified the dismissal... in determining whether there was a valid reason for the dismissal the Commission is not confined to the reasons advanced by the employer (either at the time of dismissal or during the course of the subsequent hearing). A valid reason for dismissal can be any valid reason underpinned by the evidence provided to the Commission.

...

[73] ...The proposition that earlier instances of misconduct which have been condoned by the employer ‘cannot of themselves, constitute valid reasons for dismissal’ is simply wrong.”

[57] I have applied these principles to the matter before me.

Consideration

[58] The Respondent’s position is that there are numerous valid reasons for the termination of Mr Smith’s employment. That the evidence supports a conclusion Mr Smith engaged in the conduct alleged and that both on their own, and taken together, each instance provides a valid, sound and defensible reason for his employment to come to an end.

[59] On review of all the material and evidence presented to the Commission, Qube argue the valid reasons for Mr Smith’s termination are as follows:

- Mr Smith engaged in the misconduct by showing photos of female work colleagues to co-workers (the **Facebook photo incident**).
- Mr Smith engaged in misconduct by victimising, targeting and swearing at a junior employee, Mr Churchward (The **Hatch and Toilet car incidents**).

- Mr Smith engaged in misconduct by swearing at and intimidating a co-worker, Mr Aquilina (the **Subway Sandwich incident**).
- Mr Smith lied to human resources in his responses to their investigations into the above incidents.
- Mr Smith has engaged in misconduct by bullying colleagues in the workplace, including in the incidents above.

[60] To be satisfied Qube had valid reason to dismiss Mr Smith, I must be satisfied that it is more probable than not he engaged in the misconduct alleged. This requires a consideration of all the relevant evidence and submissions of the parties, for the Commission to make a finding that, on the balance of probabilities, Mr Smith did in fact engage in the alleged misconduct. I have set out my consideration of each of the grounds of misconduct Mr Smith is alleged to have engaged in below.³⁰

The Facebook Photo Incident

Mr Churchward's evidence

[61] Mr Churchward's evidence is that on the day, he was working in the hold of the ship (hatch) with 3 other male stevedores, including Mr Smith, who was the foreman. During the shift, Mr Smith began boasting about two female co-workers talking to him regularly and sending them photos of themselves. That he, and his fellow stevedores, didn't believe Mr Smith and told him so saying words to the effect of "*that's not true.... your full of it*".³¹ And that in response, Mr Smith told him and his co-workers that he had photos saved on his phone and computer "*just in case*" and showed them a photo of the girls "*in their bikini's, in a hot tub together*".³²

[62] Mr Churchward's evidence is that in showing the photo Mr Smith scrolled through his phone, clicked on the photo, and then showed it to him and his workmates. That his reaction, and that of his workmates, was that it was wrong Mr Smith had photos like that. And that it was wrong and disrespectful he was showing them around.³³

[63] Mr Churchward says his workmates made this clear to Mr Smith, and that he agreed. That none of them were impressed by Mr Smith, and that he thought it was disrespectful and disappointing conduct.³⁴

Mr Smith's evidence

[64] Mr Smith accepts that he showed the photos as described by Mr Churchward. His evidence is that he did so in the context of a conversation amongst all the stevedores. That he is Facebook friends with the two women and that he showed the photos from his Facebook account. He acknowledges that Mr Churchward seemed to be offended by his decision to show the photo, but that the other stevedores were not. He maintains it was Mr Churchward who was angered by his conduct. In proceedings, Mr Smith accepted that he was likely to have "zoomed" onto the image of the women in the photo.

[65] In retrospect, Mr Smith accepted he should not have shown the photo and that it was inappropriate do to so. Further, accepting that as foreman on shift he did not have authority to

use his phone for the purposes of showing images of co-workers. His evidence is that his behaviour, whilst inappropriate, was not intended to harm or offend anyway. And that he has consistently indicated a willingness to apologise to the women in the picture for showing their photo without consent but has been denied an opportunity to do so.

Findings

[66] The only evidence before the Commission about this allegation is the contested evidence of Mr Smith and Mr Churchward, who present significantly different versions of events. Neither of which I am satisfied present an accurate description of what occurred in the hatch on 27 March 2024.

[67] Mr Smith accepts he acted inappropriately in showing a photo of co-workers to colleagues contrary to Qube's policies. This includes, as he accepted in evidence, "zooming in" on the images in a suggestive and inappropriate way. His actions in doing so clearly amount to misconduct and provide a valid reason for dismissal. I am satisfied of this being the case.

[68] On the evidence before me, however, I am not satisfied, as Mr Churchward claims, that the source of the offensive photo was not Facebook as Mr Smith maintains. At its highest, Mr Churchward's evidence is that *"It just looked like, just your camera roll on your phone"*.³⁵ Absent any other direct evidence, including from the other stevedores present or the women in the picture, I do not accept this evidence supports a conclusion Mr Smith is lying about the photo being on Facebook or that's where he is able to recall it to have come from.

[69] In reaching this conclusion, I have considered the evidence presented by the Respondent that the women pictured denied ever putting the photo in question on Facebook or providing it to Mr Smith. This evidence was not open to be examined by the Commission. I have therefore, favoured the direct evidence of Mr Churchward and Mr Smith in reaching these findings in the circumstances where elements of misconduct have been accepted.

[70] I also do not accept that Mr Smith just said to Mr Churchward *"you're close with the girls, aren't you?... Look at this photo they sent me when they were in Canada"*.³⁶ Mr Smith's evidence is that the context in which he showed the photo was an inappropriate conversation amongst the stevedores about the romantic prospects of one of them. Accepting that he inappropriately brought up his coworkers and showed their photo, suggesting they be considered.

[71] Mr Churchward doesn't recall this.³⁷ His evidence is that he did not have much to do with the others. Yet he is adamant he was close enough to Mr Smith to see where he got the pictures off his phone and hear exactly what he said.

[72] I do not accept this to be the case. Rather, I find it is more probable than not Mr Smith's evidence of the context in which he showed the photo is the more accurate version of events.

[73] Mr Churchward initially maintained he was only disappointed with Mr Smith's conduct in showing the photo because it was inappropriate, disrespectful and offensive. In his witness statement, he said: *"I didn't see it as a joke. I felt very uncomfortable. If I had a daughter and a photo of her like that was been shown, I would be mad."*³⁸ Similarly, in proceedings, he submitted he *"definitely wasn't angry"* by Mr Smith's conduct,³⁹ later conceding he did have some level of anger.⁴⁰

[74] Mr Churchward also denied he ever wanted Mr Smith to lose his job because of what had occurred.⁴¹ Initially making the following remark in cross-examination:⁴²

Mr Bond:

You were upset that he kept his job after people cooperated and came forward and make a complaint about the bikini photo incident, right?

Mr Churchward:

Um sorry, I think I was, like, I feel like it's upsetting the company wouldn't do anything about that. But if me and him worked together it doesn't affect me. Doesn't bother me if he still has a job or not."

[75] Subsequently, Mr Churchward made clear he "didn't think he should've kept his job, but [he] didn't want him to lose his job."⁴³

[76] Further accepting that his then girlfriend (Ms Cogger), one of the women pictured, had told him on multiple occasions that she didn't want Mr Smith to work for Qube anymore because he "was a sexual harasser, and a bully". And that Mr Smith did in fact lose his job, in part, because of what Mr Churchward has alleged.⁴⁴

[77] This inconsistent evidence from Mr Churchward leads me to the conclusion that his version of events in relation to this incident is selectively presented.

[78] Whilst I am more persuaded by Mr Smith's evidence of what occurred on 27 March 2024, it does not follow that he did not engage in misconduct, providing a sound and defensible reason for the decision to terminate his employment. I am satisfied this is the case.

[79] I accept Mr Smith he is genuinely sorry for his conduct. However, I am not satisfied he fully understands why it was so offensive or fully appreciates the inappropriateness of his conduct. When pressed on this point in proceedings, after accepting he probably shouldn't have "zoomed in" to the image saying words to the effect of "check them out" Mr Smith engaged in the following exchange:

Counsel:

What's the problem with it

Smith:

Well, they were saying to me at work that its inappropriate for showing a photograph like that without their consent or something

Counsel:

So why is it inappropriate?

Smith:

I don't know.... Because they're in bikinis or something, maybe.

Counsel:

You know that a safe workplace is really important to Qube

Smith:

Yes

Counsel:

That is really important that women and others at work feel safe and respected

Smith:

Yes

Counsel:

And not sexualised?

Smith:

Yes

Counsel:

Yes, but you still can't understand why there's a problem with what you did?

Smith:

Yes, I understand now.

[80] I consider this evidence relevant to the seriousness of the misconduct I have been satisfied Mr Smith engaged in. My assessment of this evidence is that, whilst sorry, Mr Smith's understanding of the offense caused still needs improvement.

[81] While I have made this finding, I am not satisfied that the evidence supports a conclusion that there was anything malicious, predatory, or intentionally harmful amounting to sexual harassment or bullying in Mr Smith's conduct. I do not make this finding.

Consequences of the Facebook Photo Incident

[82] The consequences of Mr Smith's misconduct on 27 March 2024 were not without significance.

[83] Firstly, Mr Churchward acted on his concern about what occurred. He spoke directly to one of the women in the photo shown by Mr Smith. He asked her if she had sent bikini photos to herself to Mr Smith and she responded, "No way!".⁴⁵

[84] Mr Churchward's understanding is that she subsequently made a complaint of Mr Smith's conduct to management. His evidence is that she then asked him if he would be prepared to speak to management about what happened. His answer was yes, and that he subsequently spoke to Ms Tsirepas about what occurred.

[85] Ms Tsirepas's evidence to the Commission is that Mr Jamieson brought the incident of 27 March 2024 to her attention seeking her assistance with the investigation/disciplinary process. That this was the first disciplinary process she had independently conducted.⁴⁶ In proceedings, her evidence was that she undertook an investigation into the bikini photo incident, conducted interviews during her investigation and took notes of what was said attaching them to her witness statement.⁴⁷

[86] Further, that when she conducted interviews during a disciplinary investigation, she always took notes of what was said.⁴⁸ Only to accept that she would only take notes if the person interviewed could comment on whether the allegations could be substantiated or not substantiated.⁴⁹

[87] Ms Tsirepas attached three notes to her witness statement in relation to the events on 27 March 2024. The first was titled *File note – Discussion Misconduct* dated 17 April 2024. Present at this meeting were Ms Tsirepas, Mr Jamieson, Mr Smith and Mr Lumsden. Ms Tsirepas’s notes begin as follows:⁵⁰

“VT began the meeting by stating “Today’s meeting is regarding an allegation received by Jay from two employees. To begin I’ll outline the complaint, then give you the opportunity to respond and then go over the possible outcomes of today’s meeting.

...

The complaint relayed to Jay by two employees, and corroborated by witness statements is that...

...

On Wednesday 27th March, it has been alleged that, while in the hatch, you turned to other employees and told them you were talking with 2 girls and they sent you images of a personal nature. You then showed a photo to other employees.”

[88] The second, undated document, is Ms Tsirepas’s interview notes of what she was told by Ms Cogger (Paige), who recounted what she was told by Mr Churchward.⁵¹ It begins as follows:⁵²

“Paige was in the car with Jeremy, and he turned around and told her Robbie Smith had bragged to him, “you guys sent him photos in bikinis’. Paige denied doing this. Paige said “The boys said to Robbie there is no way the girls would have sent him photos”, as Robbie is in his 60s. Jeremy told Paige that Robbie then turned around and showed a photo of Paige and Charlotte in bikinis on his phone...”

[89] The third, undated document, is what Ms Tsirepas says are her interview notes of what she was told by Ms Sheldon (Charlotte).⁵³ These notes begin as follows:⁵⁴

“VT said “I have some questions. Have either you or Paige seen the image in question. Charlotte said “no, that’s what makes it hard. We can’t pinpoint the photo. There was 1 we thought it could potentially have been but Paige showed the photo to Jeremy and he said it wasn’t the same one.”

VT stated “I do want to pre-face by saying, no matter where he obtained the image – it is obviously inappropriate to show a photo of 2 colleagues that they deem to be of personal nature to others in the workplace so that is not up for debate.”

[90] And ended as follows:

“VT asked if any concluded comments to add? Paige said no, as Paige relayed what she had been told by Jeremy so she would have a better understanding than her.”

[91] These interview notes are revealing in the following aspects. Firstly, either Ms Cogger was present when Ms Tsirepas interviewed Ms Sheldon, or Ms Tsirepas incorrectly recorded her name in her notes. Secondly, neither Ms Charlotte or Ms Sheldon had seen or were able to identify the offensive photo Mr Smith had shown to the other stevedores. Finally, Ms Tsirepas’s evidence to the Commission does not indicate that she separately interviewed Mr Churchward, or the 2 other stevedores Mr Smith admits he had shown the photo to.

[92] Ms Tsirepas’s evidence is that conclusions of her investigation into what occurred on 27 March 2024 were as follows:⁵⁵

“14. I also spoke with Ms Cogger and Ms Sheldon as part of the investigation. They had not seen the photo that the Applicant had shown to the other stevedores, but denied having any bikini photos on the Facebook accounts. This made me question the source of the photo, but I did not feel like I could draw any conclusions about this....

15. Either way, I was comfortably satisfied that the Applicant’s behaviour in showing the photo was entirely inappropriate and inconsistent with Qube’s values and policies...

16. ...I considered the appropriate disciplinary outcome to be a First and Final Warning. This is the course I recommended...”

[93] Following interview on 17 April 2024, Mr Jamieson provided Mr Smith with a letter dated 19 April 2024, which advised him Qube was satisfied his conduct on 27 March 2024 was inconsistent with Qube’s policies, values and expectations of employee behaviour. This letter provided Mr Smith with a first and final warning about his conduct. It also advised he had a final opportunity to improve and reach the expected standard and any failure to do so would likely result in the termination of his employment.⁵⁶

[94] While accepting his conduct on 27 March 2024 was inappropriate, Mr Smith and his union Secretary Mr Lumsden still believed it was unfair. Acting on this belief, on 21 April 2024, Mr Lumsden emailed Mr Jamieson indicating he wished to lodge a grievance pursuant to clause 48.1(b) of the enterprise agreement about the decision to give Mr Smith a first and final warning. Mr Lumsden’s email was in the following terms:⁵⁷

“... ”

Rob wishes to lodge a grievance as per Clause 48.1b

This is in relation to the final warning letter that he received last Friday.

There is no actual description of the outcome of the investigation. On that basis a final warning seems manifestly disproportionate.”

[95] Both Mr Smith and Mr Lumsden understood this email to be an appeal to Mr Smith's first and final warning letter. Mr Lumsden also raised his concerns directly with Mr Ortiz, Qube's General Manager of IR and at an EBA bargaining meeting in Adelaide on 23 April 2024. He recalled Mr Ortiz said he would investigate it. Mr Lumsden sent a further follow up email to Mr Jamieson on 7 May 2024 asking for a response as soon as possible. Mr Jamieson responded and indicated the matter was with Mr Ortiz.

[96] Mr Lumsden accepts he did not take any further action in relation to his appeal until after Mr Smith was stood down for work in December 2024. Qube's submissions are that Mr Ortiz, who did not give evidence, made it clear that the final warning decision was to stand and confirmed this to Mr Smith by 19 December 2024.⁵⁸

[97] It is clear from this evidence that both Mr Smith and Mr Lumsden thought Mr Smith's grievance with being issued with a first and final warning was being considered by management. I accept this to be the case.

[98] It is also clear that Mr Smith clearly understood that if his conduct and behaviour failed to improve after what occurred on 27 March 2024, he could be dismissed. Mr Smith clearly articulated this to be the case under examination as follows:⁵⁹

“It was only not long after that time with the photo incident. I had been given a warning. There's no way I would have done this, and that's what – it's like I was trying to explain, there was a group trying to get me. You know, trying to take me – trying to get me terminated.”

[99] Despite some anomalies in Mr Smith's testimony that I have identified, I accept this evidence. While I have not been satisfied Mr Smith was entirely truthfully in what he told Qube about the Facebook incident or his appreciation that it was Mr Churchward who made the complaint about him, I am satisfied that his evidence is not that of someone intentionally seeking to mislead the Commission.

[100] Rather, on balance, I have found Mr Smith's evidence genuinely provided. That he was not someone with an intent to harm or malice. But that he was careless and failed to perceive the potential impact of his acts and behaviour on others. And someone who did nothing to reflect on how his words, actions and conduct could be interpreted or perceived by others, regardless of whether he meant no harm by it.

[101] It is also clear that another consequence of the Facebook incident was that Mr Churchward, Ms Cogger and Ms Sheldon were not satisfied with how things were handled by management. Mr Churchward's evidence is that he was disappointed, and that Ms Cogger was not satisfied that Mr Smith had kept his job. Ms Tsirepas's evidence is that both Ms Cogger and Ms Sheldon continued to be in regular contact with her after the incident. In proceedings, she acknowledged as follows – “...*given the impact that it did have, I was in constant communication...*”⁶⁰

[102] Neither Ms Cogger nor Ms Sheldon provided any direct evidence to the Commission. The only evidence before the Commission of the impact of Mr Smith's actions on them both is provided by Ms Tsirepas, Ms Heveren and Mr Churchward. This evidence, which I accept, is that they found Mr Smith's conduct reprehensible, offensive and demeaning. That they were concerned by it and had an ongoing concern about continuing to work with him.

[103] Ms Tsirepas's notes of her interview with Ms Sheldon record this to be the case. Ms Tsirepas further evidence is that another consequence of this incident is that Qube HR and management decided to take steps to ensure Mr Smith, Ms Sheldon and Ms Cogger had minimal contact thereafter and that they were no longer rostered to work on the same shifts or share the same meal rooms together.

[104] If Ms Cogger was present in this interview, she did not disagree with Ms Sheldon. Mr Churchward's evidence of how Ms Cogger felt was that she felt violated, and that she had been sexually harassed and bullied by Mr Smith.

[105] Neither Ms Tsirepas's notes, nor the allegations formally put to Mr Smith about what occurred on 27 March 2024 reflect this being put to him at the time.

[106] It was not until 2 December 2024 that there was any mention of Mr Smith perpetuating sexual harassment or bullying.

[107] As I will return to these matters further below, for this purpose, my conclusion on the evidence before me is that another consequence of the Facebook incident was that Ms Sheldon and Ms Cogger continued to be aggrieved with how Qube had handled their complaint, and the conduct of Mr Smith.

[108] I have found and been satisfied that Mr Churchward was disappointed and not satisfied in how Qube handled the complaints made by Ms Cogger and Ms Sheldon about Mr Smith on 27 March 2024. I have also been satisfied that, despite raising a grievance about receiving a first and final for his conduct on 27 March 2024, Mr Smith had a clear understanding following this event that if his conduct did not improve, he could be dismissed.

[109] In this context, the Respondent submits a further valid reason for its decision to terminate Mr Smith is that he took active steps to victimise and bully Mr Churchward for coming forward about the Facebook photo incident.

[110] There is no evidence before the Commission that it was Mr Churchward who made a complaint about what occurred on 27 March 2024. The above evidence is that the complaint was made by Ms Cogger and Ms Sheldon.

The Hatch Incident

[111] Mr Churchward's evidence is that following the Facebook photo incident he would generally try and keep out of Mr Smith's way. Mr Smith provides the same evidence from his perspective. Despite this, on 23 April 2024, Mr Churchward submits he was unloading a ship with Mr Smith who was his foreman. Mr Churchward needed to use the cargo cage to descend into the ship. His evidence is that as he was getting his safety harness on to use the cage Mr Smith came up to him and the following exchange occurred:

Mr Smith: *“Fuck off”*

Mr Churchward: *“excuse me?”*

Mr Smith: *you’re not coming down the hatch, you’re a fucking rat. I’m not fucking working with you cunt, fuck off”*

Mr Churchward: *“alright mate, it is what it is. I’ll fucking stay out of your way all night, I don’t care”*

Mr Smith: *“I don’t work with fucking cunts like you”*

Mr Churchward: *“alright cool. If you don’t want to work with me, don’t work with me. It doesn’t bother me”*.⁶¹

[112] Mr Churchward’s further evidence was that:

“...some of the other stevedores asked what I had done to piss Robbie off. It was obvious to me that Robbie was shitty with me because I had come forward about the Bikini Photo Incident. Nothing else had happened that could have triggered this sort of response. I wasn’t about to get into it with the other stevedores, so I told them not to worry about it and that it was all good.”⁶²

[113] Under examination in proceedings Mr Churchward went further. His evidence is that he went home after this shift and:

“...couldn’t sleep, couldn’t eat – that morning, sorry. Couldn’t sleep, couldn’t eat that whole day. Had about three or four panic attacks because of how I got treated. Then I decided to write an email that night...I feel like I don’t deserve to go home and have to still think about this sort of, shit, I guess at work...”⁶³

[114] Mr Churchward does not specify who he sent his email too. Nor does he provide any evidence of seeking medical assistance, accessing EAP support, leave or other support. In further evidence, he made it clear that it was Mr Smith’s conduct that caused him to feel the way he did. That Mr Smith’s conduct made *“a lot of people at work feel uncomfortable”*, that he was the only one at work that behaves that way and that people were reluctant to report him because they were worried what might happen to them.⁶⁴

[115] Mr Churchward did not accuse Mr Smith of being a bully. Nor did he make any other formal complaint of bullying, harassment, victimisation or any other misconduct against Mr Smith. He accepted that he would regularly use swear words at work and that this was a common occurrence. That he swore at Mr Smith and refused to follow his direction when he disagreed with it.

[116] Mr Churchward made it clear that the difference between the swear words he used and those used by Mr Smith is that he felt Mr Smith's words were directed straight at him.⁶⁵ That he was uncomfortable around Mr Smith and "pretty scared of him", and that others at work felt the same but were scared to put their hands up. When pressed, he accepted there was no evidence of Mr Smith striking fear into anybody at work or being a bully.⁶⁶

[117] Mr Churchward accepted he was aware of Qube policies and their requirements of employees to treat each other with respect, and accepted he was encouraged to come forward and make complaints if needed.⁶⁷ He explained that after his involvement in the Facebook photo incident and sending his email about what happened on 23 April 2024, he did not want to get involved and just wanted to move on with his job and his life.⁶⁸

[118] When pressed on why he did not make a complaint, Mr Churchward's explanation was that he felt it wouldn't go any further and he didn't want to compromise his job.⁶⁹

[119] His explanation for this remark was that bringing something like this up might make him look bad and stop him progressing. His explanation for why he felt like it wouldn't go any further was because after the email he sent following his shift on 23 April 2024, he got a phone call from Ms Tsirepas and then nothing happened.⁷⁰

[120] Ms Tsirepas did not include any recollection of the Hatch incident, phone call, interview or notes with Mr Churchward in her witness statement. Her evidence in proceedings was that she received Mr Churchward's email about the Hatch incident. That she emailed him; took steps to ensure he was not rostered with Mr Smith again and called him. The purpose of this call was to get more information to see where she was going to go with the next steps of the investigation.⁷¹

[121] Following this phone call, she sent a letter to Mr Smith advising him that Qube had received a formal complaint about an incident that took place during his shift on 23 April 2024 as follows:⁷²

"The complaint and statement received indicate that you may have engaged in unacceptable workplace behavior (*sic*). Qube has determined that it is appropriate to investigate these allegations.

Qube has received a complaint from another employee that indicates allegedly:

- During your shift, while putting harnesses on to get caged in with your co-workers, you victimized an employee that has been involved in the previous investigation of your workplace misconduct.
- It is alleged, you told the employee they could stay out of the hatch if they wanted. When that employee responded "I'm more than happy to go down into the hatch", you then said "You're staying out. I don't want to work with you."
- In doing so, you have failed to act in accordance with Qube's policies

...

Every attempt will be made to ensure that the investigation is completed as soon as practically possible...”

[122] Notably, there are significant anomalies between the evidence Mr Churchward presented in proceedings about his recollection of what happened, and the letter Ms Tsirepas sent shortly after the alleged events. For example, Ms Tsirepas makes no reference to an allegation of Mr Smith using swear words directly targeted at Mr Churchward.

[123] In further evidence, Mr Churchward indicated he decided to get involved with concerns about Mr Smith again in December 2024. This was when his then girlfriend, Ms Cogger, sent an email about Mr Smith being a known bully. That he spoke to Ms Tsirepas again after this.⁷³ And that Ms Tsirepas and other representatives of Qube encouraged him to give evidence and make a statement against Mr Smith.⁷⁴ When asked again if he was happy Mr Smith got the sack, Mr Churchward’s final response was:

“I wouldn’t say happy because I knew that I’d be in a situation that I’m now and that’s bullshit in my opinion. I shouldn’t have to be here doing this. If he took responsibilities for his own actions we wouldn’t be here.”⁷⁵

[124] Mr Smith’s evidence is that the events alleged by Mr Churchward are not true and did not occur. That on his receipt of the letter from Ms Tsirepas he checked with the shift managers if there were any complaints about him. He says he was told there were no complaints. That he was not stood down for an investigation to occur or even contacted by Ms Tsirepas to be interviewed. His evidence is that he didn’t hear anything further from Qube after receiving the letter accusing him of misconduct. Further, that he understood he was on a warning.

[125] Mr Smith’s further evidence is that it was not until he received Mr Churchward’s witness statement that became aware he was responsible for the letter of complaint he received on 3 May 2024. I do not accept this to be the case. As Mr Smith accepted in proceedings, I am satisfied that he would have concluded Mr Churchward was the person who had made a complaint about his conduct on 23 April 2024.

Findings

[126] I am not satisfied that there is evidence before the Commission to lead me to conclude that it is reasonable to believe Mr Smith engaged in the conduct Mr Churchward alleges.

[127] The significant anomalies and inconstancies in the Respondent’s position that I have set out above support this conclusion. Included amongst these are the differences in the allegations of what Mr Smith is alleged to have said put to him by Ms Tsirepas, and those put forward by Mr Churchward. It is also of note that Ms Tsirepas failed to include any record of her interviews about what occurred on 23 April 2024 in her material presented to the Commission, despite her assertions that she always takes notes.⁷⁶

[128] I am also satisfied that following the incident of 27 March 2024, Mr Smith understood his conduct had to improve and it is more likely than not that he didn't engage in the alleged conduct. Furthermore, I accept Mr Smith's evidence that he was not investigated or provided any additional information about the alleged hatch incident after receiving Ms Tsirepas's letter. Overall, I find his account that the conduct he is alleged to have engaged in did not occur more compelling to that of Mr Churchward.

[129] As I have not been satisfied the alleged conduct occurred, I cannot be satisfied the hatch incident is a valid reason for dismissal. That the only explanation Ms Tsirepas can provide for why she did nothing to follow up her letter of such serious allegations is that she "*dropped the ball*" reinforces my conclusion.⁷⁷

The Toilet Car Incident

[130] The findings about this incident were set out in a letter Mr Smith received on 9 January 2025, advising him the allegations of misconduct against him had been substantiated as follows:⁷⁸

- On or around September 2024, you requested another employee drive the toilet car but this employee was unable as they were already driving the breakout cab off the ship. You then called the employee a "condescending cunt" and "a useless piece of shit."

[131] Mr Churchward provided additional evidence to support these allegations. His evidence is that he and Mr Smith had a tense exchange about how fast he was driving while at work on their shift during a 'go slow' before working together on 5 October 2024. On 5 October 2024, he was arranged to be working the breakout role on shift where Mr Smith was the team leader. At the start of the shift, he says the foreman warned him that Mr Smith was out to get him that night.⁷⁹ He accepts that he and Mr Smith had a run in earlier in the shift about a vehicle car being incorrectly removed from the ship they were unloading and that they both swore at each other.⁸⁰ And further, that:⁸¹

"39. When we drove up off the ramp, I remember Robbie was yelling at me and pointing at me from inside his car where he was sitting. I could not hear exactly what he was saying because we were moving and my window was closed. I did not stop to find out.

40. Shortly after, Robbie suddenly pulled up in front of us in his car and cut us off...

41. Robbie then rolled down his window and yelled at me to do the same. Robbie then started going off at me, saying among other things "you condescending cunt. You useless piece of shit".

42. ...Robbie was swearing his head off at me. I did swear back at him...

43. When he finished yelling at me, I told him that he needed to pull his head in and that he couldn't be disrespecting people like that.

44. Then he started up again and yelled at me that I needed to go and get the toilet car...

45. Someone need to bring up the toilet car, but I was already driving the breakout taxi. There were three cabs of 18 other stevedores who could drive the toilet car back. There

was no reason to get me out of the breakout taxi and drive back the toilet car...I knew that Robbie was just trying to push me around. I did swear back at him and said something like "get your own fucking toilet car". It was already 11:00pm. I wasn't getting paid and I wasn't going to keep putting up with Robbie's shit. I then rolled up the window and drove the car off.

46. At some point then or around that time, Robbie said that he was going to get me "written up" for my behaviour that night. I told him he couldn't write me up for defending myself."

[132] Ms Tsirepas included a filed note to her witness statement from the other stevedore who was driving the breakout taxi with Mr Churchward on 5 October 2024, Mr Zidarich. There is no dispute Mr Zidarich was in the cab with Mr Churchward on 5 October 2024.

[133] Ms Tsirepas's file note of her conversation with Mr Zidarich records that he could not recall what Mr Smith said to Mr Churchward.⁸² His recollection of the event as she recorded it as follows:

"RZ: Look I can't tell you the exact words said but Robbie was not happy with Jeremy. Jeremy pointed out that he was already driving the cab and said "What should I do?" Rob wasn't happy with him and bagged him out. I did not hear exactly the words used. I don't really remember the exact words but they weren't nice. Jeremy was obviously driving a vehicle already so why would you ask him to. He likes to ride Jeremy after what happened earlier in the year.

...

VT: Did Jeremy tell Rob to fuck off?

RZ: Yes he did. When you're being targeted like that, and Robbie gets on the nasty side. He will ask you to do something when you he knows you can't do it...

RZ: With Rob when he gets a bit of power, he likes to ride people. To have him stop you have to give it back then he will back off.

VT: Is this the first time you have witnessed Jeremy being targeted?

RZ: I haven't ever witnessed, but I've heard he has ridden him a few times. Sometimes he bags other people to make himself look good, but as soon as you give it back to him he usually stops...

...

RZ: Me and him have had it out a bit but he stopped when I stood up to him. He's a good worker but when he gets a bit of power, and he has group around him he likes to be outspoken. Everyone else just wants to come to work and work in harmony, and he just disrupts it. I know Jay has his hands full, but it should have been squashed back when everything happened with the girls and the photo. It's a shame. Some people say he shouldn't get the sack and others say he should have been gone a while ago."

[134] Mr Zidarich was asked by Qube to provide a witness statement to the Commission, but he did not. Ms Tsirepas's record of what he told her was that, even though he was in the cab with Jeremy he could not recall the exact words that Mr Smith is alleged to have said.

[135] Mr Smith denies using the words that Mr Churchward says he used. His evidence presented a very different picture of what happened on the night of 5 October 2024. Mr Smith's evidence is that he did not specifically ask Jeremy to drive the toilet car but only asked him to stop so one of the other breakout drivers could have got out and drive it to where it needed to be parked. And that Jeremy just told him to "*get fucked*" before driving off.⁸³

[136] Ms Heveren provided evidence to the Commission that the only person to make a report about what happened on 5 October 2024 was Mr Smith. Her evidence was Mr Smith asked her to speak to Jeremy for swearing at him and refusing to do what he was asked by his team leader.⁸⁴

[137] The allegations of misconduct arising from the Toilet Car Incident against Mr Smith are explicit. That he used the language Mr Churchward has alleged.

Findings

[138] On the evidence before the Commission, I do not accept that the evidence establishes Mr Smith engaged in the conduct alleged. It follows; I do not accept that the allegations that Mr Smith used the words alleged by Mr Churchward provide a valid reason for Mr Smith to be dismissed.

[139] I accept it is more likely than not that Mr Smith swore at Mr Churchward on 5 October 2024. Mr Churchward accepts he certainly swore at Mr Smith. Mr Smith denies using the words alleged. There is no other direct evidence before the Commission to support the Respondent's position. The record of what Mr Zidarich who was in the cab told Ms Tsirepas does support Mr Churchward's version of what Mr Smith said. These facts do not provide a sound and defensible basis on which to conclude Mr Smith engaged in the alleged misconduct.

[140] I do not make this finding. In reaching this conclusion, I have considered that Mr Churchward did not make a complaint about Mr Smith's conduct after this incident occurred.

[141] In fact, he did not make a complaint about Mr Smith's conduct on 5 October 2024 until these proceedings commenced when requested to do so by Qube. His first mention of what he recall's precisely what Mr Smith said to him while they were both in vehicles working on the waterfront unloading a ship was in a conversation he had with Ms Tsirepas in December 2024 when she called him. I do not accept this evidence to be reliable.

[142] I accept that both Mr Smith and Mr Churchward swore at each other on shift on 5 October 2024. I also accept that, given the history they shared, it is more likely than not that there was an increased degree of sensitivity to their communications and how they were perceived and interpreted by each other. It is well accepted that swearing on the waterfront, however, is not controversial. Nor is it usually controversial for stevedores to engage in robust language and use explicit language, including directing them at each other.

[143] The gravamen of the Respondent’s submissions in proceedings were that in the context of this case Mr Smith swearing at Mr Churchward on 5 October 2024 as an act of targeted victimisation. And that this conduct is a further valid reason justifying the decision to terminate his employment. I am not persuaded the evidence supports this conclusion. I do not make this finding about the interaction of Mr Smith and Mr Churchward on 5 October 2024.

[144] Rather, my assessment of this interaction is that it was nothing more sinister than two stevedores who clearly did not get on, communicating poorly, inappropriately and ineffectively with each other. While engaging in this conduct discredits both Mr Smith and Mr Churchward and has created a detriment to, and negatively impacted their employer, the evidence does not establish there is an element of victimisation or maliciousness in Mr Smith’s conduct.

[145] In reaching this conclusion, Mr Churchward’s evidence that he was not afraid to stand up for himself, tell Mr Smith to “*fuck off*” and “gave as good as he got” even though Mr Smith was his team leader on the night, reinforces my conclusion.⁸⁵

The Subway Sandwich Incident

[146] The findings about this incident were set out in a letter Mr Smith received on 9 January 2025 advising him the allegations of misconduct against him had been substantiated as follows:⁸⁶

“On or around 27 November 2024, you asked another employee “What’s for lunch?” to which they replied “Subway. Why? What did you do to it?”. You then told that employee “Well I spat in it and put my cock in it”.”

[147] No direct evidence was presented to the Commission to support the conclusion that Mr Smith has engaged in this conduct.

[148] Ms Heveren provided evidence that she was shift manager on 27 November 2024. Mr Smith and several other employees, including Mr Dylan Aquilina were rostered to work on the “Roll on Roll Off” (RoRo) gang that day. Her evidence is that she recalled Mr Smith asking where his smoko bag was during a second toolbox meeting. And that shortly afterwards, she saw Mr Smith catch his smoko bag and that few minutes later:⁸⁷

“11. ...Dylan came into my office and told me that he was the one who had taken Rob’s bag and that he had done this because Rob had been at him all morning...

...

My sense at the time was that Dylan had come in to tell me that because he was worried he would get in trouble for taking Rob’s bag. Dylan is somebody who keeps to himself and is very quiet. He is not one to mess around or play pranks...”

[149] The gang went back to work. As they were leaving the ship for the crib room for a stop work break, Ms Heveren says she followed them and as she pulled up, she saw Mr Aquilina standing there with a subway sandwich in his hands. She noticed he was visibly upset and shaking. Mr Aquilina told her he needed to go home. Ms Heveren’s evidence was that then:⁸⁸

“15. I asked him what had happened and whether he was okay. He said that he was okay but that he needed to go home.

16. I asked Dylan why he needed to go home and he said words to the effect that Rob had been at it again. I asked Dylan what he was talking about, and he said that they had been in the cab coming back from the ship when Jason Todd (one of the other stevedores in the gang) asked Rob what was for lunch. Rob said “*Subway*” because he had seen Dylan put his Subway in the fridge. Dylan said that he had laughed and Rob had then said “*well, I spat in it and put my cock in it.*”

17. I asked Dylan whether he wanted to put in a complaint. He said he did, so I asked him to step into my office.

18. In my office, Dylan and I recorded in an email his account of what had happened.

...

20. Once Dylan had left, I finished off the email and sent it...”

[150] Ms Heveren attached this email to her witness statement, which was as follows:⁸⁹

“Hi Jay and Myron,

There has been an incident with R SMITH and Dylan Aquilina.

As I pulled up to the smoko room and got out of my car, Dylan was standing beside my car very upset. He asked if he could go home as he had enough of R SMITH and then told me what R SMITH had done and that he wanted to put in a **formal complaint**.

Dylan told me as the roro gang were pulling up to the smoko room J TODD said to R SMITH “What’s for lunch?” and R SMITH said “Subway” as he saw that Dylan had put Subway in there earlier. Dylan laughed and then R SMITH said “Well I spat in it and put my cock in it”.

Dylan also wanted to let you know that Steve Millar and Anton Moret were also in the taxi and heard.

I heard there were issues happening in the morning but I wasn’t told. However, with that information, I was on deck and in the yard and didn’t notice anything untoward.

I also had a conversation with Shannon about it and nothing was mentioned to him from either one prior to the incident.”

[151] Ms Heveren’s evidence went on to note that Mr Jamison asked her to talk the other stevedores in the gang to get their version of what had occurred. Her evidence is that she asked each of them separately and that two of them had not heard anything at all, and that none of them were prepared to make a witness statement. On this basis, Ms Heveren concluded that none of the other stevedores were prepared to speak out.⁹⁰

[152] Mr Aquilina was off sick the following shift and when he returned to work, he made it clear to Ms Heveren that he did not want to make a complaint about Mr Smith. After talking to Ms Tsirepas in December 2024, Ms Heveren said she tried to encourage Mr Aquilina to put in a formal complaint. Her evidence is that he did not want to because he was worried about the backlash.⁹¹

[153] Mr Smith denied that he used the language alleged by Ms Heveren. He accepts that he would regularly engage in banter, joked around with co-workers and use swear words. That perhaps others could misinterpret his banter to be something other than it was, but that his intention was never meant to hurt or harm anyone.

[154] Mr Smith's versions of events is the exchange with Mr Aquilina on 27 November 2024 occurred in the crib room, not the cab. That earlier in the morning, they had been mucking around. Mr Aquilina had taken and hidden his bag and thrown gloves at him. He had thrown Mr Aquilina's gloves out the cab window. At the start of the stop work break, he walked into the crib room and that's when the interaction described at [146] above occurred.

[155] Mr Smith does not accept Mr Aquilina was shaking and upset by what he said to him. His evidence is that Mr Aquilina is someone who "gives as good as he gets" in terms of banter amongst stevedores on the wharf.⁹² He acknowledged that he was later told Mr Aquilina left work that day because something happened but maintains he didn't notice anything unusual about him on the day.

[156] Under cross examination, Ms Heveren acknowledged that she had an association with Ms Cogger's mother and that they were friends. That Mrs Cogger had told her she was upset that Mr Smith had shown photos of her daughter to other stevedores.⁹³ That she was disappointed Mr Smith had not been sacked for the Facebook photo incident because she thought he had breached Qube's sexual harassment policy.⁹⁴

[157] On 1 December 2024, Ms Heveren was informed by her Operations Superintendent Mr Mascarenhas that he was going to have to roster Mr Smith and Ms Cogger on the same shifts. On receiving this information, she replied informing her senior managers, including Mr Jamieson, her views on this.

[158] Ms Heveren's evidence is that the basis of this email to her supervisors was because Ms Cogger had previously been rostered on shift with Mr Smith and gone home. Ms Heveren did not present anything further to support this being the case.⁹⁵

[159] Ms Heveren also accepted in proceedings that she referred to Mr Smith as being a "*narcissistic, gaslighting bully*" because she believed he had violated and sexually harassed Ms Cogger. Her evidence was that she had formed this view on her understanding of how Ms Cogger felt about Mr Smith showing her photo to other stevedores and her frustration.⁹⁶

[160] In her evidence, Ms Heveren accepted that apart from the interaction with the other stevedores on 27 March 2024, she was not aware of any other incident or interaction where Mr Smith is alleged to have harassed or abused Ms Cogger. That she was not aware of any other complaints of bullying being made against Mr Smith from any other employees. That Mr Smith had never bullied her and that she never witnessed him ever bullying anybody else. Further accepting that she made the allegations against Mr Smith without any evidence to support her claims.⁹⁷

[161] In explaining her position, Ms Heveren provided evidence to the Commission that she had other employees come to her to make complaints about Mr Smith. That she had heard about other complaints about what occurred in the ‘smoko rooms’ and Mr Smith putting their faces on photos of other people’s bodies, but that people would not make formal complaints.⁹⁸ When pressed, Ms Heveren referred to a fellow shift manager, Mr Carbis, who had previously told her he felt “*sick from the fear of whether Mr Smith was working or not*”.⁹⁹ Ms Heveren reiterated her view that Mr Smith was a bully on this basis and that he should not be reinstated.

[162] Mr Carbis did not provide evidence to the Commission. While I have considered what Ms Heveren says he told her and what Ms Tsirepas says he may have told her, absent further direct evidence, I am not satisfied I can conclude anything further from this material.

[163] Aside from Mr Aquilina telling her he was worried about repercussions, Mr Carbis telling her he was sick from fear, and her conclusion Ms Cogger was not able to stand Mr Smith, Ms Heveren accepted that she was not aware of anybody ever expressing they were fearful of Mr Smith at work.¹⁰⁰

[164] Mr Smith’s evidence is that on 8 May 2024, he made a complaint to Mr Jamieson that he was being targeted and victimised by others at work, including two shift managers, Ms Heveren and Mr Carbis. That he felt there was a group out there trying to get him sacked.

[165] Ms Tsirepas accepted Mr Smith had made this complaint. His evidence was that she did not investigate the complaint but understood Mr Jamieson had spoken to Ms Heveren about it. Ms Heveren did not give this evidence.

[166] Ms Heveren’s evidence was that she was not aware Mr Smith had made a complaint about being targeted and victimised by her. She denied she was trying to get Mr Smith sacked. Her evidence was that she recalled seeing an email from Mr Jamieson telling all shift managers that they were not to be discussing the Facebook photo incident, Mr Smith, Ms Sheldon and Ms Cogger.¹⁰¹

[167] Ms Heveren also accepted she did not provide Mr Churchward with a formal warning for swearing at Mr Smith during the Toilet Car Incident because Mr Smith said he did not want to make a formal complaint.

[168] When pressed on her understanding of Qube’s bullying and harassment policies, Ms Heveren’s evidence is that the extent of her training in Qube’s bullying obligations as a shift manager was “*reading the policies and procedures*”. That her understanding of her obligations was that if someone made a complaint about bullying to her, she had to report it to Mr Jamieson. And that while she was not sure about her obligations in relation to the reporting documents for bullying, she was aware Qube did not approve of bullying in the workplace.¹⁰²

[169] Ms Heveren was a shift manager, at a senior level with a significant amount of authority and responsibility to uphold, reflect and apply Qube policies. She has made serious allegations that Mr Smith has breached these policies, and that he is a bully in the workplace. Yet when asked about her understanding of these policies she responded as follows:¹⁰³

“PN2688

What's its position about bullying and harassment in the workplace? ---I couldn't categorically tell you; I haven't looked at it for some time.

PN2689

As a shift manager, one of your responsibilities is to apply the policies of the company? ---Correct.

PN2690

You're not aware of what your responsibilities include? ---Correct.”

[170] The Applicant submits Ms Heveren has conspired to manipulate Ms Cogger and Mr Smith being rostered to work together in early December 2024 to have Mr Smith sacked. That she is the only one who has made a complaint about what Mr Smith is alleged to have said to Mr Aquilina about the subway sandwich. That she referred Ms Tsirepas to Mr Churchward about the Toilet Car Incident. And that she has accused Mr Smith of being a bully and narcissist because she wants him sacked.

[171] I do not accept the evidence establishes this conspiracy theory.

[172] Nor do I accept that Ms Heveren has presented reliable evidence to the Commission. My assessment of her evidence is that she clearly had a pre-determined view about Mr Smith. She firmly believed he should have been sacked for his actions of showing the photos of Ms Cogger and Ms Sheldon and that this has coloured all her subsequent interactions with, and about Mr Smith thereafter.

[173] In circumstances where Ms Heveren's evidence is the only direct evidence before the Commission of the conduct of Mr Smith on 27 November 2024, I am not satisfied it presents an accurate picture of what occurred. I am therefore not satisfied, on balance, that Mr Smith engaged in the conduct alleged. It follows; I am not satisfied the events of 27 November 2024 provide a valid reason for his dismissal.

[174] In reaching this conclusion, I have also had regard to Ms Tsirepas's evidence about her investigation into these allegations and the reasons for her findings. Ms Tsirepas' evidence is that she had no reason to not believe Ms Heveren was presenting her with an accurate version of what Mr Aquilina told her happened.

[175] Ms Tsirepas accepted she reached this conclusion even though she did not talk to Mr Aquilina directly and knew that he did not want to make a formal complaint. Also knowing that the evidence of two other stevedores on shift with Mr Smith and Mr Aquilina (Mr Todd and Mr Anton) did not hear anything or couldn't recall what was said. And further accepting that the other stevedore present, Mr Millar, was not interviewed at all. Ms Tsirepas also accepted that she did not consider the complaint Mr Smith had made about being victimised and targeted by Ms Heveren.¹⁰⁴

[176] Ms Tsirepas's evidence reinforces my conclusions that there was no basis that is sound or defensible for Qube to have concluded Mr Smith engaged in conduct alleged on the 27 November 2024.

Has Mr Smith been honest?

[177] The Respondent rejects Mr Smith's evidence and submits he has not been truthful in his responses during the investigations into his conduct or these proceedings before the Commission.

[178] Qube submits this dishonesty provides a further valid reason for dismissal.

[179] I do not accept this to be the case. My assessment of Mr Smith's evidence is that it has been genuinely provided, to the extent of his recollection and ability.

[180] I am not persuaded that he has deliberately peddled mistruths to account for or justify his conduct in either the investigations into his conduct or these proceedings. Rather, I am satisfied he has been as honest as can reasonably be expected of him when faced with allegations of serious misconduct from his employer and that he was aware put his employment and livelihood at risk.

[181] I accept there are some anomalies in Mr Smith's evidence. But I do not consider these to be such that they rise to the level of intentionally seeking to mislead either his employer or the Commission.

[182] My consideration of Mr Smith's evidence identifies three inconsistencies. First, I am satisfied Mr Smith was more likely than not aware Mr Churchward was the individual who had made the allegations of misconduct about him which he was notified of on 3 May 2024. Second, I am satisfied Mr Smith (as he acknowledged) knew that the conversation he and the other stevedores were having before he showed them the Facebook photo was something he should have said more about when interviewed. Third, what Mr Smith told Ms Tsirepas about as to what he said to Mr Aquilina about the subway sandwich was not consistent with the version of the conversation he relayed to this Commission.

[183] I have considered each inconsistency at their highest as follows.

[184] Mr Smith's evidence is that the detailed interaction with Mr Churchward in the Hatch never took place. I have accepted this evidence and am satisfied Mr Smith cannot be expected to recall something he says didn't occur.

[185] In proceedings, Mr Smith accepted the conversation with the other stevedores on 27 March 2024 was inappropriate. He submits that he did not accurately report this to Ms Tsirepas when initially asked because he did not want to get others into trouble, including potentially, Mr Churchward. This misplaced aversion led Mr Smith to not be entirely honest in his response. Not disclosing everything and telling deliberate lies, however, are very different. On this basis, I do not accept Mr Smith's non-disclosure, while misplaced, rises to a level of conduct providing a valid reason to terminate his employment.

[186] I am also not satisfied that Mr Smith's clarification that he said to Mr Aquilina he "*may have spat in his subway*" in addition to telling him to "*cop it*" is nothing more serious than a clarification of evidence.

[187] It follows that I am not satisfied these inconsistencies provide a further valid reason for dismissal in the circumstances of this case.

Has Mr Smith engaged in bullying of colleagues in the workplace, including in the incidents above?

[188] The Respondent submits the evidence in this case establishes a pattern of bullying and victimisation conduct by Mr Smith that provides a further valid reason for dismissal.

[189] The basis of this submission is the material presented by several co-workers of Mr Smith: including Mr Churchward, Mr Aquilina and Mr Carbis of being targeted, subjected to bullying conduct and being fearful of him. Ms Heveren also provided evidence that other employees had complained to her, or others, about Mr Smith but had not made formal complaints because they were fearful of the repercussions.

[190] I have considered this evidence in detail above. My assessment is that it does not establish Mr Smith was a bully. Nor does it establish that Mr Smith engaged in victimising Mr Churchward. On balance, I have concluded that it is unlikely Mr Smith engaged in the bullying conduct alleged.

[191] An additional basis for the Respondent's submission is that Mr Smith's conduct of showing the photos of Ms Sheldon and Ms Cogger was also an act of victimising, harassment and bullying. Ms Cogger's email to Ms Tsirepas of 2 December 2024 supports this submission.

[192] While I accept Ms Cogger had a sound basis to want to have nothing to do with Mr Smith and not feel comfortable around him, Ms Cogger's email is not an allegation of bullying.

[193] Rather, Ms Cogger's email asserts Mr Smith is a known bully. It goes on to make a request for Ms Tsirepas to put a better system in place to ensure she is not rostered on the same shift with him again.

[194] The difficulty for the Respondent is that asserting someone is a known bully, does not equate to them being a bully.

[195] A further significant difficulty is that neither Ms Cogger, Ms Sheldon, Mr Carbis, Mr Zidarich or anyone else who is claimed has been bullied by Mr Smith has provided evidence that could be examined by the Commission.

[196] In fact, the Respondent has not presented any direct allegation or complaint of Mr Smith being a bully by a co-worker.

[197] Ms Heveren's accepted she was not aware of any such allegation.

[198] Ms Tsirepas indicated she spoke to Mr Jamieson, who is Mr Smith's General Manager, and he did not accuse Mr Smith of being a bully, only saying he had "heard".¹⁰⁵

[199] Only Mr Churchward who did not make a complaint about Mr Smith being a bully, provided direct evidence to the Commission. For the reasons set out above I have not been satisfied this evidence establishes Mr Smith either bullied or victimised him.

[200] When Ms Cogger was asked by Ms Tsirepas to provide examples of incidents/behaviour that led to her characterisation of Mr Smith as a "known bully" she referred to an incident where his glaring at her made her feel uncomfortable. Mr Smith denies his glaring was anything other than doing his job monitoring work on the wharf. Absent an alternative version of what occurred, I accept Mr Smith's evidence.

[201] Notably, Ms Cogger did not mention the other instances where she had left work or not gone past the car park because she had discovered she was on the same shift as Mr Smith and could not be on site with him. Rather, Ms Cogger only referred to reports of Mr Smith taking unwanted photos of people, that he had recently targeted Mr Churchward in addition to bullying and sexually harassing her and Ms Sheldon by showing their photo to other stevedores.

[202] I have considered the evidence presented to support the submission Mr Smith is a bully. In each instance, I have not been satisfied that this evidence leads to a conclusion that on balance, Mr Smith, engaged in bullying.

[203] I am therefore not satisfied that Mr Smith's bullying conduct provides another valid reason for his dismissal because I am not satisfied he engaged in the alleged conduct.

Conclusion on valid reason

[204] I have been satisfied that Mr Smith's conduct on 27 March 2024 in showing a photo of Ms Cogger and Ms Sheldon to other stevedores is a valid reason for dismissal. I am also satisfied his conduct involved 'zooming in' on the image in a suggestive way. This finding supports a conclusion he was not unfairly dismissed.

[205] I have not been satisfied the Respondent has presented other sound, defensible or valid reasons for the termination of Mr Smith's employment because I have not been satisfied, on balance, that he engaged in the alleged conduct.

s.387(b) Whether the person was notified of that reason

[206] Proper consideration of s.387(b) requires a finding to be made as to whether the Applicant "was notified of that reason". 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,¹⁰⁶ in explicit,¹⁰⁷ plain and clear terms.¹⁰⁸ Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).¹⁰⁹

[207] The valid reasons I have found to exist are Mr Smith's conduct on 27 March 2024 (the Facebook Incident) contrary to Qube's Workplace Behaviour Policy, Code of Conduct and Ethics, and the Qube Employee Handbook as well as its values of Integrity, Reliability, Inclusion and Zero Harm.

[208] The allegations letter of 17 December 2024 and termination letter of 15 January 2025 make no reference to this valid reason. The conduct for which Mr Smith was asked to answer for and was ultimately terminated for was his specific conduct on 27 November 2024 in relation to the Subway Sandwich Incident and on 5 October 2024 regarding the Toilet Car Incident.

[209] As identified by the Full Bench in *Crozier v Palazzo Corporation Pty Ltd*:

“As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before a decision taken to terminate their employment in order to provide them an opportunity to respond to the reason identified.”

[210] The Applicant’s position is that Mr Smith was entitled to be made aware of the precise nature of the allegations against him and provided a proper opportunity to respond. The Respondent’s case is that from 17 April 2024, Mr Smith was on notice in form of the final warning he received that he had to improve.

[211] In the 3 separate letters Qube sent to Mr Smith about the allegations against him and the decision to dismiss him, there is not a single mention of Mr Smith being on a final warning, or his conduct on 27 March 2024.

[212] The first and only mention of this is recorded in Ms Tsirepas’s notes of Mr Smith’s “show cause” meeting on 18 December 2024 where she recalls saying:¹¹⁰

“Before I go over the allegations, Robert as you’re aware you’re already on a final warning, this is your 3rd recorded disciplinary matter in the last 12 months. I want to make it quite clear that this is your final opportunity to show cause why we should continue the employment relationship should the allegations be substantiated.”

[213] Ms Tsirepas’s notes go on as follows:¹¹¹

“RL: We raised a grievance about the final warning and never heard back.

RL checked emails and it was 23rd April that RL followed up the grievance from the previous week. VT to check with Dan Ortiz.

RL: So if this is a show cause you are required to provide a full list of allegations.

VT: That’s correct. I issued a letter advising Robert of the allegations.”

[214] Ms Tsirepas’s letter of 17 December 2024 made no reference to his prior conduct, warnings or allegations other than those in relation to the Subway Sandwich and Toilet Car Incidents in precise terms.

[215] These are the allegations to which Mr Smith responded to.

[216] They are in no way inclusive of the valid reasons I have found for this dismissal. I find this factor weighs in favour of Mr Smith’s dismissal being harsh and unjust.

[217] In reaching this conclusion, I have also considered the Respondent’s suggestion that Mr Smith’s appeal to his final warning was pre-conceived. I find no evidence of this being the case. Mr Lumsden sent his email to Mr Jamieson seeking a review of the final warning on

Sunday 21 April 2024. I am satisfied he did so because both him and Mr Smith genuinely believed the decision was harsh, not because they had any pre-conceived notion of what was to follow.

s.387(c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[218] It is not contested that Mr Smith was provided an opportunity to respond to the allegations against him in relation to his conduct with regard to the Subway Sandwich and Toilet Car Incidents. It is not in dispute that Mr Smith was not notified that further reasons for his dismissal included allegations of bullying, victimisation and dishonesty.¹¹²

[219] In *Newton v Toll Transport Pty Ltd*,¹¹³ the Full Bench made clear that section s387(c.) focused on provision of an opportunity to respond to a reason for dismissal prior to the dismissal.

[220] I have been satisfied that Mr Smith was not notified that a reason for his dismissal was his conduct on 27 March 2024. I am, therefore, also satisfied Mr Smith was not provided an opportunity to respond to this reason.

[221] I have also considered Ms Tsirepas's evidence in proceedings that Mr Smith was terminated because of bullying as a further reason for dismissal.

[222] Mr Smith's evidence is that it was not until he had the opportunity to review the submissions of the Respondent that he became aware he had apparently been dismissed because of his conduct on 27 March 2024, the alleged Hatch Incident and allegations against him of bullying and victimisation.

[223] Ms Tsirepas's record of the show cause meeting with Mr Smith is set out above. At the conclusion of the meeting, her record is that the following exchange occurred:

“VT: ...Throughout this investigation, it has been raised by witnesses that you are a known bully in this workplace. What is your response to that?

RS looked confused and looked to RL.

RL: It's a bit of a general statement, I don't think it's fair to put that to him with no specific incident.

VT: I have put 2 specific bullying incidents to him, and yes it is a general statement but one that has been made by witness's privy to the incidents raised. I think it would be less fair if I didn't give Robert a chance to respond to such a comment.

RS: I don't understand.

VT: I'll rephrase. You are viewed as a known bully. How do you respond to that?

RS looked confused.

VT: Do you agree with the comment?

RS: I don't think I am."

[224] This is the first mention of an allegation against Mr Smith of being a known bully. Ms Tsirepas accepts this was put to him in general terms. It was also put in the context of a meeting and the record establishes Mr Smith was engaging in a response to his conduct on 27 November 2024 and 5 October 2024, which made no mention of bullying.

[225] The above considerations make it clear to me that Mr Smith was not given an opportunity to respond to all the matters which directly informed his dismissal.

[226] Had the Respondent intended to rely on these matters, it should have made them clear to Mr Smith. The fact that Mr Smith was not provided details of the matters relied upon by the Respondent to dismiss him meant that he was wrongfully denied an opportunity to respond. This factor weighs in favour of a finding that his dismissal was harsh and unjust.

s.387(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

[227] There is no dispute Mr Smith was afforded a support person of his choice at all stages of the disciplinary process. His union, the MUA, was present with him in all meetings.

s.387(e) If the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal

[228] This factor was not a relevant consideration to Mr Smith's dismissal as he was dismissed for misconduct. This is, therefore, a neutral consideration.

s.387(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 s.387(g) - Whether the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise impacted on the procedures followed

[229] It is not in contest that Qube is an organisation of significant size, and resources, including dedicated human resource specialists.

[230] I have considered these factors, and do not consider them having any impact effecting the dismissal. I, therefore, consider these to be neutral factors.

s.387(h) Any other matters that the FWC considers relevant

[231] The provisions of s.387(h) requires the Commission to take into account any other matters it considers relevant. In the circumstances of this case, the Applicant submits there are several other matters the Commission should consider that render the Mr Smith's termination unfair.

[232] These matters include the proportionality of dismissal considering the conduct alleged and the prevalence of a practice of swearing on the wharf. That Mr Smith was treated differently to others in the workplace engaging in the same conduct. That he was denied procedural fairness, was a dedicated employee of 15 years' service and was 62 years old with limited prospects of comparable work. And finally, that Mr Smith's dismissal took place against a backdrop of hostile enterprise bargaining negotiations.

[233] The Respondent does not accept a consideration of these other matters by the Commission has any impact on the legitimacy of its decision to bring Mr Smith's employment to an end. In addition, it is their position that in any fair assessment of the circumstances of this case, the Respondent's right to exit Mr Smith from its workplace ought to be upheld.

[234] In proceedings, the Respondent's representatives made it clear Mr Smith was also dismissed because he was a bully. These are serious allegations and while my consideration of the evidence in this case does not support the Respondent's, I consider these allegations, and the workers involved are other relevant matters. I also consider Mr Smith's employment history and previous written warnings another relevant matter to be considered.

[235] I consider each of these other matters in turn below.

Disproportionate response

[236] The basis of the Applicant's argument that terminating him is a disproportionate response to his alleged misconduct is premised on his conduct as alleged in the letter of allegations. The Applicant argues engaging in swearing and banter is well established on the waterfront, and while perhaps unacceptable, is so commonplace that most employees, including managers, regularly engage with each other in such a way. Further adding that Mr Smith has not previously received any warning in relation to swearing, foul language or any related conduct.

[237] The Respondent's position is that Mr Smith has not just been dismissed for swearing, but bullying, victimisation, and dishonesty. Further, that Mr Smith's conduct on 27 March 2024 involved him zooming onto the images of his female co-workers, objectifying them.

[238] I have not been satisfied Mr Smith has engaged in bullying, victimisation and accept that anomalies in his evidence do not amount to a form of conduct justifying dismissal in the circumstances of this case.

[239] However, I have been satisfied Mr Smith's conduct on 27 March 2024 was entirely inappropriate, and on its own provides a valid reason for dismissal. Had this been the action Qube took at the time, I would not be satisfied this was a disproportionate response.

[240] The difficulty for the Respondent is that it conducted its own investigation into Mr Smith's conduct in March 2024 and resolved that the conduct warranted a final warning. Mr Smith may have sought to appeal this decision, but ultimately, the final warning was upheld. And as I have already determined relevant to s.387(c), Mr Smith was not provided with an opportunity to address his conduct on 27 March 2024 prior to his dismissal.

Differential treatment

[241] The evidence in this case is that swearing to and at others remains a common occurrence amongst stevedores at Qube, Port Melbourne. Mr Smith swore at Mr Churchward, and Mr Churchward swore at Mr Smith. Yet only Mr Smith has been called to account for this conduct.

[242] Ms Heveren's explanation for this being the case is that while she spoke to Mr Churchward about losing his cool with Mr Smith, she did not take it further because Mr Smith did not want to make a formal complaint.

[243] Mr Aquilina, however, did not want to make a formal complaint against Mr Smith. Similarly, Mr Churchward did not make a formal complaint about the Toilet Car Incident.

[244] Ms Heveren had no hesitation to bring Mr Churchward's and Mr Aquilina's experiences to Ms Tsirepas's attention when asked why she thought Mr Smith was a known bully.

[245] In proceedings, Ms Heveren accepted she believed Mr Smith was a bully, and that he should have been sacked following the Facebook incident. My assessment of this evidence is that it supports a conclusion that Ms Heveren as a shift manager of Mr Smith treated him differently to other workers.

[246] This conclusion is reinforced by the way in which Mr Smith's complaint that he was being targeted and victimised that was sent to Mr Jamieson on 8 May 2024 was handled.

[247] Rather than being independently investigated as a serious complaint, Ms Tsirepas accepted it to be, the extent to Qube's reaction appears to have been that Mr Jamieson sent an email to Qube shift managers telling them not to talk about Mr Smith or the Facebook incident.

[248] This response is in stark contrast to Ms Tsirepas's response to the email she received from Ms Cogger on 2 December 2024 that did not make a formal complaint about Mr Smith's conduct, but requested Qube do a better job to ensure herself and Mr Smith were not rostered on together.

[249] I accept an appropriate degree of caution with respect to conclusions about employees being differentially. I am satisfied, however, that the above evidence establishes Mr Smith was treated differently by Qube managers and that this finding supports a conclusion his dismissal was harsh and unjust.

Denial of procedural fairness

[250] The Applicant's contentions are that Mr Smith's disciplinary process is replete with procedural deficiencies. I have already made findings in relation to these factors as required by s.387 (b) and (c). While these findings weigh in favour of a finding that Mr Smith's dismissal was harsh and unjust in the circumstances, I do not consider these deficiencies warrant a further finding.

Length of service and age of Mr Smith

[251] Mr Smith was an employee of Qube for 15 years' service. The uncontested evidence is that he was generally a good worker. He is 62 years old and nearing retirement. By being dismissed, he has lost a job he has held for the last 15 years which he enjoys and seeks to return to.

[252] I consider these factors weigh in Mr Smith's favour that his dismissal was harsh and unjust in the circumstances.

Impact of hostile enterprise bargaining negotiations

[253] There is no evidence before me to consider the fact that the MUA and its members were involved in enterprise bargaining negotiations had any impact on how Mr Smith was treated in

this case. I do not accept this submission. Notably, each of the stevedores involved in these proceedings were MUA members and there is no evidence union membership or activity had any impact on how Qube treated Mr Smith.

Employment history and previous warnings

[254] Mr Smith received a written warning for a failure to comply with D&A requirements in February 2024. In addition to the first and final warning he received in April 2024, he accepted in evidence he had previously been counselled.

[255] I have also been satisfied Mr Smith was fully aware of the significance of the final warning he received in April 2024 and that he knew his employment was at risk if he failed to improve. This finding weighs against a conclusion his termination was harsh and unjust.

A Fair Go All Round

[256] The Respondent's position is that industrial justice requires that Mr Smith should bear the consequences of his actions. That he has been found to have engaged in conduct justifying his dismissal, was provided an opportunity to improve and failed to do so. That he has been dishonest, shown no remorse, and destroyed Qube's trust and confidence in continuing an ongoing employment relationship with him.

[257] While I have considered these submissions, I have not been satisfied on the balance of evidence that Mr Smith has engaged in the conduct alleged by his employer. I have also made findings in relation to his honesty and genuine remorse for the inappropriateness of his conduct.

[258] I accept Ms Tsirepas attempted to deal with allegations against Mr Smith to the best of her ability. However, my assessment of the evidence does not support her findings. Rather, my assessment of the evidence is that it is more likely Mr Smith did not engage in the conduct for which he was dismissed and that this decision was neither sound nor defensible.

[259] I do not consider this factor weighs against a finding that Mr Smith's termination was harsh and unjust.

The implications of Mr Smith's conduct on 27 March 2024 and the other allegations of bullying against him

[260] In proceedings, Mr Smith accepted that he has become aware of the impact of his conduct on 27 March 2024 on both Ms Cogger and Ms Sheldon was significant. I accept this to be the case. I also accept that Mr Churchward's evidence to the Commission was of someone clearly concerned about the impact, and ongoing impact, of what had occurred at work on someone he cared about.

[261] The Respondent's position is that these factors should be considered by the Commission. They also submit the Commission must consider the impact on future workers who may be discouraged from making complaints about Mr Smith or others in the future.

[262] I have considered these submissions. I accept a finding in Mr Smith's favour may be a disappointment to Ms Heveren.

[263] Ms Cogger and Ms Sheldon did not provide any evidence to the Commission. I am unable to speculate on their reaction. The same applies for Mr Carbis and Mr Aquilina. As for Mr Churchward, his consistent evidence was while he may have thought Mr Smith should have been sacked, he had no issues working with him.

[264] I am not persuaded these factors outweigh the other factors I have considered above and have weighed this in favour of a finding that Mr's Smith termination was harsh and unjust.

[265] In reaching this conclusion, I have also considered Ms Tsirepas's evidence that in the event Mr Smith is reinstated, the most likely outcome is that the Respondent will initiate a new disciplinary process. The basis of this evidence is that additional information uncovered during her investigation may have to be put to Mr Smith. When pressed, Ms Tsirepas did not take this submission further, and the Respondent acknowledged the limits on the Commission to determine a matter on the material before it.

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

[266] I have made findings in relation to each matter specified in section 387 of the FW Act as required.

[267] I must consider and give due weight to each of these matters as a fundamental element in determining whether the dismissal was harsh, unjust or reasonable.

[268] I have found Mr Smith's conduct on 27 March 2024 establishes there was a valid reason for dismissal. This weighs in favour of a finding that the dismissal was not unfair or unreasonable.

[269] My findings in relation to 387(b) and 387 (c) are weighed in Mr Smith's favour. These findings establish that Mr Smith was not notified of the valid reasons for his dismissal or provided a proper opportunity to respond to the reasons for his dismissal. As an employee of 15 years' service, he deserved to be provided these opportunities. That he was not, was harsh and unjust.

[270] My findings in relation to the 387(d) weigh in favour of a finding that Mr Smith was not unfairly dismissed. The factors in 387(e.), (f) and (g) are neutral considerations.

[271] Relevant to 387(h) I have considered the other matters relevant to the circumstances of this case and considered the views of the parties. With respect to these other matters, I have concluded Mr Smith was treated differently to other employees in similar circumstances, that this factor, along with his age and length of service, weigh in favour of a finding that his dismissal was harsh and unjust.

[272] I have considered Mr Smith's employment history and recent warnings and determined these factors weigh in favour of a finding that his dismissal was not unfair.

[273] I have considered other relevant matters and taking all these other matters into account, my findings is that on balance, these matters relevant to s387(h) weigh in favour of a finding that Mr Smith was unfairly dismissed.

Conclusions on section 387

[274] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Mr Smith was harsh and unjust because the seriousness of his conduct on 27 March 2024 in breaching Qube's policies when considered with his disciplinary history is outweighed by the following matters:

- Mr Smith's age and length of service
- My finding that Mr Smith was not notified of the valid reason for his dismissal
- My finding that Mr Smith was not provided with an opportunity to respond to reasons for his dismissal prior to being dismissed
- My finding that Mr Smith was treated differently to other workers in the circumstances of complaints made and conduct involving swearing

[275] I am therefore satisfied Mr Smith was unfairly dismissed within the meaning of s.385 of the FW Act.

Remedy

[276] Having been satisfied that the Applicant:

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

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

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

- (a) the FWC is satisfied that reinstatement of the Applicant is inappropriate; and
- (b) the FWC considers an order for payment of compensation is appropriate in all of the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

[278] Mr Smith is seeking reinstatement and submitted that reinstatement was appropriate. In support of this submission, the Applicant argues Mr Smith has a 15-year history of working with the Respondent where he has demonstrated his capacity, ability to follow polices and meet the expectations placed on him by his employer. That there has been no breakdown of trust and confidence in the employment relationship. Further, that Mr Smith has expressed regret for his conduct on 27 March 2024 and consistently offered to apologise directly to Ms Cogger and Ms Sheldon for his conduct. That he his 62 years old, has limited transferable skills and little prospect to finding comparable employment in the future. Furthermore, that at least 42 of Mr Smith's workmates support his return to work.

[279] Qube strongly opposes reinstatement.

[280] Their position is that reinstating Mr Smith would send the wrong message to everyone involved and create major issues for Mr Churchward as the only person who has bravely stood up to Mr Smith. That Mr Smith had been found to have engaged in conduct in breach of Qube's polices, that he was on a final warning and that he should be held to account for that conduct and bear the consequences of his actions. That considering the seriousness of Mr Smith's conduct, there is no element of harshness to his dismissal. And finally, that despite Mr Smith's age he has transferable skills and reasonable prospects of like, or comparable, employment.

[281] I have considered these submissions.

[282] Critical to Qube's submissions is that there has been a fundamental breakdown in its relationship of trust and confidence with Mr Smith that cannot be restored.

[283] In *Nguyen v Vietnamese Community in Australia T/A Vietnamese Community Ethnic School South Australian Chapter (Nguyen)*, the Full Bench has helpfully identified the following principles that are relevant to the impact of a loss of trust and confidence on the question of whether reinstatement is inappropriate:¹¹⁴

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based, and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, dispute a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.

- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

[284] The Full Bench concluded that, “ultimately, the question is whether there can be a level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party.”¹¹⁵

[285] My assessment of the evidence in this case is that Qube’s conclusion that it has lost trust and confidence in Mr Smith is not soundly or rationally based. It overlooks the fact that following the final warning in April 2024 and Ms Tsirepas’s letter of 3 May 2024, there have been no other complaints made against him by a coworker. Mr Smith has continued to work and perform his duties to the expectations of his employer, including alongside those involved or referred to in these materials, since this time.

[286] Mr Churchward’s evidence is that ultimately, he has no issue working with Mr Smith.

[287] Had Ms Cogger not been rostered to work with Mr Smith in early December 2024 as had been indicated, she may not have had cause to send an email to Ms Tsirepas asking Qube to improve its rostering practices.

[288] My assessment of the evidence presented of Mr Smith’s conduct in the period from his conduct on 27 March 2024 to his stand down in December 2024 supports this conclusion.

[289] I accept it is more likely than not that Mr Smith continued to engage in swearing, banter and behaviour otherwise not befitting a man of 62 years of age.

[290] However, the material presented in this case makes clear he is not the only stevedore at Port Melbourne that is likely to have behaved in this way. I do not accept this evidence provides a sound basis to conclude an irrevocable breakdown in trust and confidence.

[291] Notably, aside from Ms Heveren, whose evidence I have discounted, no member of the line management team directly responsible for Mr Smith with knowledge of his work history of over 15 years provides this evidence.

[292] Having regard to all these matters, I cannot accept the submission that Qube have lost all trust and confidence in Mr Smith is soundly and rationally based.

[293] I have also considered Qube’s submissions that the message of Mr Smith being reinstated will send to other employees, and its impact on Mr Churchward. I acknowledge these concerns. However, Mr Churchward’s direct evidence is that he has no issues working with Mr Smith.

[294] Aside from Ms Heveren, there is no evidence of co-workers of Mr Smith being opposed to, or concerned with, him being reinstated. Mr Smith has presented evidence of 42 co-workers who would welcome him back. In the weight of this evidence, I do not consider the Respondent’s submissions support a conclusion that reinstatement is inappropriate.

[295] I have also considered Qube’s submissions that the seriousness of Mr Smith’s conduct justifies his dismissal. This submission is not supported by my assessment of the evidence in

this case and the findings I have made about the allegations of misconduct made against Mr Smith.

[296] While I have made findings that his conduct on 27 March 2024 present a valid reason for dismissal, Mr Smith has already been reprimanded by his employer for this conduct. While my additional findings of his “zooming in” add to the severity of his misconduct, I do not consider this should weigh in favour of reinstatement being inappropriate.

[297] Mr Smith is a long serving and experienced employee who, until recent events, has been generally well regarded. He is recognised as a hard worker. He had a satisfactory work performance and has shown he is able to comply with his employer’s directions, policies and expectations for an extended period. He has expressed a genuine willingness to apologise to Ms Cogger and Ms Sheldon for this conduct on 27 March 2024.

[298] Mr Smith is also 62 years old and spent the last 15 years working the waterfront as a stevedore. In these circumstances, I also consider he has limited prospects of finding like or comparable alternative employment.

[299] Considering all these matters, I am satisfied that a level of trust and confidence can be restored between Mr Smith and Qube management to make the relationship viable and productive and that reinstatement is not inappropriate.

Reinstatement – to what position should Mr Smith be appointed.

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

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

[301] In the absence of any evidence on the contrary, I am satisfied that it is open to me to make an order reappointing Mr Smith within 21 days of the date of this decision to the position Mr Smith was employed in immediately before the dismissal.

Is it appropriate to make an order to maintain continuity and/or lost pay?

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

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

[303] Section 391(3) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order

that the Commission considers appropriate to cause the employer to pay the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

[304] Section 391(4) of the FW Act provides that in determining an amount for the purposes of such an order, the Commission must take into account:

- (a) The amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and
- (b) The amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

[305] An order to restore lost pay does not necessarily follow an order for reinstatement. The Commission may only make an order if it considers it appropriate to do so and only make an order that the Commission considers appropriate.¹¹⁶ Where an employee has engaged in misconduct, the Commission may refuse to make any order to restore lost pay.¹¹⁷

[306] Taking into account all the circumstances of this case, including Mr Smith's age and length of service, I consider it appropriate to make orders to maintain Mr Smith's continuity of employment and period of continuous service with Qube. I also consider it is appropriate in these circumstances to make an order in respect of lost remuneration.

[307] I have been satisfied Mr Smith's conduct on 27 March 2024 breached Qube's policies and has had a significant impact on him and other employees of Qube. I consider it appropriate that Mr Smith bear some consequence for his breach of Qube's policies and the inappropriateness of my findings about his conduct on that day. My assessment of the need for Mr Smith's understanding of the significance of his conduct to improve at [80] reinforces this conclusion.

[308] Previous decisions of the Commission have helpfully identified examples of where the Commission has reduced back pay because of an employee's misconduct.¹¹⁸ I am guided by these decisions.

[309] Taking all the circumstances of this case into account, I consider a reduction of 50% in the amount of pay Qube is required to pay Mr Smith as compensation is appropriate.

[310] Therefore, I consider it appropriate to order Qube to pay Mr Smith 50% of the amount he would have earned for the period from his dismissal to the date of his reinstatement, less the notice paid on termination and any income earned during this period.

[311] If the parties are unable to reach an agreement on this amount, I will list the matter for determination of the amount to be paid.

Conclusion

[312] I have been satisfied that Mr Smith's conduct on 27 March 2024 in breach of Qube's policies was a valid reason for dismissal.

[313] I have been satisfied further evidence of Mr Smith’s conduct on 27 March 2024 of “zooming in” reinforces my finding of misconduct, providing a further valid reason for dismissal.

[314] I have considered that Mr Smith’s employer determined to issue Mr Smith with a first and final warning for his conduct on 27 March 2024. I have considered Mr Smith’s employment and disciplinary history.

[315] I have not been satisfied Mr Smith engaged in further misconduct as alleged.

[316] I have been satisfied Mr Smith has not been made aware of the valid reason for his dismissal or provided the opportunity to respond to reasons for his dismissal.

[317] Based on these findings, and my consideration of other relevant matters including Mr Smith’s age and years of service, I have concluded that his dismissal was harsh and unjust.

[318] I have made orders reinstating Mr Smith to the position he was employed in immediately before the dismissal, maintaining continuity of his employment and in relation to lost remuneration.

[319] My orders are to take effect within 21 days of the date of this decision. An order giving effect to this decision has been separately issued in [PR791460](#).



COMMISSIONER

Appearances:

K. Bond for the Applicant.

Ms R. Preston of Counsel for the Respondent.

Hearing details:

2025.

Melbourne:

May 5, 15

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<PR791459>

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- ¹ Attachment VT-16, Witness Statement of Vicki Louise Tsirepas – 23 April 2025, Court Book p.192.
- ² Transcript, PN2685-2686.
- ³ Respondent’s Outline of Submissions at [1]-[3], Court Book p.118.
- ⁴ Attachment VT-13, Witness Statement of Vicki Louise Tsirepas – 23 April 2025, Court Book p.186.
- ⁵ Ibid, Attachment VT-07, Court Book p.173.
- ⁶ Ibid, Attachment VT-08, Court Book p.176-177, Transcript PN2599.
- ⁷ RS-6, Reply Witness Statement of Robert Smith – 1 May 2025, Court Book p.221.
- ⁸ Ibid, RS-7, Court Book p.225.
- ⁹ RL-1, Witness Statement of Robert Lumsden, Court Book p.113-117.
- ¹⁰ Exhibit #R5 Series of Emails, produced in proceedings.
- ¹¹ Ibid.
- ¹² Attachment VT-08, Witness Statement of Vicki Louise Tsirepas – 23 April 2025, Court Book pg.176-177.
- ¹³ Ibid.
- ¹⁴ Ibid.
- ¹⁵ Ibid, Court Book p.175.
- ¹⁶ RS-2, Witness Statement of Robert Smith – 7 April 2025, Court Book p.101.
- ¹⁷ Ibid, RS-3, Court Book p.103.
- ¹⁸ Attachment VT-14, Witness Statement of Vicki Louise Tsirepas – 23 April 2025, Court Book p.187.
- ¹⁹ Ibid, Court Book p.187-189.
- ²⁰ See *Australian Hearing v Peary* [2009] AIRCFB at [39].
- ²¹ (1995) 131 ALR 422 at [128].
- ²² *Sayer v Melsteel Pty Ltd* [2011] FWA 7498 at [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRC FB Ross VP, Lacy SDP, Simmonds C, 21 March 2002, at [69].
- ²³ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at [373].
- ²⁴ Ibid.
- ²⁵ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at [685].
- ²⁶ *Edwards v Justice Giudice* [1999] FCA 1836 at [7].
- ²⁷ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [23]-[24].
- ²⁸ [2020] FWC 2989.
- ²⁹ [2021] FWCFB 3457.
- ³⁰ [2020] FWC 2989.
- ³¹ Witness Statement of Jeremy Churchward – 22 April 2025, Court Book p.204.
- ³² Ibid.
- ³³ PN1052-1061.
- ³⁴ Ibid.
- ³⁵ PN1048.
- ³⁶ PN1053.
- ³⁷ Ibid.
- ³⁸ Witness Statement of Jeremy Churchward – 22 April 2025 at [11], Court Book p.204.
- ³⁹ PN1056.
- ⁴⁰ PN1131.
- ⁴¹ PN1135-1136.
- ⁴² PN1142.
- ⁴³ PN1146.
- ⁴⁴ PN1148-1152.
- ⁴⁵ Witness Statement of Jeremy Churchward – 22 April 2025 at [12], Court Book p.205.
- ⁴⁶ Witness Statement of Vicki Louise Tsirepas – 23 April 2025 at [8]-[11], Court Book p.129.

⁴⁷ PN1414-1416.

⁴⁸ PN1409-1412.

⁴⁹ Ibid.

⁵⁰ Attachment VT-03, Witness Statement of Vicki Louise Tsirepas – 23 April 2025, Court Book p.166.

⁵¹ Ibid at [14], Court Book p.131.

⁵² Ibid, Attachment VT-03, Court Book p.169.

⁵³ Ibid at [14], Court Book p.131.

⁵⁴ Ibid, Attachment VT-04, Court Book p.170.

⁵⁵ Ibid at [14]-[16], Court Book p.130-131.

⁵⁶ Ibid, Attachment VT-07, Court Book p.173-173.

⁵⁷ RL-3, Reply Witness Statement of Robert Lumsden – 1 May 2025, Court Book p.233.

⁵⁸ Ibid, Court Book p.231-235.

⁵⁹ PN349.

⁶⁰ PN1393.

⁶¹ Witness Statement of Jeremy Churchward – 22 April 2025 at [16]-[20], Court Book p.205.

⁶² Ibid at [22].

⁶³ PN1269.

⁶⁴ PN1325-1334.

⁶⁵ PN1315.

⁶⁶ PN1239-1242.

⁶⁷ PN1337.

⁶⁸ PN1301.

⁶⁹ PN1339.

⁷⁰ PN1269.

⁷¹ PN1383-1386.

⁷² RS-6, Reply Witness Statement of Robert Smith – 1 May 2025, Court Book p.221.

⁷³ PN1296-1302.

⁷⁴ PN1258.

⁷⁵ PN1287.

⁷⁶ PN1409-1412.

⁷⁷ PN1389.

⁷⁸ RS-4, Witness Statement of Robert Smith – 7 April 2025, Court Book p.105.

⁷⁹ Witness Statement of Jeremy Churchward – 22 April 2025, Court Book p.207.

⁸⁰ Ibid.

⁸¹ Ibid, Court Book p.208-209.

⁸² Attachment VT-11, Witness Statement of Vicki Louise Tsirepas – 23 April 2025, Court Book p.182.

⁸³ Reply Witness Statement of Robert Smith – 1 May 2025, Court Book p.217.

⁸⁴ Ibid at [30], PN2544-2552.

⁸⁵ PN1199-1177.

⁸⁶ RS-4, Witness Statement of Robert Smith – 7 April 2025, Court Book p.105.

⁸⁷ Witness Statement of Bree Heveren – 23 April 2025 at [11]. Court Book p.195.

⁸⁸ Ibid, Court Book p.196-197.

⁸⁹ Ibid, Attachment BH-01, Court Book p.201.

⁹⁰ PN2499.

⁹¹ Witness Statement of Bree Heveren – 23 April 2025, Court Book p.196-197.

⁹² Reply Witness Statement of Robert Smith – 1 May 2025, Court Book p.220.

⁹³ PN2302-2305.

⁹⁴ PN2308-2309.

⁹⁵ PN2452-2479.

⁹⁶ PN2510-2525, PN2629.

⁹⁷ Ibid.

⁹⁸ PN2632-2633.

⁹⁹ PN2636.

¹⁰⁰ PN2565.

¹⁰¹ PN2663.

¹⁰² PN2688-2696.

¹⁰³ PN2688-2690.

¹⁰⁴ PN1560-1583.

¹⁰⁵ PN2091-2093.

¹⁰⁶ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [151].

¹⁰⁷ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

¹⁰⁸ Ibid.

¹⁰⁹ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#) at [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#) at [55].

¹¹⁰ Attachment VT-14, Witness Statement of Vicki Louise Tsirepas – 23 April 2025, Court Book p.187.

¹¹¹ Ibid.

¹¹² Respondent's Outline of Submissions at [30]-[32], Court Book p.125.

¹¹³ [\[2021\] FWCFB 3457](#).

¹¹⁴ [\[2014\] FWCFB 7198](#) at [27].

¹¹⁵ Ibid at [28].

¹¹⁶ *Aurora Energy Pty Ltd v Davison* [PR902108](#) (AIRC FB, Watson SDP, Williams SDP, Holmes C, 8 March 2001) at [25].

¹¹⁷ *Regional Express Holdings Ltd v Richards* [\[2010\] FWAFB 8753](#) at [29].

¹¹⁸ *Reece Goodsell v Sydney Trains* [\[2023\] FWC 3209](#) at [183].