



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Garth Saunders

v

Jellinbah Mining Pty Ltd

(U2025/9685)

DEPUTY PRESIDENT BUTLER

ROCKHAMPTON, 5 FEBRUARY 2026

Application for an unfair dismissal remedy - jurisdictional objection - whether applicant was not dismissed - applicant was dismissed - jurisdictional objection dismissed - application dismissed - reasons given ex tempore

[1] Mr Garth Saunders (“the Applicant”) has applied to the Fair Work Commission (“the Commission”) for a remedy, alleging that he was unfairly dismissed from his employment with Jellinbah Mining Pty Ltd (“Jellinbah” or “the Respondent”). The matters the subject of the application substantially related to exchanges over a two-way radio at a mine site in relation to how to get one’s partner to agree to anal sex, and the subsequent termination of Mr Saunders’ employment.

[2] The Respondent opposed the application and also objected to the application on the basis that Mr Saunders was not dismissed. The objection was heard on 4 February 2026, on which date I gave an *ex tempore* decision. For the reasons given in that decision, I decided to dismiss the Respondent’s jurisdictional objection, and I also decided to dismiss the Applicant’s application for an unfair dismissal remedy. The following is the edited text of that decision.

Ex tempore decision

[3] Parties, this is an application made pursuant to Section 394 of the *Fair Work Act 2009* (Cth) (“the Fair Work Act” or “the Act”), an unfair dismissal application. I am confident that it is not in contest that the application was made within time. Nor was it in contest that the Applicant was protected from unfair dismissal.

[4] There are two salient issues in contest, and one of which is whether or not the Applicant was dismissed within the meaning of that term for the purposes of sections 386 and 394 of the Fair Work Act, as well as section 385. The other one is whether, if the Applicant was dismissed, the dismissal was harsh, unjust or unreasonable, having regard to the criteria set out in section 387 of the Fair Work Act.

[5] Parties, the Applicant had been employed since April 2022. There's evidence that in 2022 there was a memorandum circulated in relation to use of the two-way radio. That

memorandum is annexed to the witness statement of Mr Scutt, which was exhibit 5 in these proceedings.

[6] The memorandum made very clear that the two-ways were not to be used for offensive language. The memorandum said, "The conduct of two-way radio users at Jellinbah is of a high standard. This helps to create a healthy image of a workplace that is decent and professional."

[7] The memorandum went on to say, "I have observed that the use of offensive language and swearing on our channels used by the mine is on the increase. This is unlawful and not acceptable," and the memorandum, which is brief, went on to say the users were urged to exercise restraint in respect of their language and maintain the high standard of two-way usage that they had enjoyed. That was June 2022.

[8] By October 2024, though, the company had introduced what I considered to be quite robust training in relation to respect at work and in relation to the use of the two-way specifically. It seems to me that even though there was some discussion about whether Mr Saunders had been present at all of the training in relation to those matters, he was present for at least some of the training. The training material is annexed to the witness statement of Ms Fitzgerald, which is exhibit 4 in these proceedings. And there's an extensive slide deck included in that material. And at page 251 of the court book, the slide related to offensive language / content on the two-ways was included. That slide says:

"A lack of objection to unacceptable behaviour at the time it occurs does not infer that the behaviour is welcome or that it is acceptable for the behaviour to continue at another time.

Jellinbah has provided solid training over the last two years on what behaviours make up a successful and positive culture.

Whether you agree or disagree with the changing legislation is irrelevant, as an employee, you are accountable for your actions.

- There are still pockets of the workforce that continue to use offensive language and or inappropriate content on our channels on site.
- This is unlawful and not acceptable.
- As you would know the open use of the channels for safety, operational or general communications is encouraged and makes for a safe workplace.
- There is zero tolerance of offensive language, demeaning or harassing content, excluding behaviour, and/or intimidating behaviour.
- Any notification of this continuing behaviour will be investigated immediately."

[9] And then it gives some examples:

"Types of two-way conversations but not limited to, that are not within our values, code of conduct or Jellinbah expectations..."

[10] And it lists:

“Discussions of any sexual nature, no matter the crew or the audience.
Asking improper, tasteless personal questions.
Using vulgar or offensive language.
Open discussions meant to exclude others through, singling out members, or by means to intimidate.
Any form of unlawful behaviour, including victimisation or retaliation.”

[11] That was, as I say, the subject of training in October 2024.

[12] In 2024, there were also new policies promulgated. The Code of Conduct that is attached to Ms Fitzgerald's witness statement is dated January 2024. That Code of Conduct makes clear that employees are directed to comply with it and it explicitly dealt with discrimination, sexual harassment and bullying, as well as workplace health and safety, among other things. The Code of Conduct explicitly states that in the event of a breach, disciplinary action may be taken in relation with relevant policies. There's also a sexual harassment, sex-based discrimination and the like policy promulgated at around the same time. That is called the Sexual Harassment, Sex-Based Harassment and Hostile Working Environments Policy. It's dated January 2024. That policy made explicit that the board and management of Jellinbah Group were committed to maintaining a zero tolerance approach for any form of sexual harassment, sex-based harassment, and hostile work environments and made clear of the risk of disciplinary action in the event of conduct and breach of that policy. It said a breach of this policy by an employee would result in disciplinary action, up to and including termination of employment.

[13] Those policies, as I said, were dated 2024. Then in April 2025, over the dates in late April – we have material from 23 through to 25 April – there were some exchanges over the two-way which have been the subject of these proceedings.

[14] On the 8th of May, the Respondent commenced a show cause process which included a show cause letter sent to the Applicant in these proceedings. That show cause letter referred to UHF two-way radio between midnight and 3:30 AM on the 24th and 25th of April 2025 and referred to conversation which was alleged to have been “inappropriate and offensive” and “included discussion of, among other things...” and then a variety of things are listed.

[15] The letter then went on to say that recordings had been obtained, and made allegations that Mr Saunders had said words to the effect of

- asking a worker's partner if they would do MDMA as a way of encouraging them to engage in anal sex,
- suggesting a worker finger themselves in front of their sexual partner and film a reaction of their sexual partner during intercourse ‘so we can all enjoy it’, and third,
- encouraging a worker to train their sexual partner more in response to that person pushing the worker’s face away during sexual intercourse.

[16] Further, the show cause letter said given this occurred on the two-way it was able to be heard by other workers and it was not a private conversation.

[17] The show cause letter then set out a range of concerns about the conduct in respect of alleged contravention of the Code of Conduct, and in relation to harassment, psychosocial

safety and inconsistency with Jellinbah's two-way radio standards. The show cause letter provided Mr Saunders with an opportunity to respond and put him on notice of potential disciplinary action up to and including termination of his employment. The letter invited him to bring a support person to a show cause meeting. The letter also invited him to provide a response in writing and explicitly invited him that if he wished to listen to the recordings before the 15th of May 2025, he should let the General Manager SSE, who was the signatory to the letter, know before the 15th of May.

[18] The Respondent also conducted an interview with the Applicant. The notes of the interview are on the record before me.

[19] The Applicant provided a written response to the show cause process on the 12th of May 2025. It was two paragraphs as follows:

“I am writing this letter to accept responsibility for my actions and apologise for offending people by the things I have said on the 2 way. I accept that I have done the wrong thing, and I am very sorry and embarrassed by the things I have said. I'm disappointed that this incident has occurred and that I have tarnished my name and reputation at Jellinbah. In the future, I will not be inappropriate and will raise any issues of inappropriate behaviour immediately.

I have been with Jellinbah for 3 years without disciplinary issues and I have worked at a few other mines and understand how lucky I am to work at Jellinbah, Our family is a single income household and rely on my wage, I am committed to Jellinbah living locally in Blackwater with my family. This has been an awakening for me, and I will never do anything to jeopardise my position at Jellinbah again.”

[20] Following that, on the 21st of May, the Respondent provided to Mr Saunders a termination letter and indicated that his employment was being terminated effective from that day, the 21st of May 2025, but that the final payment would include any outstanding salary accrued but unused leave entitlements and there would be a payment of five weeks wages in lieu of notice. On that date a person who was assisting Mr Saunders asked that he be provided with the opportunity to resign rather than being dismissed, which he then did.

[21] The Respondent has contended that Mr Saunders cannot make this application because he was not dismissed. In my discussions with parties during submissions today I put them on notice that I considered that jurisdictional objection was unlikely to succeed. I have not deviated from that provisional view. From my perspective, it is very clear that the employment was terminated at the initiative of the Respondent and that was done by providing a termination letter to Mr Saunders on the 21st of May. In the alternative, if it was a resignation, it was a resignation brought about by conduct that had the intention of ending the employment. The conduct that had the intention of ending the employment was providing a termination letter effective immediately. So, I dismiss the jurisdictional objection.

[22] The matter was before me to determine the section 394 application. I determined issues in relation to legal representation prior to the hearing. The Respondent was legally represented. Mr Saunders was not represented. I attempted to provide procedural guidance to Mr Saunders throughout the course of the determinative conference that has been held today.

[23] The matter proceeded by way of determinative conference. I had previously made directions indicating that the parties should indicate in advance if they preferred a determinative conference. That did not happen. However, Mr Saunders made an application this morning and after hearing from the parties I granted the application for the matter to proceed by way of determinative conference, and we did so.

[24] The parties had been directed to provide witness statements and submissions. The initial directions were issued on the 3rd of October 2025. There was further directions order of the 24th of October 2025, providing extensions for the parties. Mr Saunders filed three witness statements, one of himself, one of Mr Hayden Latchford, one of Mr Brant Clanfield. Each of the three of those witness statements was tendered today and admitted into the evidence on the basis that the Respondent did not take a formal objection to parts of those witness statements that were hearsay or opinion but asked me to deal with those matters as a matter of weight.

[25] Mr Saunders gave evidence in person and was cross examined. The other two of his witnesses were not required for cross examination. There was no written outline of submissions filed at the time. The Respondent filed an outline of submissions on the 24th of November as well as witness statements of Mr Scutt and Ms Fitzgerald that I have already mentioned.

[26] The Applicant did not file any materials in reply despite having the opportunity to do so under the directions order. I make no criticism of the applicant for not providing a reply. It was an opportunity, not a requirement. So that's the material I've had before me.

[27] Having dealt with the question of whether there was a dismissal, I now turn to the question of whether the dismissal was harsh, unjust and reasonable. Before I do that, an evidentiary issue has arisen during the course of today. The Respondent in their material filed, as I said, a witness statement of Ms Fitzgerald and the last annexure to that witness statement was three audio recordings files and each of those three audio recording files was a composite of an unknown, to me at least, number of short excerpts of recordings from the two-way from the relevant dates. They were 23, 24 and 25 April. Those [excerpts] were said to be excerpts of 10 to 15 seconds in length and had been composited together for convenience into three separate audio files rather than into multiple separate short audio files.

[28] It's clear from the evidence of Ms Fitzgerald today that I can't be confident that the audio files were compiled in a way that meant that they unfolded in real time as we were listening to them. And some issue has been taken in that regard in relation to whether things that were successive to each other on the audio had actually happened in such quick succession or there were pauses between them. That is an issue that's been raised in relation to a particular comment in relation to MDMA, which I'll come to. I will say though, at this point, Mr Saunders has asked me to listen to each of those three recordings in full, separately and outside the confines of the hearing.

[29] I have got a procedural and a substantive reason why I don't propose to do that. The procedural issue is simply that the only sworn evidence I have about what is actually on those recordings and who said what is in the witness statements that have been filed and the testimony under cross examination and I think perhaps in re-examination today. So, it just wouldn't help

me to listen to the entire recordings. I don't know the voices. I would not be able to infer who was saying what just simply from hearing those audio files in full. As to those inferences, the weight – the probative value – would be pretty limited given as I say, that I've got a very limited amount of sworn evidence about who has said what.

[30] The substantive issue that arises in that regard is that regardless of what other people have said, the Applicant's admissions about what he said amount, in my view to egregious conduct warranting a valid reason for termination, regardless of what other people might have said. That's the first thing. The second thing is in relation to mitigation, he says that he's been treated inconsistently with others, and that if I was to listen to the whole of those recordings, I would find that. Again, that is a very difficult proposition for him to mount when I firstly wouldn't be able to know with certainty whose voice was what, and I wouldn't have the sworn evidence to allow me to treat my inferences with any probative value in doing that, but secondly, again, in absolute terms, putting aside the question of relative terms, the things that were said were egregious.

[31] So, in terms of the evidentiary issue, I'll just say this. On the 3rd of October when I issued directions allowing for witness statements and outlines of submissions to be provided, those directions were accompanied by notes to the parties about how to do certain things. In those notes, I explained what an outline of submissions is, what a witness statement is, how to deal with documentary evidence, how to get documentary evidence from the other side, how to get witnesses here, how to "summons" or "subpoena" witnesses. The information was all there, and if Mr Saunders had wanted to put in evidence that certain people had said certain things consistent with what was in those recordings, he could have done that at any time, but particularly after those recordings had been filed with the Respondent's materials in November. Secondly, Mr Saunders could have provided me with written submissions or made submissions this afternoon in relation to particular things said on those recordings, and what inferences or conclusions I should draw from them. That didn't happen. As I've indicated already today, I have an obligation to conduct these matters efficiently and asking me to simply go away and work out for myself who said what and what it all meant on those recordings would be inconsistent with that as well.

[32] So having said that, I'll now turn to the question of harshness, unjustness or unreasonableness. Mr Saunders heard from me during the course of the conference in relation to my provisional view. I invited him to consider that and to make submissions in relation to my provisional view, so I consider that he's had fairness in relation to the matters I was considering. He also heard the Respondent's submissions, of course, this afternoon, and had an opportunity to make submissions in reply.

[33] As to the question of valid reason, remarks Mr Saunders admitted to making in April 2025 did constitute a valid reason for his dismissal. As I've said, they were egregious in and of themselves. They were made more egregious in light of the training six months before in respect of use of the two-way, and respect at work. They had the potential to harm others; they also had the potential to give rise to vicarious liability for the employer. I hear that there is a dispute in relation to whether anyone was actually offended. I don't consider actual offence to be necessary, but even if it was there's evidence, that was uncontested, that a worker made complaints about what was being said, which is what prompted the investigation in the first place. I would also say in relation to the question of valid reason, the conduct was a valid reason

in and of itself. It was also a valid reason, because it contravened directions that were lawful and reasonable that had been given by way of the policies, the Code of Conduct policy, and the Sexual Harassment, Sex based Discrimination and Hostile Environment policy.

[34] In terms of whether Mr Saunders was notified [of the reason for dismissal], Mr Saunders was notified. The show cause letter provided information sufficient to allow Mr Saunders to respond and went over and above that and offered him a chance to listen to the recordings. Similarly, the termination letter provided detail in relation to the reason for the dismissal.

[35] The opportunity to respond was given in the show cause letter. There was an opportunity to do so both in writing and by interview. Mr Saunders, in taking up that opportunity, did not contest that he had said the things that he was being accused of having said. He did not, for example, seek to dispute in that show cause response the three points that were there that were being attributed that were in the show cause letter as being attributed to Mr Saunders. But regardless of that, the opportunity to respond was there and if he didn't take that up, that's really a matter for him.

[36] There was no refusal of a support person. In fact, there was an explicit invitation to have a support person.

[37] The matter in section 387 paragraph (e) does not arise. It's a neutral consideration in these proceedings. The matter in paragraph (f) also does not arise and is a neutral consideration in these proceedings; (g) is also neutral. There was no absence of HR. There was in fact a dedicated HR manager. But in any event, there's no procedural fairness flaws, in my view, that would need to be mitigated by the absence of HR limb of section 387.

[38] Section 387(h): Mr Saunders argued, essentially, that his supervisors condoned what he had said on the recordings on the night or nights in question. He pointed to the presence of a Mr Torr and another supervisor on the recording. I am satisfied that Mr Torr at least was on, as in, was listening to, at, at least, three points. What was on the recording – but I can't say for how long at each of those three points – there was the signing in, the signing out and the laughter of Mr Torr's, [which] are the three occasions that I've been directed to. That doesn't tell me that he was listening to any of the comments attributed to Mr Saunders that Mr Saunders admitted to saying today. The other supervisor, again, I don't even have a strong sense of how often he was on or off the recording based on the evidence before me. But there's certainly not material before me that indicates that he was present when Mr Saunders' statements and comments that were the subject of these proceedings were being made. But in any event, even if they were there, it just simply doesn't outweigh the factors that run against Mr Saunders in relation to section 387, given the egregiousness of the conduct. In that regard, I would point to the training of October 2024, which was explicit about even if it appears someone's condoning this, a supervisor perhaps is condoning it, that doesn't get you off the hook. But more to the point, that training had come from management, not from a supervisor. And regardless of what a supervisor may or may not do, if you've got the Site Senior Executive raising issues with you in a show cause and you've got explicit policies signed off, not just by management, but in one of the ones I've referred to, by the board, it should be pretty clear to anyone that it's not going to be sufficient, when there's egregious misconduct to say, 'well, the supervisor was aware of it and didn't stop me.'

[39] I would also say that it is clear on both Mr Saunders' material and on the answers provided by Ms Fitzgerald today that Mr Saunders was not new to the world of work and would have been aware of the importance of following policies and procedures.

[40] In terms of the seriousness that I've referred to, I just wanted to refer now to the specific allegations that were made.

(a) In terms of the first one, asking a worker's partner if they would do MDMA as a way of encouraging them to engage in anal sex, Mr Saunders disputes that that was all one comment or remark. The audio recording has a brief pause between the reference to MDMA and the reference to anal sex. Having said that, the context of all of the remarks around that recording was in relation to sexual acts. I found Mr Saunders' explanation that he was there, referring to podcasts about using MDMA as a way of breaking down barriers based on couples therapy, to not be able to be accepted in light of the language that was used in the context of the discussions over the two-way that night. But in any event, even if that was two separate remarks, they were two separate remarks that ought not to have been said over the two-way, that anyone could have listened to. Mr Saunders' factual dispute was simply whether they were all one remark or whether they were two separate remarks at two separate times.

(b) The suggestion that a worker fingered themselves in front of their sexual partner: Mr Saunders was taken to that in the cross examination and agreed that he'd said it. Suggesting a worker film a reaction to their sexual partner during intercourse, 'so we can all enjoy it' – the words 'so we can all enjoy it', are a direct quote from the audio of what was said: Mr Saunders was taken to this particular remark, and I accept that he said these things.

(c) I do not accept that it has been made out that Mr Saunders said words to the effect of encouraging a worker to train their sexual partner more in response to that person pushing the workers face away during sexual intercourse. He denied that in his witness statement. I'm not convinced that there was evidence in the testimony today that would allow me to accept that he had said that particular remark.

[41] However, I also accept that he made the remarks in the context of discussing someone's partner's reluctance to do a particular sexual act. And that he made the remark that they should 'give her a few wines'; he conceded to that today. These are not the only matters that he was taken to and agreed to, but it's very clear that these things are not acceptable in any workplace in 2025 and are particularly egregious in light of the training that had been conducted.

[42] In terms of the next issue under paragraph (h) that's been raised, that issue is about what Mr Saunders considers to be the inconsistent treatment between himself and other workers who were captured on the audio. He points out that his remarks are more clear because of his position, physical location at the time under the tower, meaning that the audio picked up what he said in a clearer way than what others had said. He says that some things that were attributed to him by Ms Fitzgerald in her witness statement had actually been said by others. He says that he was not any more of an instigator than anyone else, he was a participant in the conversations like everyone else. I've considered these issues of inconsistent treatment. I accept that Ms Fitzgerald was wrong to attribute some of those things to Mr Saunders. I accept that his audio

may have been clearer because of his physical location, but saying, “I don't know how you're gonna get that finger in there then, mate”, “film her reaction so we can enjoy it”, those things, “give her a few wines”, in the context in which they were said, are so significant that even if there was inconsistency with the way that the others were treated, then that's not sufficient to overcome the factors tending in favour of warranting dismissal and against a finding of harshness, unjust or unreasonableness.

[43] Mr Saunders also complained about being poorly advised by his representative at the time, who he says made certain representations to him about the likely outcome of the show cause process. I find that the show cause letter was entirely clear and explicit that termination was a possible consequence and given that that was signed by the Site Senior Executive, I can't see how the applicant could maintain that he didn't need to take this matter seriously.

[44] Mr Saunders points to his length of service. The length of service was three years. This is, in my view, a neutral consideration in respect of whether the dismissal was harsh. It's not an extensive period of time with the one employer. I would say, though, that I do accept that Mr Saunders was an experienced worker.

[45] In terms of the impact on Mr Saunders, I of course accept that there's been adverse financial impacts as a consequence of the termination of Mr Saunders' employment; Mr Saunders also put in evidence about his anxiety and related impacts. I accept he would have been very distressed by the termination of his employment.

[46] Mr Saunders put in evidence about the absence of offence on the part of one of the coworkers who are on the radio discussions. I do not consider that actual offence is necessary in order for there to be a valid reason and I don't consider the lack of offence to be a particularly strong consideration in favour of finding that the termination was harsh, unjust or unreasonable.

[47] Weighing all of the matters that are before me on the evidence, having regard to the probative evidence that was placed before me in the course of the determinative conference, I am not satisfied that the dismissal was harsh, unjust or unreasonable, and on that basis, I cannot find that it was an unfair dismissal. As I cannot find and do not find that the dismissal was an unfair dismissal, the issue of remedy does not arise.

[48] Those are the reasons for my decision to dismiss the application, which I now do.

Order

[49] The application is dismissed.



DEPUTY PRESIDENT

Appearances:

Mr G. Saunders, for himself.

Mr J. McLean of Counsel, instructed by Minter Ellison, for the Respondent.

Hearing details:

4 February 2026

Rockhampton

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