



DECISION

Fair Work Act 2009

s 394 - Application for unfair dismissal remedy

Eric Jordan

v

Pacific National Services Pty Ltd

(U2025/10201)

DEPUTY PRESIDENT CROSS

SYDNEY, 18 FEBRUARY 2026

Application for an unfair dismissal remedy – serious misconduct – performing Nazi salutes – clear CCTV footage – valid reason – application dismissed.

Introduction

[1] Mr Eric Jordan (**the Applicant**) commenced this proceeding by filing a Form F2 Unfair Dismissal Application on 16 June 2025 (**the Application**), seeking a remedy under s 394 of the *Fair Work Act 2009* (Cth) (**the Act**) in respect of the termination of his employment by Pacific National Services Pty Ltd (**Pacific National**).

[2] On 26 May 2025, the Respondent terminated the Applicant’s employment. On 6 March 2025, the Respondent contends the Applicant engaged in serious misconduct by making a Nazi salute gesture twice while on the platform at Mittagong Railway Station (collectively referred to as the **Incidents**). The Respondent further contends that the Applicant was on duty and identifiable as a Pacific National employee, and that such conduct breached workplace policies including Pacific National’s Code of Conduct (**Code of Conduct**) and Pacific National’s Respect at Pacific National’s Policy (**the Respect Policy**) and brought the Respondent into disrepute.

[3] The Applicant denies performing any Nazi salute. He contends that he performed an “*all clear*” hand’ signal used in the rail industry and/or a gesture of camaraderie between train crew. In correspondence responding to the allegations, he asserted the raising of an arm with a flat palm is consistent with an “*all clear*” signal and is not, without more proof of a Nazi salute.

[4] The parties accepted that the Application was properly before the Commission and its disposition turns on whether the dismissal was harsh, unjust, or unreasonable, having regard to the criteria in s 387 of the Act. In particular, the central contest is whether there was a valid reason related to the Applicant’s conduct

Procedural background

[5] The Respondent filed a Form F3 – Response to a Claim for Unfair Dismissal, disputing that the dismissal was unfair and asserting a valid reason for dismissal.

[6] On 3 September 2025, directions were issued in the manner in which the Application was to proceed to Hearing (**the Directions**). The parties complied with the Directions. Notably:

- (a) On 19 September 2025, the Applicant filed a witness statement and an Outline of Submissions;
- (b) On 13 October 2025, the Respondent filed an Outline of Submissions, in addition to CCTV footage (annexed to Mr Heatley’s Statement), and witness statements of:
 - (i) Ms Margaret Martin, a trainee locomotive driver employed by SCT Logistics;
 - (ii) Mr Peter Armstrong, a locomotive driver employed by SCT Logistics;
 - (iii) Mr Nathan Heatley, regional manager (Queensland) of Pacific National; and
 - (iv) Mr James Georgiades, people and culture manager (Queensland) of Pacific National.
- (c) On 21 October 2025, the Applicant filed an Outline of Submissions in Reply, and witness statements of:
 - (i) The Applicant;
 - (ii) Mr David Kelly, a train crew compliance officer employed by Sydney Trains; and
 - (iii) Mr Kevin Pryor, an organiser with the Rail Tram and Bus Union (RTBU).

[7] On 23 October 2025, my Chambers issued an Order to Attend for Senior Constable Rivas of New South Wales (NSW) Police Force, together with an Order to Produce, for documents relating to the personnel file of Mr Armstrong.

[8] The matter was heard on 29 October 2025, 30 October 2025, and 26 November 2025 (the Hearing). Both parties were represented at the Hearing. Ms Badger, a legal officer at the RTBU appeared for the Applicant, and Mr Arndt of Australian Business Lawyers & Advisors appeared for the Respondent. Written and oral closing submissions were made at the conclusion of the evidence.

Background facts

(a) *The employment relationship and context*

[9] The Applicant commenced employment with Pacific National as a train driver in or around 2014. He has worked in the rail industry since 2007.

[10] The Applicant's role involved safety critical duties and required adherence to rail safety rules, workplace policies, and expectations regarding professional conduct in public and with other rail operators.

[11] Pacific National's case is that even a single instance of a Nazi salute by an identifiable employee is fundamentally inconsistent with its standards and irreparably damages trust and confidence. Its policies (including the Code of Conduct and the Respect Policy) are said to address discrimination, harassment and respect, and to require employees to refrain from conduct that could bring the company into disrepute.

[12] The Applicant signed and thereby was bound to the Code of Conduct which relevantly stated:

We behave in a way that is inclusive and recognises every person has a role to play and respects the value and diversity of our teams. Our people embrace collaboration and curiosity.

We demonstrate Our Values and Our Code through our behaviours. Those Values include 'Kindness: We are thoughtful and show respect in all circumstances' (page 4 of the Code)

We do not engage in behaviour which might bring the Company into disrepute or otherwise adversely affect its brand or reputation.

We treat all people fairly, respectfully, courteously and with dignity, to create an inclusive and kind environment.

We do not engage or support behaviour that constitutes harassment, discrimination, bullying or victimisation.

We act appropriately and professionally in the workplace and when representing the company.

[13] The Respect Policy contained obligations whereby the Applicant was expected to:

promote a safe, inclusive and respectful culture both physically and emotionally, where everyone is treated with dignity, courtesy, and respect at all times. Treat others fairly and with kindness in line with our PNA Values, our Code of Conduct, this Policy, and other related policies.

Never [to] engage in sexual, sex-based and other unlawful harassment, discrimination, bullying, victimisation...

[14] The Respect Policy also states that: 'Any form of harassment, bullying, discrimination and victimisation will not be tolerated'. It defines harassment as 'unwanted behaviour that may offend, humiliate, or intimidate and that, in the circumstances, a reasonable person should have

expected would offend, humiliate, or intimidate’. Harassment can include ‘offensive physical actions’.

[15] The Respect Policy further states that:

Bullying occurs when an individual or group of individuals in the workplace repeatedly behave unreasonably ... towards others, and the behaviour creates a risk to the health, safety or wellbeing of an individual or a group. The individual or group of individuals do not have to intend their actions to be bullying for the actions to be bullying.

(b) Other disciplinary matter - Final Written Warning (17 April 2025)

[16] On 17 April 2025, Pacific National issued the Applicant with a final written warning arising from failing to follow a reasonable management direction to ensure that he had signed on and off from a rostered shift. That Final Written Warning concluded:

OUTCOME

Final Warning

In forming a view about the appropriate outcome, I have taken into account your response to the letter of allegation and your work history.

In the circumstances, given the nature of the substantiated allegations, and the breaches of Pacific National’s policies, I have decided to issue you with a **final warning**.

Moving forward, any further instances of unacceptable behaviour will not be tolerated and may lead to further disciplinary action, up to and including termination of employment.

As part of this outcome, you will be required to ensure you conduct moving forward is in accordance with Pacific National’s policies and procedures, including the performance expectations of your role.

This includes:

- Ensure you sign on and sign off for each shift at the rostered time, inclusive of any alterations.
- Ensure you take the rest break required by the Enterprise Agreement when in barracks. If you are unsure of the required rest break, engage with your supervisor or the Planning team.

Should you have any questions in relation to these expectations, please contact me.

(c) The events of 6 March 2025 – the alleged gestures at Mittagong Station

[17] On 6 March 2025, the Respondent alleges that the Applicant twice performed a Nazi salute while on the Mittagong train station platform:

- (a) On the first occasion (**First Incident**) occurred at approximately 12:38 pm, the Applicant gestured toward an Aurizon service. At the time, Mr Bornwell Ngwabi was working in the Driver’s compartment on the Aurizon service. A still image from the CCTV footage of that gesture is found annexed in Annexure A to this decision; and

- (b) On the second occasion (**Second Incident**) at approximately 1:21 pm, the Applicant gestured toward an SCT Logistics service where, at the time, Ms Martin and Mr Armstrong were working in the Driver's compartment. A still image from the CCTV footage of that gesture is found annexed in Annexure B to this decision.

(d) *The Investigation*

[18] On 6 March 2025, at 6:16 pm and 9:04 pm, respectively, Mr Armstrong and Ms Martin sent messages to their Manager, Mr Gregory Borg complaining about the Applicant performing a Nazi salute. Mr Armstrong identified the Applicant as the individual who performed the Nazi gesture.

[19] On 12 March 2025, Mr Ali Karnib, the area manager for the Respondent, forwarded a letter of allegation to the Applicant. That contents of the letter included:

Workplace Investigation - Allegations about your conduct

Thank you for speaking with me today.

As discussed, Pacific National has received a complaint from external parties about an incident which allegedly occurred on 6 March 2025 involving an antisemitic act (Nazi salute) to oncoming train crew.

In the interests of clarifying appropriate workplace behaviour, Pacific National has appointed myself and Victoria Karraz, Senior Employee Relations Specialist to consider whether any conduct, in relation to the above amounts to a breach of your obligations as an employee. In order to explore this further, we would like you to respond to the concerns set out below.

...

Specific allegations

It is alleged that on 6 March 2025, between approximately 1235 hours and 1330 hours, at Mittagong Station you engaged in highly inappropriate, discriminatory and offensive behaviour when:

1. At or around 1240 hours as Aurizon service 4MB1 drove past, you made a gesture that is considered antisemitic in nature by imitating the "Nazi Salute", by raising your hand in front of your body at a roughly 45-degree angle with a flat palm facing the ground. It is alleged that you made this gesture prior to the locomotive arriving at your location and held this pose as the locomotive travelled past your location.
2. At or around 1320 hours as SCT service 4MS9 drove past, you made a gesture that is considered antisemitic in nature by imitating the "Nazi Salute", by raising your hand in front of your body at a roughly 45-degree angle with a flat palm facing the ground. It is alleged that you made this gesture prior to the locomotive arriving at your location and held this pose as the locomotive travelled past your location.
3. You were dressed in a Pacific National uniform and representing the company on the Mittagong Station platform, a public place. Your display of an antisemitic gesture towards drivers from two (2) other rail operators, which additionally could have also been seen by members of the public,

has bought the company into disrepute and adversely affects Pacific National's brand and reputation.

[20] On 1 April 2025, Mr Georgiades became involved in the investigation into the allegations of misconduct brought against the Applicant when he received an automated email from the Pacific National management system "*Service Now*", which indicated that he had been allocated a case for an NSW performance management matter.

[21] On 2 April 2025, Mr Georgiades attended a Microsoft Teams meeting with Ms Sarah Griffiths, senior manager workplace relations at Pacific National. In the meeting, Mr Georgiades was requested to assume carriage of the workplace investigation into allegations of misconduct by the Applicant in lieu of Ms Victoria Karraz, a Senior Employee Relations Specialist of Pacific National, who had been conducting the investigation. That transfer was to ensure that the investigation was conducted free of any accusations of bias given Mr Georgiades was based in Queensland, he was geographically and personally distant from the events in question.

[22] When Mr Georgiades became involved in the investigation, the vast majority of information had been collected.¹ Ms Martin, Mr Armstrong, and Mr Ngwabi had given oral statements to Ms Karraz. Mr Georgiades did not interview anyone, nor did he view the CCTV footage.

[23] On 2 April 2025, the Applicant responded to the Mr Karnib's letter of allegation dated 12 March 2025 as follows:

Dear Ali,

Please see below my response to the Letter of Allegations issued to myself on 12 March 2025.

I respond to these allegations as follows:

It has been alleged that, on 6 March 2025, I imitated an antisemitic gesture in a public location whilst representing Pacific National.

While I have yet to be presented with footage of this alleged incident, and am therefore responding to hearsay, I still vehemently deny this allegation.

It upsets me greatly to hear that any gesture alleged to have been demonstrated on this (or any) occasion was the Roman/Fascist salute. This notion to perform this gesture would never occur to me, as the aforementioned gesture is incredibly offensive.

While I cannot recall the exact reason I may have raised my hand on this date, I would conclude that if any gesture was made, it was to demonstrate to the drivers of Aurizon service 4MB1 and SCT service 4MS9 that the track was clear, while also showing camaraderie amongst fellow train drivers which is a usual occurrence.

As per the Railsafe Rules and Procedures (NGE 202 Handsignals V4.0), the hand signal for 'All Clear' is an arm raised into the air with a flat palm. I have included a copy of the diagram for this signal below:



This signal is also detailed in the Pacific National Track Safety Awareness Manual, Page 8.

I am unsure as to why you would suggest that an alleged raise of my hand - however the hand is raised or held there after - is anything other than a friendly and helpful gesture to my fellow drivers.

More pertinently, raising one's arm alone is not evidence of a roman salute, and should not be interpreted as such.

This fact was supported in the recent court case of R v Nikola Marko Gasparovic (2024), in which the defendant was found not guilty of displaying antisemitic symbolism. In the case of R v Nikola Marko Gasparovic (2024), evidence was presented from Kristy Campion, a senior lecturer in terrorism studies from Charles Sturt University. Campion stated that such a salute would need to be 'triangulated' with other displays such as clothing or charts to determine nazi symbolism. I would not perform a fascist/roman salute, and I am offended that anyone would allege that I have an affinity for nazi symbolism, as this is categorically untrue.

Should this allegation be unfairly substantiated, and my employment terminated as a result, I am confident that the court proceedings which will follow will demonstrate that I have not acted in a way that is antisemitic. I state again that I find this accusation to be very insulting, as I consider myself to be a person who is accepting of all cultures

In closing, it is worth noting that my mentor and the man who introduced me to my career in the rail, industry follows the Jewish faith and that I hold the utmost respect to him.

I trust that the above is sufficient in explaining the apparent act that was witnessed on 6 March 2025.

Please do not hesitate to reach out to me, should further clarification regarding this alleged incident be required.

[24] On 17 April 2025, Mr Georgiades received an email from Mr Shane Frankham, who stated that he had viewed the footage of the Incidents, having been authorised to do so, in the company of a lawyer.² He described the contents of the CCTV footage as follows:

Sarah / James,

I am providing this statement after I had viewed CCTV footage of a Pacific National employee on Friday 11th of April to observe 3 video's after Pacific National received complaints that 1 of our employees that had allegedly made the Nazi hand gesture (symbol).

Lara Rogers P&C Business Partner viewed these CCTV video's with me. The first video was played and I observed 2 Pacific National employee's in the video. The male employee in the video was Mr Eric Jordan, I was not familiar with the female employee. Lara informed me the female employee was Nikki from SFT.

During the 1st video Eric and Nikki are waiting at the Mittagong platform. In this video I observed Eric sitting and he looked to his right and then he extended his Left arm at 45deg angle from his body fully extended (The same as a Nazi sign / salute). An Aurizon train then came into view and Eric lowered his Left arm when. Nikki raised her hand like a wave to acknowledge the train.

The 2nd video was then played for us. Again Eric was sitting and was eating something. Again he looked to his right and this time he extended his Right arm at 45deg from his body fully extended (The same as a Nazi sign / salute). An SCT train then came into view and Eric lowered his arm. Nikki raised her hand like a wave to acknowledge the train.

The third was then played – this showed Eric and Nikki waiting on the platform. Hand Signal – I have attached a document (NGE-202 Handsignals) which shows that the all clear signal is done by raising 1 arm high to the side of the persons head. In the observed video's Eric raised his hand at 45deg fully extended.

[25] Mr Georgiades determined the matter by comparing the statements of Ms Martin, Mr Armstrong, and Mr Ngwabi to the response of the Applicant. He also relied on Mr Frankham's description of what he saw on the CCTV footage. He also consulted Railsafe's NGE 202 Handsignals V4.0 document (NGE 202) that was attached to Mr Frankham's email dated 17 April 2025.

[26] Ultimately, in relation to allegations 1 and 2, Mr Georgiades did not believe the Applicant's claim that, if he had performed gestures, those gestures were an all-clear signal in relation to either of the Aurizon service or the SCT Logistics service.

[27] In relation to allegation 3, Mr Georgiades considered:

Mr Frankham's statement, which confirmed that it was Mr Jordan who was in the CCTV footage; and that, because Allegations 1 and 2 had been substantiated, there was a reasonable basis to conclude that Pacific National's reputation had been damaged.

[28] On 1 May 2025 the Respondent issued a Letter of Allegation - Outcome with respect to the conduct at Mittagong Station. That letter included the following:

Thank you for providing your response to the Letter of Allegation dated 12 March 2025, received via email on 2 April 2025. As you are aware, the allegations related to concerns you engaged in serious misconduct, inconsistent with Pacific National policies, as set out in the Letter of Allegation.

Pacific National has carefully considered all relevant information available to it in relation to these allegations, including your responses provided in writing.

The purpose of this letter is to confirm the Findings in respect to the Allegations and to confirm the outcome based upon these findings. Specifically:

FINDINGS

In relation to the specific allegations as, summarized below:

Allegation One

On 6 March 2025, at Mittagong Station at or around 1240 hours as Aurizon service 4MB1 drove past, you made a gesture that is considered antisemitic in nature by imitating the “Nazi Salute”, by raising your hand in front of your body at a roughly 45-degree angle with a flat palm facing the ground. You made this gesture prior to the locomotive arriving at your location and held this pose as the locomotive travelled past your location.

This allegation is substantiated.

Allegation Two

On 6 March 2025, at Mittagong Station at or around 1320 hours as SCT service 4MS9 drove past, you made a gesture that is considered antisemitic in nature by imitating the “Nazi Salute”, by raising your hand in front of your body at a roughly 45-degree angle with a flat palm facing the ground. You made this gesture prior to the locomotive arriving at your location and held this pose as the locomotive travelled past your location.

This allegation is substantiated.

Allegation Three

On 6 March 2025, at Mittagong Station you were dressed in a Pacific National uniform and representing the company on the Mittagong Station platform, a public place. Your display of an antisemitic gesture towards drivers from two (2) other rail operators, which additionally could have also been seen by members of the public, has brought the company into disrepute and adversely affects Pacific National’s brand and reputation.

This allegation is substantiated.

The substantiated allegations constitute a serious breach of Pacific National’s Code of Conduct:

- We treat all people fairly, respectfully, courteously and with dignity, to create an inclusive and kind environment.
- We are honest and cooperative
- We do not engage in behaviour which might bring the Company into disrepute or otherwise adversely affect its brand or reputation.

- Engaging in behaviour which might bring the Company into disrepute or otherwise adversely affect its brand or reputation.
- Failing to behave in a way that is reflective of our customer focus – meeting the needs of our people, customers, and shareholders. Our conduct fosters authentic, trusting, and ethical relationships, co-creating value for all.
- We comply with the law, company policies, and directions.

And;

Respect at Pacific National Policy:

- We are committed to and expect our people to:

Promote a safe, inclusive and respectful culture both physically and emotionally, where everyone is treated with dignity, courtesy, and respect at all times. Treat others fairly and with kindness in line with our PNA Values, our Code of Conduct, this Policy, and other related policies.

OUTCOME

Show Cause

In forming a view about the appropriate outcome, I have taken into account your response to the allegations and work history. In the circumstances, given the serious nature of the substantiated allegations, and the breaches of Pacific National's policies, Pacific National is considering terminating your employment. Before a final decision is made, I would like to provide you with the opportunity to show cause as to why you should remain employed with Pacific National. Please provide any information you wish Pacific National to have regard to before a decision is made.

[29] On 8 May 2025, Mr Georgiades emailed Mr Pryor, who had asked Mr Heatley for further information in relation to the Letter of Allegation – Outcome which Mr Heatley had sent to the Applicant on 1 May 2025. In that email Mr Georgiades informed the Applicant that 'the CCTV and email from Sydney Trains has [sic] not been relied upon in reaching my findings of the investigation, nor relied upon by Nathan reaching his view as to the appropriate disciplinary outcome'. Attached to that email were:

- (a) A document collecting seven recent news stories of antisemitic incidents in NSW, with weblinks;
- (b) The email of Mr Frankham dated 17 April 2025; and
- (c) A redacted email chain of correspondence from Sydney Trains, dated 1 April 2025, with two emails from Sydney Trains to Pacific National at 4:56 pm and 5:41 pm, relating to referrals to police.

[30] On 12 May 2025, the Applicant provided a response to the above outcome letter. In that further response the Applicant:

- (a) Questioned the veracity of statements given by Ms Martin, Mr Armstrong, and a Mr Ngwabi, a driver on the train in the First Incident;
- (b) Identified Mr Armstrong as ‘a driver with whom [he had] a long and uncordial history’, and then provided significant detail;
- (c) Stated he was not wearing a Pacific National uniform;
- (d) Submitted his recent formal warning was irrelevant; and
- (e) In summarising the position of the NSW Police, provided:

Allegation One / Allegation Two:

On Friday 2 May 2025, Senior Constable Manuel Rivas from the Police Transport Command, Campbelltown, and a follow-up to the initial conversation on 8 May 2025, investigated the alleged incident and following a review of the footage have advised that it is not a Nazi Salute, especially when I was sitting down and that if I indeed standing, they advised that, they feel that the hand signal for ‘All Clear’ and a Roman/Nazi Salute are almost identical, that they do not believe any antisemitic gesture was made in this instance, and they would not pursue any further action.

[31] On 26 May 2025, the Respondent issued further correspondence to the Applicant that was titled Letter of Allegation - Show Cause Outcome but was in fact a letter terminating his employment (the Termination Letter). That letter relevantly included the following:

I refer to our previous letter dated 1 May 2025, requesting you show cause as to why your ongoing employment should not be terminated as a result of the Findings of breaches of Pacific Nationals policies and procedures, as outlined in our letters dated 12 March 2025 and 12 April 2025.

I confirm that I have received and carefully considered the response to show cause, provided by you via email, on Monday 12 May 2025.

In addition, I confirm that I have had regard to the following matters:

- your responses previously provided as part of the investigation process.
- your response to the Show Cause; and
- your previous employment history, including a final written warning issued to you on 17 April 2025.

Having considered these matters, it is important to note that you have not been requested to respond to allegations of criminal conduct, but rather, breaches of Pacific Nationals policies and procedures in light of Pacific National being made aware of two external complaints about discriminatory and harassing conduct. Importantly, under antidiscrimination laws and our policies, it is irrelevant whether there was an intention to offend the complainants, rather, whether a reasonable person in the position of the complainants was likely to be offended by such gesture.

Having investigated such complaints, Pacific National does not view your responses provided as reasonable. There is no operational basis for your assertion that you were performing an all-

clear hand signal. Such action was not performed in a manner consistent with an all-clear signal nor in an operational setting where the all-clear signal would be required or expected.

Both Complainants provided a reasonable basis for viewing your conduct as antisemitic in nature and viewed such action as offensive. The CCTV footage, which you are aware, demonstrates such action as consistent with a nazi salute. This was viewed so seriously, that the footage was referred to New South Wales police.

To date, your responses have failed to acknowledge the impact that such conduct has had on the Complainants.

As such, I confirm the decision to terminate your ongoing employment, upon notice, effective on and from Monday 26 May 2025. We confirm that you are not required to attend for work during the notice period but rather, Pacific National will make a payment in lieu of 4 weeks' notice.

[32] On 5 September 2025, the Respondent sought an application for production of documents, records, and information directed to Sydney Trains seeking production of the CCTV footage. The footage was provided to the Commission on 16 September 2025, and to the Applicant and Respondent on Wednesday 17 September 2025.

[33] On 19 September 2025, the Applicant filed his witness statement and Outline of Submissions.

Applicant's Final Submissions

[34] The Applicant submitted his dismissal was harsh, unjust, and/or unreasonable because it lacked a valid reason and lacked procedural fairness/natural justice. The Applicant emphasises there is 'significant factual contest', and that the Commission will be required to prefer one body of evidence over another where inconsistencies arise.

[35] The Applicant submitted the Respondent's witnesses should not be preferred, characterising their evidence (at its highest) as contradicted by their own prior accounts, materially inconsistent with CCTV footage, or internally contradictory (including within the same witness's oral evidence). By contrast, the Applicant submitted he made concessions where appropriate, answered questions candidly (including where unflattering), and did not tailor his evidence.

[36] The Applicant highlighted his evidence that he understands and 'reprehends' Nazism and its symbols, and that he accepted that, when particular CCTV frames of the first gesture were isolated, he could understand why the Respondent considered the gesture to be a Nazi salute while maintaining the gesture "*in its totality*" was not the imputed conduct.

[37] The Applicant relied on Mr Kelly's evidence as 'independent' and expertise-based, submitting Mr Kelly considered the gesture consistent with an "*all-clear*" signal and that Mr Kelly's professional role is directly relevant to the rules and procedures for hand signalling.

[38] The Applicant submitted Senior Constable Rivas is a witness of uncriticised credit and relied on his evidence to challenge aspects of the Respondent's contentions. In particular, the Applicant submitted that SC Rivas' evidence supports the contention that the CCTV does not

‘speak for itself’ and that context surrounding context is relevant for to both characterisation and the applicable criminal thresholds.

[39] The Applicant attacked Mr Armstrong’s credit as inconsistent, incorrect, and prone to “*doubling down*” rather than making concessions, which the Applicant says was destructive of reliability. The Applicant highlighted Mr Armstrong’s admissions about believing the Applicant had conspired in connection with a 2013 derailment (and related assertions of “bad blood”), as inconsistent with any suggestion of a neutral complaint motive.

[40] The Applicant also submits Mr Armstrong was evasive when pressed on matters said to bear on whether the gesture could have been an “all-clear” (including platform positioning and the alignment/movement of the Applicant’s arm). The Applicant pointed to what he described as Mr Armstrong’s admitted inaccuracy about the Applicant wearing the Respondent’s uniform (and associated retreat from the stated basis for complaint) as bearing on Mr Armstrong’s reliability and motive.

[41] The Applicant submitted Mr Georgiades’ evidence supports that the investigation was transferred to him amid concerns (at least constructively) about impartiality, and that he did not materially consider information gathered by Ms Karraz. The Applicant submits Mr Georgiades was confused about preparation and verification of witness statements, and suggests relevant statements were not annexed because they would not assist the Respondent’s case (including a reference to *Jones v Dunkel* principles).

[42] The Applicant also characterised Mr Georgiades as evasive about whether personal history between the Applicant and Mr Armstrong was relevant, whether Karraz notes were edited, and about how he dismissed the relevance of that personal history while claiming to deal only in “*pure fact*”.

[43] The Applicant submitted the Respondent made adverse conclusions about purported “misrepresentations” (including about police conversations and CCTV access) without putting those matters to him for response, and without confirming the position with SC Rivas. The Applicant submitted SC Rivas’ evidence contradicted the Respondent’s assertions about the CCTV footage viewing opportunities including the Applicant’s ability to view the footage.

[44] The Applicant submitted the Respondent bears the evidentiary onus to establish dismissal was for a valid reason, and must prove the alleged Nazi salute occurred, not merely that the gesture was inconsistent with an ‘all-clear’ hand signal.

Respondent’s Final Submission

[45] The Respondent submitted the evidence demonstrates the Applicant twice performed a Nazi salute twice at Mittagong Railway Station on 6 March 2025. The CCTV is “clear and unambiguous” and independent witnesses supports that conclusion. The Respondent submitted these proceedings are ‘unusual’ because of the ‘excellent video footage’ of the Applicant’s gestures. On each occasion the Applicant is said to raise a rigid arm with palm facing down, consistent with a Nazi salute. The footage is ‘unusually clear’ and ‘reveals all’, and that the Commission must make its own assessment of what is depicted.

[46] The Respondent submitted the Applicant should be found ‘not to be a witness of truth’, and characterised his explanation as inconsistent, undermined by other witnesses (including his own), and as developing new/invented elements under cross-examination.

[47] The Respondent also submitted that a range of witnesses (Mr Armstrong, Ms Martin, and Mr Ngwabi), Sydney Trains’ referral to police, and SC Rivas’ evidence support the Respondent’s interpretation of the Applicant’s actions and goes further to submit the Commission can be satisfied a valid reason exists “simply by viewing” the footage.

[48] The Respondent submitted the “*all-clear*” explanation is not credible, and that rejecting it supports the conclusion the gestures were Nazi salutes.

[49] The Respondent relied on various contextual considerations as supporting its interpretation of the gesture, including what it described as a “*smirk*” by the Applicant seen before the first gesture.

[50] The Respondent submitted the Applicant’s evidence about his “*all-clear*” practice varied “*wildly*” during cross-examination and was marked by shifting exceptions and retractions (including inconsistent accounts about signalling passenger trains and “*restricted speed*” trains, and claimed historical disputes with Sydney Trains).

[51] The Respondent submitted the Applicant’s claim that rail workers routinely perform gestures indistinguishable from Nazi salutes “*thousands of times a day*” is impossible to accept and offensive, and that no evidence was produced of any other rail worker performing an “*all-clear*” like the Applicant did.

[52] The Respondent submitted Mr Kelly’s evidence undermined (rather than supported) the Applicant, emphasising Mr Kelly’s evidence that the Applicant’s gestures were not “*standard practice*”, that he would never instruct a trainee to do it, and that it looks similar to a Nazi salute.

[53] The Respondent submitted the Applicant mischaracterised the NSW Police position (as if police “*found*” there was no Nazi salute), and that SC Rivas directly contradicted the Applicant on that point. The Respondent submitted the Applicant’s qualified/evasive answers when confronted with that contradiction demonstrate lack of candour and affect credit.

[54] The Respondent also submitted SC Rivas’ evidence was that, if it were his call, he would probably have charged the Applicant, and that absent a willing witness the matter did not proceed, undermining the Applicant’s reliance on the absence of prosecution. The Respondent further submitted the Applicant was untruthful about access to CCTV, relying on SC Rivas’ evidence and an 8 May 2025 email said to record that the Applicant could obtain the footage from Sydney Trains, and noted the Applicant did not seek access until months later.

[55] The Respondent submitted the complainant witnesses (particularly Ms Martin) should be accepted because the CCTV proves what they describe occurred, and that attempts to show inconsistencies in recall are of no utility given the CCTV. The Respondent further submitted Ms Martin had no personal interest, was not compelled, and gave unequivocal evidence that she should not be subjected to such a salute in her workplace.

[56] The Respondent submitted Mr Armstrong’s position was “*more complicated*” but his evidence is confirmed by CCTV and by Ms Martin’s account, and that cross-examination about historical Facebook posts and older employment matters were irrelevant to what the Applicant did on 6 March 2025.

[57] The Respondent addressed the absent witness issue (Mr Ngwabi), submitting no *Jones v Dunkel* inference should be drawn (including because he is not in the Respondent’s control, being employed by a different rail entity, and was unsuccessfully approached), and in any event any inference would not displace the CCTV and the existence of Mr Ngwabi’s investigation statement.

[58] The Respondent submitted there should be no dispute that, if Nazi salutes are found, a valid reason exists, it also emphasises the Applicant’s own concessions about the reprehensibility of Nazi ideology and that termination would be fair if an employee performed a Nazi salute at work.

[59] The Respondent characterised the Nazi salute as likely “*the most offensive physical gesture*” in the contemporary Australian employment context and submits it is a valid reason for termination.

[60] The Respondent submitted the Commission can be “*comfortably satisfied*” procedural fairness was afforded because the Applicant was notified of the allegations with precision, given multiple opportunities to respond, and was clearly told the reason for dismissal.

[61] The Respondent submitted that the rejection of the Applicant’s explanation (and a resulting view he was dishonest) does not demonstrate a denial of procedural fairness rather it is the common outcome of an investigation where an employee is dishonest in response.

CONSIDERATION

[62] There are no jurisdictional objections to the Application being determined by the Commission. Specifically, I am satisfied that:

- a) the Applicant was dismissed at the initiative of the employer (ss.385(a) 386(1)(a));
- b) his unfair dismissal application was lodged within the 21-day statutory time limitation found at s.394(2) of the Act;
- c) the Applicant is a person protected from unfair dismissal in that he had completed the minimum employment period set out in ss.382 and 383 of the Act;
- d) his dismissal was not a case of genuine redundancy (s.385(d)); and
- e) his dismissal was not a case involving the Small Business Fair Dismissal Code (s.385(c)).

[63] Section 387 of the Act outlines the factors to be considered in determining whether a dismissal was harsh, unjust or unreasonable. The matters to be taken into account are:

- (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.*

Section 387(a) - whether there was a valid reason(s) for the Applicant's dismissal

[64] Where the facts alleged involve serious wrongdoing, the Commission should subject those facts to rigorous examination and not be satisfied by “*inexact proofs, indirect testimony or indirect inferences*”,³ and the *Briginshaw* standard should be applied. The onus in this case rests on the Respondent to prove, to the Commission's satisfaction, that the misconduct had, in fact, occurred. This evidentiary onus must be discharged on the civil onus of proof, on the balance of probabilities set out in *Briginshaw*.⁴

[65] While decided in an earlier statutory context, the comments of Moore J in *Edwards v Giudice* at paras [4] and [7] are apposite to this case:

[4] *In the present case the Full Bench concluded that Commissioner Tolley had failed to determine whether Ms Edwards was guilty of misconduct in the way alleged by Telstra Corporation Ltd and that the Commissioner should have done so as part of ascertaining whether her termination had been harsh, unjust or unreasonable. The approach of the Full Bench was, in my opinion, unexceptionable. When the reason for a termination is based on the misconduct of the employee, the Commission must, if it is an issue in proceedings challenging the termination, determine whether the conduct occurred. The obligation to make such a determination flows from s 170CG(3)(a). That is, the Commission must determine whether the alleged conduct took place and what it involved. Section 170CG(3) provides:*

“In determining, for the purposes of the arbitration, whether a termination was harsh, unjust or unreasonable, the Commission must have regard to:

(a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and

(b) whether the employee was notified of that reason; and

(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and

(d) if the termination related to unsatisfactory performance by the employee - whether the employee had been warned about that unsatisfactory performance before the termination; and

(e) any other matters that the Commission considers relevant.”

...

[7] The reason would be valid because the conduct occurred and justified termination. The reason might not be valid because the conduct did not occur or it did occur but did not justify termination. An employee may concede in an arbitration that the conduct took place because, for example, it involved a trivial misdemeanour. In those circumstances the employee might elect to contest the termination in the arbitration on the basis that the conduct took place but the conduct did not provide a valid reason and perhaps also by relying on the other grounds in paras (b) to (e). However an employee may not concede or admit, for the purposes of the arbitration, that the conduct occurred or may not be prepared to accept that the Commission could assume the conduct occurred. In either situation the employee would be putting in issue whether the conduct occurred. In my opinion the Commission must, in these circumstances, determine whether the conduct occurred as a step in resolving whether there was a valid reason. I do not see how the Commission can move straight to a consideration of whether termination was justified by assuming the conduct did occur. First the Commission would have failed to resolve an issue raised by and relied on by the employee, namely whether the conduct occurred at all. Second the Commission would have failed to make findings by reference to which a Full Bench might have to determine an appeal where the Commission had concluded the termination was harsh unjust or unreasonable on assumed facts and not facts found.

[Emphasis added]

[66] In *King v Freshmore*, a Full Bench of the AIRC said at paras [24], [26], [28] and [29]:

[24] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.

...

[26] As we have noted above, s.170CG(3)(a) obliges the Commission to make a finding as to whether there was a valid reason for the termination of employment. In circumstances where a reason for termination is based on the conduct of the employee the Commission must also determine whether the alleged conduct took place and what it involved.

...

[28] It is apparent from the above extract that his Honour answered the question of whether the alleged misconduct took place on the basis of whether it was reasonably open to the employer to conclude that the employee was guilty of the misconduct which resulted in termination. This is not the correct approach. The Commission's obligation is to determine, for itself and on the basis of the evidence in the proceedings before it, whether the alleged misconduct took place and what it involved.

[29] In our view the Senior Deputy President failed to determine for himself whether Mr King was guilty of misconduct in the way alleged by Freshmore and he should have done so as part of determining whether the termination had been harsh, unjust or unreasonable. When the reason for a termination is based on the misconduct of the employee the Commission must, if it is an issue in the proceedings challenging the termination, determine whether the conduct occurred. The absence of such a finding leads us to conclude that the member below failed to properly determine whether there was a valid reason for the termination of Mr King's employment.

[Emphasis added]

[67] The statute still requires the Commission to find that there was, or was not, a valid reason for dismissal (s 387(a)). In *Royal Melbourne Institute of Technology v Asher*⁵, a Full Bench of Fair Work Australia (FWA, as the Commission then was) held:

In the circumstances of this matter the University purported to terminate Dr Asher's employment for serious misconduct within the meaning of that term in the University's enterprise agreement. If it successfully established that Dr Asher had engaged in serious misconduct it would necessarily follow that there was a valid reason for the dismissal. However, the converse is not true. As established by Annetta, the question that needed to be considered was whether there was a "valid reason" in the Selvachandran sense – whether the reason was sound, defensible or well founded. Whether it also amounted to serious misconduct may well be a factor relating to the overall characterisation of the termination but it was not an essential requirement in the determination of whether a valid reason exists.

[68] The meaning of "valid reason" in s 387(a) is drawn from the judgment of Northrop J in *Selvachandran*. This meaning has been applied by members of the Commission and its predecessors for many years:

'In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee's capacity or conduct or

based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that the employer and employee are treated fairly."

[69] There is no dispute between the parties that the act of performing a Nazi salute would warrant dismissal. The evidence of the Applicant was:⁶

Now, if you can't answer these questions tell me. You accept, don't you, that a Nazi salute – an employee performing a Nazi salute would be a breach of Pacific Nationals workplace policy? --- Absolutely. Yes.

It would constitute harassment? --- More than that, obviously. But, yes.

You said there'd be a breach in contract? --- Yes.

Do you think it would be fair to terminate someone who did a Nazi salute while working? --- If they actually did it, yes.

So you think it's fair? --- Yes.

Would you expect Pacific National to do that? --- Yes.

[70] While it will be apparent that I make observations below as to the procedural fairness afforded to the Applicant, those observations cannot affect the existence of valid reasons, and I note that I conclude that the Applicant was afforded procedural fairness as required by the Act.

[71] The Commission's obligation is to determine, for itself and on the basis of the evidence in the proceedings before it, whether the alleged misconduct took place and what it involved. It was an unusual feature in this case that the CCTV footage was not made available to the Applicant and the Respondent until Wednesday 17 September 2025, being two days before filing of the Applicant's materials and almost four months after the dismissal. The result is that the Respondent determined whether it had a valid reason on the basis of materials that differ significantly from the evidence on which the Commission will determine valid reason.

[72] Based on all the materials before me, I find that:

- (a) At approximately 12.38pm, the Applicant gestured by way of a Nazi Salute toward an Aurizon service; and
- (b) At approximately 1.21pm, the Applicant gestured by way of a Nazi Salute toward an SCT Logistics service.

[73] The conclusion regarding valid reason is based on the following evidence before me.

- (a) **The CCTV Footage**

[74] The CCTV footage is clear and compelling. Even the isolated still images from the CCTV footage of the gestures that are Annexure A and Annexure B to this decision show the Applicant performing a Nazi salute.

[75] The summary of the CCTV footage contained in the Mr Frankham's email of 17 April 2025, to Mr Georgiades gave an unembellished summary of what the CCTV showed, particularly:

...

During the 1st video Eric and Nikki are waiting at the Mittagong platform. In this video I observed Eric sitting and he looked to his right and then he extended his Left arm at 45deg angle from his body fully extended (The same as a Nazi sign / salute). An Aurizon train then came into view and Eric lowered his Left arm when. Nikki raised her hand like a wave to acknowledge the train.

The 2nd video was then played for us. Again Eric was sitting and was eating something. Again he looked to his right and this time he extended his Right arm at 45deg from his body fully extended (The same as a Nazi sign / salute). An SCT train then came into view and Eric lowered his arm. Nikki raised her hand like a wave to acknowledge the train.

...

(b) The Applicant's Evidence

[76] While the Applicant relied from 2 April 2025, on his contention that he was giving an "all clear" signal in the Incidents, his explanations of how that could be were inconsistent and at times disingenuous. In particular, his early evidence was as follows:⁷

So you do give every train an all clear hand signal? --- Yes.

Okay. That's your evidence. There's no exceptions? --- No.

Okay. No exceptions. Yes, because that's in your statement – 14. My understanding it's important to give the all clear signal no matter what you – where you are – or what you do in the rail corridor. You always give the all clear, don't you? --- Yes.

You always raise your hand. Do you raise it in the way that you did on the 6 March at Mittagong Station? --- Yes.

In exactly the same way? --- Yes.

*So your evidence today is that you have performed the same gesture in the same way? --
- Countless times.*

Countless times. We might come back to that. Can we try and count them? Thousands of times? --- Yes.

Hundreds of thousands of times? --- Probably. Yes.

Does NGE202 apply to just you? Or it applies to everyone, doesn't it? --- Yes.

Yes. So your evidence is that all rail workers need to do all clears to passing trains at all times? --- Yes.

Whenever they're on the platform? --- If they're working, yes.

If they're working. Explain what that means just for clarity? --- Well, the general public don't give all clear hand signals. But anyone that works in the corridor, whether it be relieving a train, painting a platform – anything – yes.

So does anyone else in the entire rail industry do signals that you did at Mittagong? --- Absolutely.

So and just to rule this out there are – you said you'd done it tens of thousands of times. Maybe it was hundreds of thousands of times. The same signal you did at Mittagong on the 6 March. Your evidence now is that everyone does that signal – the same signal? --- The same hand signal?

The hand – in the same way you did it on the 6 March at Mittagong Station and you know what I'm talking about. These proceedings are about two hand signals that you did at Mittagong on the 6 March this year. Your evidence is that one, you've done that hundreds of thousands of times in your career. You've accepted that everyone must do that if they're working – they're rail workers. Is your evidence that other rail workers do the same signal? --- Yes.

In the same way? --- Correct.

*There's 300 train stations in New South Wales, isn't there? --- Probably more but – yes -
--*

Probably more. Thousands of trains must be going past the stations every day and you say, or do you say that hundreds of thousands of times a day – leave hundreds of thousands. Do you say that thousands of times a day rail workers in New South Wales are performing gestures the same as you did on the 6 March at Mittagong Station? --- Absolutely.

If I went to Central Station today or yesterday I'd be able to see this? You're saying I would be able to see the gesture you performed thousands of times? --- On a through platform, yes.

[77] The above evidence regarding the same gesture as in the Incidents being performed thousands of times a day by all Rail Workers is fanciful. If any Rail Worker had performed the same gesture as in the Incidents, being extending their right or left arm at 45deg angle from his or her body fully extended, I would expect they would be subject to disciplinary proceedings.

[78] During cross-examination, the Applicant sought to introduce exceptions to his position on “*all clear*” signals in relation to:

- (a) Restricted speed trains, which he immediately changed back to giving “*all clear*” signals without exception; and
- (b) A Sydney Trains passenger train for reasons including:
 - (i) Lack of camaraderie with passenger rail drivers; and
 - (ii) That he didn’t need to signal a passenger train as it was travelling at restricted speed and wasn’t dangerous as “*it would stop before it hit you*”;⁸
 - (iii) He didn’t perform an all-clear signal because he had “*had enough trouble with City Rail blokes.*”

[79] I do not consider the Applicant to be a witness whose testimony could be accepted where there is contest.

[80] I observe, however, that I do not consider the Applicant to be a person who harbours Nazi sympathies or advocates such ideology. He simply made two extremely inappropriate gestures seemingly, particularly noting that he smiled before the first gesture, as jokes.

(c) Kelly

[81] Mr Kelly is employed by Sydney Trains as a Train Crew Compliance Officer. He presented as a form of expert witness. The conclusion of his statement was:

In my assessment, while the manner in which Eric performs the all-clear signal on these occasions is not what I would consider to be standard practice in the manner in which I have taught people to give the signal, I consider that it is within the definition of an all-clear signal according to NGE 202. This is particularly so given that he performs the gesture similarly on both occasions at both trains.

[82] In cross-examination, Mr Kelly conceded that:

- (a) He would never instruct a student to perform the all clear in the manner Mr Jordan did;⁹
- (b) He would never ask permission to be able to teach his students to perform the gesture like the Applicant;¹⁰
- (c) He would “*want to know the motives behind*” why a student wished to perform all-clear signals like the Applicant did;¹¹
- (d) He personally had never done the gesture in the way Mr Jordan did it;¹²
- (e) The gestures looks similar to a Nazi salute,¹³ and could be misconceived as a Nazi symbol;¹⁴ and

(f) He understood why Pacific National considered what the Applicant did to be a Nazi salute.¹⁵

[83] Far from supporting the evidence of the Applicant, Mr Kelly's evidence significantly undermined the evidence of the Applicant, and supported the Respondent's case that the gestures looked similar to Nazi salutes.

(d) PC Rivas

[84] On 12 May 2025, the Applicant, in his Show Cause Response stated:

On Friday 2 May 2025, Senior Constable Manuel Rivas from the Police Transport Command, Campbelltown, and a follow-up to the initial conversion on 8 May 2025, investigated the alleged incident and following a review of the footage have advised that it is not a Nazi Salute, especially when I was sitting down and that if I indeed standing, they advised that, , they feel that the hand signal for 'All Clear' and a Roman/Nazi Salute are almost identical, that they do not believe any antisemitic gesture was made in this instance, and they would not pursue any further action.

[85] The Respondent sought an order for the attendance of PC Rivas. He disagreed with the above assertion of the Applicant,¹⁶ and broadly disagreed with other statements attributed to him by the Applicant.

[86] It emerged in the Police Constable's evidence that if the decision to charge the Applicant rested with him, he would have charged the Applicant,¹⁷ and the Applicant would have more than likely been charged with a criminal offence if a witness or witnesses were willing to participate in its investigation.¹⁸ The Police Constable tried for three weeks to obtain witness statements for three weeks but was unsuccessful.¹⁹

(e) Martin

[87] Ms Martin was not an employee of the Respondent and had not had any prior dealings with the Applicant. She was clearly an independent witness. She was also an impressive witness who gave careful and considered responses to questions asked of her, and I have no difficulty accepting her evidence.

[88] Ms Martin's evidence is significant in establishing valid reason in relation to the Second Incident being that the Applicant performed a Nazi salute. I particularly note her written evidence that provided:

7. In my experience, it is customary for members of the rail industry to wave to each other as they pass through a location like a railway station. I put my hand up to wave. Initially, I was looking at the female, because I thought she might be a fellow trainee who had trained with me when I undertook my training.

8. However, in my peripheral vision, I saw that the man's arm was extended in front of his body. This was at odds with what I would normally expect to see, so I double checked

and looked directly at the man. At this point, I was about 30 metres away from him. His arm was held out from his body and in a rigid pose. He had twisted his body at an angle of about 45 degrees to the train, while he was holding the gesture.

9. *The man's pose appeared to me to be a Nazi gesture.*

...

14. *I made the complaint because, based on my own common experience and knowledge, I saw the man performing a Nazi salute, which is an offensive gesture. I knew that it was not a casual wave. I did not judge the gesture to be a Nazi salute because Mr Armstrong had stated that he thought it was a Nazi gesture, but because I myself was convinced that the man had performed that gesture. I was shocked and appalled at the inappropriate nature of the gesture. My employer, SCT Logistics, later offered me counselling via its Employee Assistance Services regarding the incident.*

[89] The above evidence reflected what is shown in the CCTV footage.

(f) Armstrong

[90] The Applicant and Mr Armstrong had previously worked together at Aurizon, and an incident had occurred in about 2013 that resulted in Mr Armstrong being blamed and losing his job. The Applicant also challenged Mr Armstrong about whether he had disavowed racist beliefs disclosed in dated Facebook entries, and the timing of such disavowal.

[91] Clearly the Applicant sought to characterise Mr Armstrong as using his complaint to attack the Applicant and not being actually offended by the gesture. However, issues of motivation and distress are not considerations for valid reason where the Commission's obligation is to determine whether the alleged misconduct took place and what it involved. In that regard, as with Ms Martin, Mr Armstrong's evidence reflected what can be seen in the CCTV footage.

(g) Ngwabi

[92] An unsigned Statement of Evidence of Mr Ngwabi that was prepared in the investigation process was annexed to Mr Georgiades' statement. Mr Ngwabi had advised Mr Georgiades that he did not want to participate in the hearing of this matter of 7 October 2025. In those circumstances I am unable to place any weight on the contents of the statement of Mr Ngwabi, and note that in relation to the First Incident the evidence of what occurred is limited to the CCTV footage.

[93] I do not consider that any *Jones v Dunkel*²⁰ inference can arise from the Respondent not calling Mr Ngwabi. He is not an employee of the Respondent. The Respondent sought to involve him in the proceedings but was unsuccessful, and similar attempts were made by the NSW Police to get him involved in the criminal prosecution of the Applicant, but with no success.

Section 387(b)/(c)- whether the Applicant was notified of the valid reason and given an opportunity to respond.

[94] Even if there was a valid reason for an employee's dismissal, the dismissal may still be held to be unfair if the employee was not afforded procedural fairness. This has been a long held industrial principle adopted and applied by this Commission, its predecessors, other Courts, industrial tribunals and the High Court. In *Byrne v Australian Airlines*,²¹ their Honours McHugh and Gummow JJ said at P. 465:

That is not to say that the steps taken, or not taken, before termination may not in a given case be relevant to consideration of whether the state of affairs that was produced was harsh, unjust or unreasonable. Thus, it has been said that a decision which is the product of unfair procedures may be arbitrary, irrational or unreasonable. But the question under cl 11(a) is whether, in all the circumstances, the termination of employment disobeyed the injunction that it not be harsh, unjust or unreasonable. That is not answered by imposing a disjunction between procedure and substance. It is important that matters not be decided simply by looking to the first issue before there is seen to be any need to enter upon the second.'

[95] Three further authorities on the subject of procedural fairness in an unfair dismissal case are relevant to the parties in this matter. In *Crozier v Palazzo*, a Full Bench of the AIRC said at para [73]:

'As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment.'

[96] In *Wadey v Y.M.C.A. Canberra* [1996] IRCA 568, Moore J made clear that an employer cannot merely pay 'lip service' to giving an employee an opportunity to respond to allegations concerning the employee's conduct. His Honour said:

'In my opinion the obligation imposed on an employer by that section has, for present purposes, two relevant aspects. The first is that the employee must be made aware of allegations concerning the employee's conduct so as to be able to respond to them. The second is that the employee must be given an opportunity to defend himself or herself. The second aspect, the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend.'

[97] Nevertheless, procedural fairness steps should be applied in a commonsense and practical way. In *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, Wilcox CJ said at 7:

'Ordinarily, before being dismissed for reasons related to conduct or performance, an employee must be made aware of the particular matters that are putting his or her job at risk and given an adequate opportunity of defence. However, I also pointed out that the section does not require any particular formality. It is intended to be applied in a practical, commonsense way so as to ensure that the affected employee is treated fairly. Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of the section.'

[98] In addition, it goes without saying that any issue or issues of procedural unfairness may not be of such significance as to outweigh the substantive reason/s for an employee's dismissal, particularly in cases of serious misconduct relating to physical assault where the proven misconduct is of such gravity as to outweigh any other considerations such as age, length of service, contrition and issues of procedural unfairness generally.

[99] On these issues of procedural fairness, the Applicant submitted:

The investigation conducted by the Respondent was infected by predetermination and prejudice.

The original complaints made by Mr Armstrong and Ms Martin were made to Mr Gregory Borg directly, a person against whom the Applicant had active complaints himself. Mr Borg and his direct reports (which included Ms Victoria Karraz) were materially involved in the collection of information in the investigation as well as materially dealing with the Applicant's own complaint against one of their own. When the Respondent realised the difficulties this was likely to cause in respect of the investigation's impartiality, it transferred the entirety of the investigation over to Mr Jim Georgiades and Mr Nathan Heatley, two individuals employed in the Respondent's Queensland business and had no prior knowledge or relationship to the Applicant.

[100] The Applicants concerns were understandable, and the conduct of the Respondent in transferring the investigation to Mr Georgiades, and then Mr Heatley, to conduct a desk review of the information obtained by Ms Karraz was less than ideal. I do not consider, however, that the investigation conducted by the Respondent was infected by predetermination and prejudice.

[101] The Applicant was clearly informed of the allegations made against him, provided with multiple opportunities to respond to the allegations and his responses were taken into account. He was subsequently notified of the reason for his dismissal. Procedural fairness was afforded to the Applicant

Section 387(d) – Unreasonable refusal by the employer of a support person

[102] The Applicant was not denied a support person by the Respondent. Mr Pryor acted as his support person.

Section 387(e) – Unsatisfactory performance

[103] The dismissal was not for unsatisfactory performance, and this is not a relevant consideration.

Sections 387(f) and 387(g) – The size of the employer’s enterprise/human resources

[104] The Respondent has sufficient resources to follow a fair process when dismissing its employees. I consider the size of the Respondent would not have affected the procedures followed in effecting the dismissal. This is a neutral factor in relation to the question of whether the dismissal was harsh, unjust or unreasonable.

Section 387(h) – Other relevant matters

[105] The Applicant did not raise any other matters pursuant to this sub-section. That may have been because of the Applicant’s candid concession in his evidence that it would be fair to terminate someone who did a Nazi salute while working, and he would expect Pacific National to do so.

[106] There is no dispute between the parties that the act of performing a Nazi salute would warrant dismissal.

Conclusion

[107] I have made findings in relation to all matters specified in s 387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable and therefore an unfair dismissal.

[108] I have found the Respondent did have a valid reason for the dismissal of the Applicant, and that procedural fairness was afforded to the Applicant. There were no other relevant matters that tended to make the dismissal harsh, unjust or unreasonable. I therefore do not find that the dismissal of the Applicant was harsh, unjust or unreasonable.

[109] The Application is dismissed.



DEPUTY PRESIDENT

Appearances:

Ms O Badger, on behalf of the Applicant.

Mr J Arndt, on behalf of the Respondent.

Hearing details:

29 October 2025, 30 October 2025, and 26 November 2025.
Sydney.
In-person.

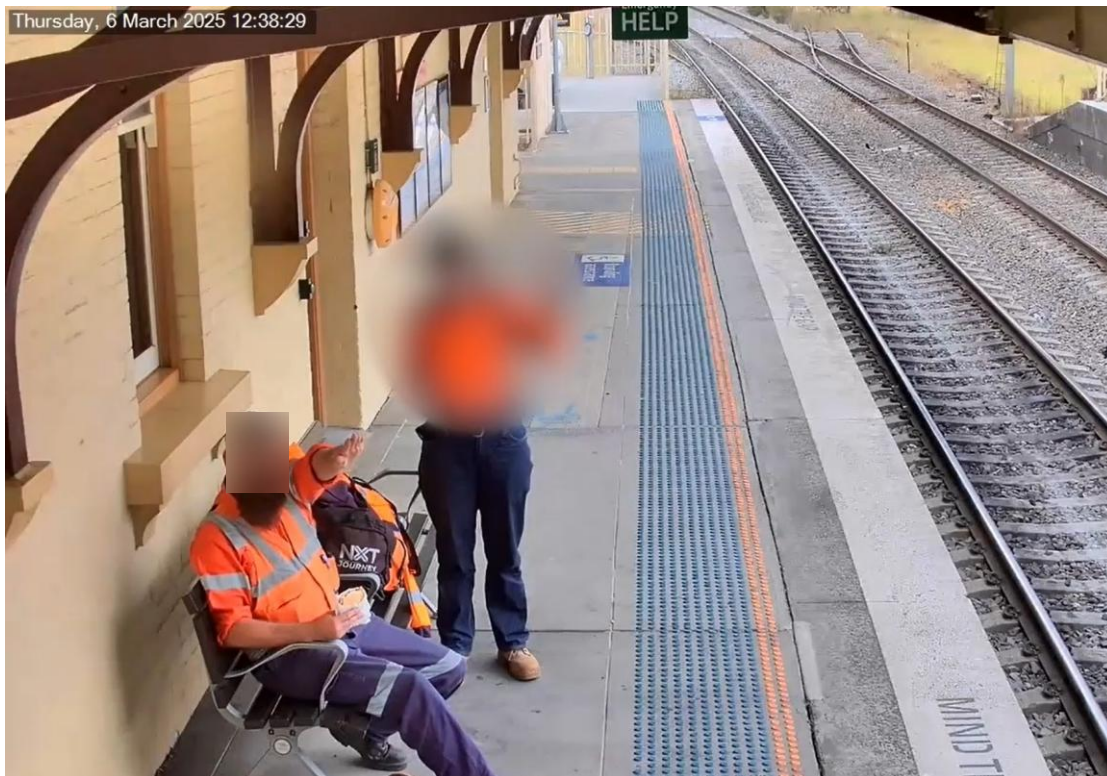
Final written submissions:

Applicant Final Submissions dated 25 November 2025.
Respondents Final Submissions dated 25 November 2025.

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Annexure A



Annexure B



¹ Transcript PN 1953 to 1956.

³ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 (*Briginshaw*).

⁴ [1938] HCA 34.

⁵ [\[2010\] FWAFB 1200](#), at [16].

⁶ Transcript PN 346 to 351.

⁷ PN 395 to 413.

⁸ Transcript PN 678.

⁹ PN 1234.

¹⁰ PN 1235.

¹¹ PN 1238

¹² PN 1270

¹³ PN 1244.

¹⁴ PN 1243.

¹⁵ PN 1282.

¹⁶ Transcript PN 55 to 60.

¹⁷ Transcript PN 93.

¹⁸ Transcript PN 180.

¹⁹ Transcript PN 198.

²⁰ (1959) 101 CLR 298 at 321.

²¹ (1995) 185 CLR 410 at 465.