



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Glenn Brew

v

Downer EDI Works Pty Ltd

(U2025/16042)

DEPUTY PRESIDENT SLEVIN

SYDNEY, 23 MARCH 2026

Application for an unfair dismissal remedy

[1] Mr Glenn Brew was employed by Downer EDI Works Pty Ltd (Downer) for more than 27 years. At the time of his dismissal, he was an Area Supervisor in Downer's Transport and Infrastructure Division. There was no complaint about his performance or his conduct prior to his dismissal. He was dismissed for serious misconduct. He was dismissed for testing positive to THC metabolites. His test results were at a very low level but were above the cut-off levels in Downer's drug and alcohol testing procedure. He has applied pursuant to s 394 of the *Fair Work Act 2009* (the FW Act) for an unfair dismissal remedy. Downer submits that the dismissal was not unfair.

[2] At the hearing Mr Brew was represented by his union, the Australian Workers' Union. He relied on his own witness statement and an expert report of Professor Robert Weatherby. Downer relied upon statements from Phil Burns, General Manager, Scott Nicholls - Southern NSW Area Manager, Glenn Lisle General Manager - Central West, Orana and Upper Hunter NSW, The Drug Detection Agency (TDDA), and an expert report of Dr. John Lewis.

Background

[3] Mr Brew is 56 years old and lives in Narrandera, NSW. He worked for Downer EDI Works Pty Ltd and its predecessors since 1998. In that time Mr Brew held a number of roles, including traffic controller, plant operator, leading hand, depot manager, and for the past twelve years, Area Supervisor. His duties included planning and overseeing works, designing bitumen seals, running audits, and working closely with engineers. Mr Brew has worked on projects for local councils, ACT Airport, RMS, and state roads. He has is trained in asphalt design, project management, safety, and environmental standards.

The dismissal

[4] The circumstances leading to Mr Brew's dismissal can be briefly stated. On Friday 22 August 2025, Mr Brew hosted a dinner at his home with friends. At the end of the dinner a guest produced a cannabis cigarette. It was shared amongst the group. Mr Brew inhaled smoke

from the cigarette twice. The next day Mr Brew went to the local chemist and purchased a urine self-testing kit that tested for THC. He was due to work in Forbes on Monday 2025. He took the test on Sunday 24 August 2025 before driving to Forbes. The test gave a negative result for the presence of THC.

[5] On Monday 25 August 2025 Mr Brew was drug tested at work and was told the result was non-negative for THC. A non-negative test requires that a confirmatory test be done in a laboratory. He was stood down while the laboratory test was undertaken. The on-site test was a urine screening test. Mr Brew described concerns about the testing process, including that the test kit was already open when he got it, and that other standard procedures were not followed. He described the test result as being unclear and that he was entitled under Downer's procedure to a second test, he was given a second test. He raised further concerns about how the test was conducted and the chain of custody associated with his urine sample.

[6] His urine sample was sent for a confirmatory test. The confirmatory test detected THC level at 41 µg/L which was above the cut-off level of 15 µg/L. As his result exceeded the confirmatory test cutoff level, it was considered a positive result. I am satisfied based on the expert evidence in the proceedings that while Mr Brew was over the cutoff level for the confirmatory test he was neither intoxicated nor impaired to work at the time of the test.

[7] On 28 August 2025, Mr Brew received a letter asking him to show cause why he shouldn't be dismissed for serious misconduct due to the positive drug test. He was asked to respond to Ms Ford, Senior People & Culture Advisor.

[8] Mr Brew responded on 29 August 2025. Mr Brew admitted to his actions and said he thought he was fit for work based on his self-test. His response included a review of policies and procedures and raised concerns they had not been followed. In his response he questioned the drug test because it used a pre-opened kit, and the onsite result was unclear. He said the lab result was 41 µg/L of THC, which is below the onsite cutoff of 50 µg/L but above the lab confirmation cutoff. This confirmed his view that the on-site test should have been negative and he should have been retested. He stressed that he always takes company policies and safety seriously. He pointed out that he had worked for the company for 27 years, had never received a written warning, and had made a significant contribution to the company's business during that time. He explained that using cannabis at the social gathering was out of character for him and not a regular habit. Mr Brew asked Downer to consider his long service and efforts to follow rules, and said he was open to discussing ways to keep his job. Including by taking regular drug tests. He also mentioned the situation had caused stress for his family, especially given cultural differences he and his wife have around cannabis use, and that he is seeking mental health support to help him cope. Mr Brew finished by reaffirming his commitment to safety and asking for the chance to keep working.

[9] A meeting to discuss whether Mr Brew should be dismissed was held over Microsoft Teams on 2 September 2025. Mr Brew, Ms Ford, Mr Nicholls, and Mr Cassidy, Depot Manager, attended the meeting. Mr Brew was offered and elected to have a support person present. Mr Brew relied upon his written response to the show cause letter.

[10] The decision to dismiss Mr Brew was made by Mr Burns. Mr Nicholls had input. Mr Nicholl's evidence was that on 10 September 2025 Ms Ford provided him with material

gathered during the show cause process. The material was accompanied by an email which included the following:

I have attached the important documents from the Glenn Brew case to assist you and Stuart with making a final decision on the outcome for Glenn. We are aware that you are recommending that Glenn receive a warning, but to round things out, can you please review the attached documentation and let us know what your final decision would be.

As Cardinal Rule breaches are considered to be misconduct, termination of employment is available as a discipline action. Can you please provide a reason if you are not considering the Termination of Glenn's employment.

[11] Mr Nicholl's said he was concerned about the fact that Mr Brew had been declined a re-test on-site and expressed that concern in an email to Mr Burns. His initial inclination was that due to Mr Brew's long service and the low reading in the test result that a final warning with a requirement for daily self-testing for 6 months was appropriate. He later considered that such an approach would not address the seriousness of the breaches of the drug policies and procedures and the cardinal rule. The cardinal rule referred to is rule 10 of the company's 10 cardinal rules it reads:

NEVER CONSUME OR BE UNDER THE INFLUENCE OF ALCOHOL OR NON-APPROVED DRUGS IN THE WORKPLACE

[12] Mr Nicholl's considered that the wide distribution of the policies and rules, Mr Brews' supervisory role, and that Mr Brew has tested positive previously justified dismissal. Mr Brew had revealed in his response to the show cause that he had tested positive in the past but that was some time ago. Mr Nicholl's also referred to an email he received from his manager, Mr Burns, which said Mr Burns had discussed the matter with the Executive General Manager, Mr Billings, who had the view that the company must be resolute in its enforcement of drugs and alcohol in the workplace and dismiss Mr Brew despite his long service and no previous disciplinary issues.

[13] Mr Burns said the decision to dismiss Mr Brew was made together with Mr Billings. He initially considered recommending that Mr Brew be given a suspension and further testing, based on his skill, extensive service and good disciplinary record. He consulted Mr Billings as the matter included a potential dismissal and ultimately concluded that dismissal was the appropriate and proportionate outcome.

[14] Mr Burns wrote to Mr Brew on 15 September 2025 advising him that he was dismissed immediately. The letter of termination relevantly read:

Having regard to the nature of the substantiated allegations and your responses the Company has determined that your conduct is a breach of Company standards, including the following:

Downer's Alcohol and Other Drugs Procedure (DG-ZH.PR083) - 'Downer workers and visitors must maintain a blood alcohol concentration (BAC) of zero (0.00) and must not have any detectable level of illegal or synthetic drugs while they are attending any Downer workplaces, performing work activities, or operating any vehicle or mobile plant

Downer's Cardinal rule 10 'NEVER consume or be under the influence of alcohol or non-approved drugs in the workplace.

Your contract of employment 'Your fitness to work - you agree to tell Downer, as soon as practicable, when you are not fully fit to perform your duties for any reason at any time,' and

Downer's Standards of Business Conduct Downer has a zero-tolerance approach to alcohol and illegal substances in the workplace and at any time our people are performing any work for Downer (and,) you must not perform any work for Downer if you are under the influence of alcohol, illegal drugs or any substance that could prevent you from performing your job safely or effectively'.

On this basis, Downer has determined your conduct amounts to serious misconduct and warrants summary dismissal effective immediately.

Expert evidence

[15] Professor Robert Weatherby's report said that finding THC metabolites only proves previous cannabis use, not that someone is currently impaired or intoxicated. He disagreed with how Downer interpreted its policies and procedures, saying Mr Brew's dismissal was based on a wrong reading of the test results. In his view, Mr Brew was neither impaired nor intoxicated at the time he was tested.

[16] Dr Lewis's report disagreed with Professor Weatherby, saying that the presence of THC metabolites is accepted as proof of cannabis use and fits within Australian standards. He agreed with Professor Weatherby that drug testing is used to spot the potential for impairment, not actual impairment. He said Downer's zero-tolerance policy is a practical way to reduce safety risks and concluded that Mr Brew's test results showed recent cannabis use and at best possible cognitive impairment.

[17] The evidence was that the question of whether was actually impaired would depend on whether Mr Brew was a regular user of cannabis. Mr Brew gave evidence that he was not and I accept that evidence. There was nothing to contradict it. I find that Mr Brew was not impaired for work on Monday 25 August 2025.

Mr Lisle

[18] Mr Lisle is a certified drug and alcohol collector and the General Manager at TDDA. He carried out Mr Brew's drug test at Downer's Forbes Depot on 25 August 2025. Mr Lisle said he followed strict procedures based on the relevant Australian and New Zealand standards and his company's accreditation. He disagreed with Mr Brew's criticisms, insisting the test kit wasn't previously opened, the test results were read on time, and the sample was handled properly.

Consideration

[19] Mr Brew seeks an unfair dismissal remedy. He seeks reinstatement, an order he be paid lost wages, and an order his service be recognised despite the dismissal. Downer accepts that Mr Brew was a person protected from unfair dismissal for the purposes of s 382. Unfair dismissal is defined in s. 385. The only issue arising under that section is whether the

Commission can be satisfied that the dismissal harsh, unjust or unreasonable and consequently was unfair.

[20] The task then is to consider whether I am satisfied that the dismissal was harsh, unjust or unreasonable for the purposes of s. 385. In determining whether a dismissal is harsh, unjust or unreasonable the Commission is required to take into account the matters listed in s. 387. Section 387 reads:

387 Criteria for considering harshness etc.

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

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

[21] In *Sydney Trains v Gary Hilder* [\[2020\] FWCFB 1373](#) the Full Bench confirmed that it is well established that a valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced and where the dismissal is related to conduct a reason would be valid because the conduct occurred and it justified termination. A termination of employment for conduct that does not justify dismissal because, for example, it involved a trivial misdemeanour would not be for a valid reason. An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal will be a relevant matter under s 387(h). Under s. 387(h) the issue is whether dismissal was a proportionate response to the conduct in question. Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable.

[22] The first matter for consideration under s. 387 is whether there was a valid reason for the dismissal related to Mr Brew's conduct. Mr Brew's conduct was that he attended work on Monday 25 August 2025 having consumed cannabis on Friday 22 August 2025, the metabolites of which were still present when he tested positive under Downer's drug and alcohol procedure.

[23] The reason given for his dismissal was that his positive test result was a breach of company standards, including the Alcohol and Other Drugs Procedure, Downer's Cardinal rule 10, and his contract and Downer's Standards of Business Conduct. I note that in the termination letter Mr Burns referred to the breach of the procedure as not having any detectable level of illegal or synthetic drugs while attending work, performing work activities, or operating any vehicle or mobile plant. Strictly speaking Mr Brew had detectable levels of THC metabolites rather than detectable levels of the drug. The expert evidence explained the difference, and I agree with Dr Lewis that the detection of metabolites is the accepted means of detected presence for certain drugs including THC. As to the other matters referred to in the termination of employment letter. I find that the test result was not a breach of Cardinal Rule 10 which is about consumption or being under the influence of drugs and alcohol. Mr Brew had not consumed and was not under the influence of THC on 25 August 2025. Nor was it contrary to the term Mr Brew's contract of employment to tell Downer, as soon as practicable, that he was not fully fit to perform his duties for any reason at any time. Mr Brew was fit to perform his duties on 25 August 2025. Similarly, Mr Brew did not act contrary to Downer's Standards of Business Conduct as he did not perform any work under the influence of alcohol, illegal drugs or any substance that could prevent him from performing his job safely or effectively.

[24] I set out below the provisions of the company's Managing Misconduct Standard which state that returning a positive result in a test conducted for drugs or alcohol is serious misconduct. It also states that serious misconduct may lead to dismissal. It is tolerably clear that this was the basis for the dismissal. That reason given was sound and defensible, drug and alcohol procedures have an important role in the workplace. It was well-founded in that Mr Brew tested positive. The decision was not capricious, fanciful, spiteful or prejudiced. It was founded on a belief that Downer should be tough on breaches of its policy. Termination of employment will be justified where a policy identifies dismissal as an outcome for breach of a drug and alcohol policy. I do not consider such a breach to be a misdemeanour. It may not be fair taking into account other factors but that is not a matter for consideration under s 387(a).

[25] I find that there was a valid reason for the dismissal which weighs in favour of the dismissal not being harsh, unjust or unreasonable.

[26] The next matter is whether Mr Brew was notified of that reason. I am satisfied that the show cause letter dated 28 August 2025 notified Mr Brew of that reason. This matter weighs in favour of the dismissal not being harsh, unjust or unreasonable.

[27] The third matter under s. 387 is whether Mr Brew was given an opportunity to respond to the reason for dismissal. The show cause process allowed Mr Brew to respond in writing, and he was asked to attend a meeting on 2 September 2025 as part of the show cause process. He attended the meeting. This matter weighs in favour of a finding that the dismissal was not harsh, unjust or unreasonable.

[28] The fourth matter is whether Mr Brew was unreasonably refused the opportunity to have a support person present to assist at any discussions relating to dismissal. Mr Brew was offered an opportunity to have a support person at the meeting on 25 September 2025 and elected to have one. This matter weighs in favour of a finding that the dismissal was not harsh, unjust or unreasonable.

[29] Section 387(e) is not relevant because the dismissal was not performance related.

[30] Downer is a large employer, and its size did not impact on the procedures followed in effecting the dismissal. This matter is neutral.

[31] Downer had a dedicated human resource management specialist, Ms Ford, involved in the steps towards dismissal which had a positive impact on the procedures followed in effecting the dismissal. This matter weighs in favour of a finding that the dismissal was not harsh, unjust or unreasonable.

[32] There are a number of other matters that I consider relevant to the question of whether Mr Brew's dismissal was harsh, unjust or unreasonable.

[33] The first is that Downer took an approach that dismissal must be the sanction for a positive drug and alcohol test result and that approach was contrary to its policies. Mush was made of the expression zero tolerance. Zero tolerance however does not mean that dismissal must follow every breach of the drug and alcohol policy. So much is clear from the policies, procedures and Golden rules.

[34] Starting with the Alcohol and Other Drugs Policy, it does not dictate dismissal for testing positive to drugs and alcohol. It states:

Our goal is zero alcohol and other drugs on our worksites. Alcohol and drugs can affect a person's health and wellbeing and their ability to work safely and competently. It is essential that workers are fit for the inherent requirements of their work and their judgement is not impaired by drugs or alcohol while at work. Compliance with this policy is a condition of entry to any Downer workplace.

[35] The alcohol and other drugs testing procedure also uses the word zero. It states its purpose as follows:

4.1 Alcohol and Other Drugs Program Requirements

Downer workers and visitors must maintain a blood alcohol concentration (BAC)/ breath alcohol concentration (BrAC) of zero (0.000) while attending any Downer workplaces, performing work activities, or operating any vehicle or mobile plant, Downer workers and visitors must not have any detectable level of:

- illegal drugs
- synthetic drugs
- prescribed medications that have not been prescribed to them and/or disclosed as per the requirements of Section 4.1.1.1 Prescribed (Prescription) Medications.

[36] However, the procedure suggests that this does not mean there is zero tolerance in the sense that dismissal must follow a positive test result. The procedure states that where there is a positive test result:

- The employee will be found to have breached Downer policy and will be subject to disciplinary action which may include termination.
- Send a copy of the test results to People & Culture Representative and discuss the employee's disciplinary action and/ or provide rehabilitation information/ or reference to EAP requirements with the People & Culture Representative. The Disciplinary action must be consistent with Downer's disciplinary policies, just culture and *DG-HR-ST017 Managing Misconduct Standard* requirements and have regard to any industrial agreement requirements.

[37] The Managing Misconduct Standard provides a definition of serious misconduct which includes where the employee "breaches a Cardinal Rule including providing a positive reading to drugs or alcohol whilst at work". This appears to extend Cardinal Rule 10, which only addresses consumption of or being under the influence of alcohol or non-prescribed drugs in the workplace. As the expert evidence made clear testing positive for certain drugs, including THC, does not prove consumption of or being under the influence of the drug, it shows presence of a metabolite which indicates consumption, and, in Mr Brew's case, consumption away from work. In any event, the definition designates providing a positive reading to drugs or alcohol whilst at work is serious misconduct.

[38] The standard however goes on to set a procedure for managing allegations of misconduct through investigations and a disciplinary process where allegations of misconduct are substantiated. The standard sets out disciplinary action available in such cases. In such cases the types of disciplinary action available include:

- development of a performance improvement plan/ formal letter of expectation
- formal counselling
- a written warning
- termination of employment
- other appropriate actions including demotion, re-training or additional training; and
- No further action

[39] Nowhere does the policy mandate dismissal for a type of misconduct such as serious misconduct for testing positive for drugs. Under the standard, when determining what disciplinary action is to be taken the following must be taken into account:

- Nature of substantiated allegations, including seriousness and the actual or potential impact of the misconduct on Downer and the safety and welfare of other employees.
- Response provided by the Employee.
- Other factors which may contribute to the proposed action being considered harsh, unjust or unreasonable. These may include:
 - Employee's length of service
 - previous disciplinary action
 - reasonableness of the expectations; and
 - any other factors which may be relevant

[40] It is apparent that Downer's decision to dismiss Mr Brew stemmed from a view that zero tolerance to drugs and alcohol in the workplace meant Mr Brew must be dismissed or at

least the default position was that the sanction was dismissal. So much is clear from the email correspondence. On 3 September 2025 Mr Nicholls wrote to Mr Burns and Ms Ford stating that he believed that while there had technically been a breach of Cardinal Rule 10 the tester had not followed the testing procedure by allowing a second on-site test. Mr Nicholls believed at that time that the test irregularity coupled with the low level detected and Mr Brew's length of service should be taken into account and that a warning was sufficient. I have already noted that Mr Brew had not breached the Cardinal Rule as he had not consumed nor been under the influence of THC at work.

[41] Ms Ford wrote to Mr Nicholls and Mr Burns on 10 September 2025. Ms Ford said that as the conduct was a breach of a Cardinal Rule a reason would be required if any sanction other than dismissal was being considered. Mr Burns spoke with Mr Billings Executive General Manager on 10 September. After doing so he wrote to Ms Ford and Mr Nicholls in the following terms:

After discussion with Stuart, we are agreed that we must ensure that we remain resolute in our enforcement of Drugs and Alcohol in the workplace and dismiss Glenn Brew, it is regrettable given his years of service and that he has had no previous disciplinary issues, in his position as Supervisor he has a greater responsibility to follow the policies.

[42] The evidence of the two managers shows the strict approach ultimately taken Mr Brew's conduct. Mr Nicholls said that the ultimate decision was made by his superiors. He stated that his aim throughout the process was to ensure that all circumstances presented by Mr Brew during the show cause process were duly considered. He said he expressed concerns about whether the testing procedure was followed correctly, particularly the error by the testing officer in failing to ask Mr Brew if he wanted to retest after the initial non-negative result. Mr Nicholls acknowledged that Mr Brew's self-testing on the Sunday before the workplace test was a mitigating factor in Mr Brew's conduct. He also noted that Mr Brew had disclosed his previous non-negative test result during the show cause meeting, which he considered to be honest and upfront. Mr Nicholls acknowledged that Mr Brew was a long-term employee of almost 30 years, had no history of unsafe acts related to drug use, had no previous disciplinary issues, and was considered a good worker. Mr Nicholls stated that he recommended considering other forms of disciplinary action, including a warning, given Mr Brew's length of service and the circumstances. However, he ultimately supported the decision of his superiors to terminate Mr Brew on the basis that it was important to the enforcement of the drug and alcohol policies in the workplace said he supported that view as it was necessary to mitigate risk and avoid setting a dangerous precedent.

[43] Mr Burns evidence was that Mr Brew was dismissed consistent with zero tolerance approach in the drugs policy. He also referred to Mr Brew's contract of employment: which required him to inform the company if not fully fit to perform duties and the standards of business conduct which requires employees to avoid performing work under the influence of alcohol, illegal drugs, or substances that could impair their ability to work safely or effectively. I note again that the expert evidence was that it was unlikely that Mr Brew was impaired at work. I find that he was not. Mr Burns also referred to Mr Brew as a long-serving employee in a supervisory leadership role who was expected to uphold and enforce the company's safety standards and policies. Mr Burns said that the company enforces a strict zero tolerance policy for drugs and alcohol to mitigate impairment risks and ensure the safety of workers and road users. Mr Burns pointed to Downer's history of consistently dismissing employees who return positive drug test results, particularly for THC. In the past two financial years, 23 employees

were summarily dismissed for positive drug test results, with no exceptions made for mitigating circumstances unless they were significant and related to the drug use such as the spiking of drinks. He said allowing Mr Brew to remain employed would have undermined the company's zero tolerance policy and safety framework. He said Mr Brew did not provide any evidence or explanation that justified or mitigated his positive test result. He said the decision to terminate Mr Brew's employment was made to protect the safety of workers and road users, uphold consistent standards across the business, and maintain the integrity of the company's safety framework.

[44] Zero tolerance approaches to employee misconduct in dismissal cases has been dealt with by the Commission in a number of contexts. In the context of drug use it was dealt with recently by the Full Bench in *Hawken v Patrick Stevedores Holdings Pty Limited* [2024] FWCFB 463. The Full Bench said at [30]:

If the consequence of Sydney Trains' "zero tolerance" was that it would not give any consideration to any mitigating circumstances advanced by any employee who has been found to have breached the Policy, that may be relevant to s 387(c) since it would arguably constitute a denial of a real opportunity to respond to the reason for the putative dismissal. If dismissal was a disproportionate response to the conduct in question because Sydney Trains had failed to take into account mitigating circumstances, that would be a matter relevant to s 387(h).

[45] The Full Bench in *Mt Arthur Coal Pty Ltd v Goodall* [2016] FWCFB 5492, dealing with a case involving breach of policy, albeit not in the drug and alcohol policy context, said at [63]:

It was not even the case here that the policy that Mr Goodall breached by making his anti-Muslim remarks, namely the Code, took a "zero tolerance" approach which mandated dismissal as the only penalty. It stated that "Corrective actions depend on the seriousness of the breach and other relevant circumstances", and nominated "discussions with supervisors or managers about desired behaviours", "a verbal or written warning" and "suspension" as possible disciplinary sanctions alongside dismissal.

[46] I consider the observations in these cases apt in the current case. While here Downer did to some extent take into account the mitigating circumstances raised by Mr Brew, it failed to consider those factors adequately as it took a zero tolerance approach that had the effect that the policy breach mandated dismissal. It did not. There were other sanctions available to Downer under the standard and I find that they were not given adequate consideration. The matters that should have been considered that were not included:

- a) Mr Brew had worked for the company for 27 years.
- b) He had never received any written warnings.
- c) He had made a significant contribution to the company during that time having received awards for his performance including in regard to safety.
- d) Mr Brew's cooperation and explanations in the investigation process.
- e) His admissions about smoking cannabis
- f) His explanation that using cannabis was out of character for him and not a regular habit.
- g) The low level of metabolites in his system.
- h) The steps he took to satisfy himself that he was fit for duty by conducting a self-test.
- i) His repeated confirmations that he always takes company policies and safety seriously.
- j) His openness to discussing ways to keep his job, including by taking regular drug tests.

[47] Mr Brew's co-operation was laudable and his responses demonstrated contrition. It should have instilled confidence that Mr Brew will not offend again. The failure of Downer to give adequate consideration due to its zero tolerance approach to these matters weighs in favour of a finding that the dismissal was harsh, unjust or unreasonable. The substance of the matters raised also weigh in favour of such a finding.

[48] The second other relevant matter is that the tester did not apply the testing procedure correctly. As Mr Nicholl's noted when the first onsite test recorded a non-negative result Mr Brew should have been given the option of another test. Mr Brew's evidence was that he had some doubt about the first test result which recorded a very faint line for the presence of the drug. He said he should have been retested under 5.8 of the procedure. He was not retested in accordance with the procedure. The doubt Mr Brew had about the result appears to be well founded given the procedure has an on-site cut-off for THC metabolites of 55 µg/L. The confirmatory test of the same sample returned a concentration of 41 µg/L which as Mr Brew pointed out means the on-site test should have given a non-negative result and there would have been no confirmatory test. Curiously the cut-off level in the procedure for confirmatory tests is 15 µg/L which gave rise to what appears to be an anomalous situation where Mr Brew had concentrations of metabolites that were acceptable under on-site testing but unacceptable when a laboratory test is done. It may be that this gives some recognition of the relative accuracy of the testing methods, but it still gives rise to an anomaly. It had the effect here of the procedure continuing and leading to a positive result when strictly speaking the procedure should have ended with the on-site test giving a negative result. Regardless, I agree with Mr Brew that he was entitled to a second test and he was not afforded one. Mr Nicholls also confirmed that Mr Brew's concern that the kit he was handed on-site had been opened before he was handed it was made out. This was also contrary to the procedure. This cast doubt on the application of the procedure and weighs in favour of a finding that the dismissal was harsh, unjust or unreasonable.

[49] Particularly relevant under s 386(h) is that the concentration of THC metabolites was very low and as I have already indicated the expert evidence was that it is unlikely that Mr Brew was neither intoxicated nor impaired at work on 25 August 2025. The expert evidence was that the test result did not show that Mr Brew was intoxicated on 25 August 2025. The test results indicated the presence of metabolites not impairment. Professor Weatherby was adamant that the level of metabolites detected meant that Mr Brew was not impaired for work. Dr Lewis also accepted that the results only showed recent cannabis use and not impairment arising from that use. I find that Mr Brew was not impaired for work on that day. This is significant because the company policy and witnesses also focussed on the importance of workers not being impaired. The Golden Rule is about not being under the influence of non-approved drugs in the workplace. Mr Brew was not under the influence of cannabis and so had not breached the golden rule. This factor also weighs in favour of the dismissal being harsh, unjust or unreasonable.

Conclusion – Unfairness

[50] The statutory task is to reach a state of satisfaction as to whether the dismissal was unfair under s. 385. Specifically, here, as to whether it was harsh, unjust or unreasonable under s. 386(b). The requires consideration of the matters in s. 387.

[51] The matters that tell against Mr Brew's dismissal being harsh, unjust or unreasonable are that Mr Brew's positive test result for THC metabolites gave Downer a **valid reason for dismissal**. It was a breach of the drug and alcohol policy and defined as serious misconduct under the managing misconduct standard. Mr Brew was notified of the reason for his dismissal through the show cause process. Mr Brew was also given an opportunity to respond to the reason for dismissal through the show cause process and afforded the opportunity to have a support person present during discussions related to his dismissal. Downer also had dedicated human resource management involved in the dismissal process, which positively impacted the procedures followed.

[52] These factors, which I regard as matters of form, must be weighed against other relevant matters. Those factors are as follows. Downer's response to the negative test result incorrectly assumed that dismissal was the default sanction for a positive drug test result, despite the policies allowing for other disciplinary actions such as warnings, counselling, or performance improvement plans. The drug testing procedure was not followed correctly as Mr Brew was not offered a second on-site test after the initial non-negative result, as required by the procedure. A second test may have not led to a positive result being recorded. The low THC metabolite concentration and expert evidence indicating that he was not impaired or intoxicated at work. Mr Brew's cooperation in the investigation and disciplinary process, his admission of consuming cannabis and explanation, and his contrition. Mr Brew's use of cannabis was out of character and not a regular habit. Mr Brew's confirmation of his willingness to comply with company policies in the future, including undergoing regular drug tests. Mr Brew's lengthy service of 27 years, with no prior disciplinary issues, and his significant contributions to the company.

[53] I consider that Downer failed to adequately consider the mitigating circumstances, including Mr Brew's long service, good record, and the low THC metabolite concentration, before deciding on dismissal.

[54] Weighing these factors, I regard the unqualified dismissal of a valued employee with 27 years of service, an unblemished disciplinary record and an otherwise untarnished safety record for a policy breach – particularly when Downer's disciplinary policy contemplates that breaches will not necessarily lead to disciplinary action let alone dismissal – as harsh.

[55] In all the circumstances, the dismissal was unfair and I find that Mr Brew was unfairly dismissed.

Remedy

[56] Mr Brew seeks orders for reinstatement, continuity of service and lost pay under s. 391 of the Act.

[57] The Full Bench of the Commission in *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWC 7198 said at [10]:

[10] Subsection 390(3) underscores the primacy of reinstatement as a remedy for an unfair dismissal as the discretion to order a remedy of compensation may only be exercised if the Commission is satisfied that reinstatement is 'inappropriate'. Further, one of the objects of Part

3-2 of Chapter 3, in which the unfair dismissal provisions appear, is “to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement”. We would observe that to describe reinstatement as the ‘primary remedy’, is to simply recognise that reinstatement is the first, perhaps even the foremost, remedy under the Act. The relevant question in determining whether to grant the remedy of reinstatement of an employee in relation to a dismissal that is found to have been ‘unfair’ is whether reinstatement is appropriate in the particular case.

[58] Downer states that reinstatement is inappropriate due to Mr Brew’s conduct. He attended work despite being aware of the prohibition against attending with detectable substances in his system contrary to company policies. He worked in a safety-critical role and so potentially endangered the safety of himself, others, and the reputation of the business. It also submitted that it has lost trust and confidence in Mr Brew’s ability to conduct himself appropriately in the workplace, which undermines the safety of its operations. Downer submitted that reinstating Mr Brew would run contrary to its consistent application of its zero tolerance approach towards detectable levels of illegal drugs.

[59] As to Mr Brew’s attendance to work on Monday 29 August 2025. While his attendance was strictly contrary to the drug and alcohol policy, as the concentration of metabolites was in excess of the cut-off in the procedure, he did not knowingly attend work with a detectable level of THC in his system. The level of THC metabolites in his system did not make him a safety risk. He was aware that he had consumed cannabis on the Friday, took precaution of purchasing a self-test kit on Saturday, and tested himself before driving on Sunday. He tested negative. To his knowledge he did not have a detectable level of THC in his system.

[60] As to loss of trust and confidence I note that both Mr Nicholls and Mr Burns considered options other than dismissal prior to forming the view that they must enforce the zero tolerance approach to positive test results. This suggests that Mr Brew’s immediate managers, and in particular Mr Nicholl’s initial reaction was not a loss of trust and confidence in Mr Brew being able to continue in his job. Further Mr Brew’s actions of self-testing before attending work demonstrated an awareness of policy and a willingness to abide by it such that Downer’s submission that he it cannot be confident that he will act appropriately in the workplace and thereby undermine the safety of its operations, is not made out. I also accept Mr Brew’s assurances that he understands the importance of safety in his role. I do not accept that the asserted loss of trust and confidence makes reinstatement inappropriate.

[61] I also reject Downer’s submission that reinstating Mr Brew would run contrary to its consistent application of its zero tolerance approach towards detectable levels of illegal drugs. I acknowledge Downer’s focus on safety in the workplace and the strong emphasis on maintaining a drug free workplace. It is commendable and essential in the industry in which it operates. However, the inflexible approach it has taken in Mr Brew’s circumstances to the application of that approach is an important factor in the dismissal being unfair in his particular circumstances. His reinstatement should not be seen as condonation of a breach of policy. It is a reflection of the unfairness of applying a zero tolerance approach in these circumstances.

[62] Consequently, I will make orders for Downer to reinstate Mr Brew along with orders for lost wages and for continuity of service. Orders will issue separately.



DEPUTY PRESIDENT

Appearances:

Mr J Ly of the Australian Workers Union for the Applicant
M A Lynch for Downer EDI Works Pty Ltd

Hearing details:

3 March 2026
Via Microsoft Teams Video

Printed by authority of the Commonwealth Government Printer

<PR797883>