[*Note: refer to the Federal Court decision dated 16 March 2015 [2015] FCAFC 35 for result of appeal*.]

[2014] FWCFB 6249

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Harbour City Ferries Pty Ltd
v
Mr Christopher Toms
(C2014/719)

SENIOR DEPUTY PRESIDENT DRAKE
SENIOR DEPUTY PRESIDENT HAMBERGER
COMMISSIONER JOHNS SYDNEY, 12 SEPTEMBER 2014

Appeal against decision [2014] FWC 2327 and order PR549780 of Deputy President Lawrence at Sydney on 16 April 2014 in matter number U2013/13687.

[1] Harbour City Ferries Pty Ltd (Harbour City) has appealed Deputy President Lawrence's decision of 16 April 2014[1] in which Deputy President Lawrence found that there was a valid reason for the termination of Mr Toms' employment but, notwithstanding that valid reason, the dismissal of Mr Toms was harsh, unjust or unreasonable. He ordered the reinstatement of Mr Toms to the employment of Harbour City from 22 April 2014.

[2] Mr Toms was dismissed from employment for a breach of the Sydney Ferries Drug and Alcohol Policy (Policy) and Code of Conduct. The applicability of Harbour City's testing regime for drugs and alcohol was not challenged by Mr Toms or Harbour City.

[3] We heard this application in Sydney on 24 July 2014. Mr Y Shariff of Counsel appeared for Harbour City with Ms R Farrar of Corrs. He relied on written submissions[2] and oral submissions in support. Mr M Gibian of Counsel with Mr J Wydell of the Australian Maritime Officers Union (AMOU) appeared for Mr Toms. He relied on written submissions[3] and oral submissions in support.

[4] Paragraph 4 of the Policy is set out below.

> "4. Definitions
>
> 4.1 "Drugs" are defined as substances or medications capable of causing dependency, alteration of mood or impaired judgement, concentration or coordination. These include but are not limited to:

(i) illegal drugs;
(ii) prescribed psychoactive mediations;
(iii) prescription medications for which no medical authorisation has been given; and
(iv) medications or 'over-the-counter' substances which are used contrary to the manufacturer's instructions or recommended dosage.

4.2 "Drug free" means any level of drug less than the cut-off levels for each class of drug stipulated by Australian Standard AS/NZS 4308:2008: Procedures for Specimen Collection and the Detection and Quantitation of Drugs of Abuse in Urine.

4.3 "Alcohol free" means a blood alcohol concentration of less than 0.02 per cent (as defined by section 3 of the Passenger Transport (Drug and Alcohol Testing) Regulation 2004)."

[5] Paragraph 18.3 of the Code of Conduct is set it is below:

"18.3 Employees must not commence or continue to work if they are affected by alcohol or other drugs".

[6] The substance of the letter of termination dated 28 August 2013 is set out below:

"As you know you were suspended without pay on the 25th July, 2013, due to a positive test result for the presence of Marijuana in your blood stream, following a collision you had whilst operating the Marjorie Jackson. At about 14:39, whilst the Master of the vessel you collided with the pylon at the Cabarita Wharf.

As a consequence of this collision, a passenger was injured and the matter was referred to Roads and Maritime Services.

The incident was fully investigated and you were interviewed by Mr Melwyn Moronha, Maritime Certificate Manager and Aaron Brown, River Service Manager. At that time you indicated you did not require a representative. At the meeting with Mr Brown you confirmed that you had taken Marijuana the day prior to the incident.

You subsequently met with me, accompanied by John Wydell, AMOU official; Gordon Hemming, AMOU Delegate; Tom Spooner, AMOU Delegate and Peter Ferrarelli, AMOU Delegate. The subject matter of this meeting is outlined in my letter to you dated 2nd August, 2013 which is attached for your convenience.

We have now had numerous exchanges of correspondence with Mr John Wydell who has made representation on your behalf. Specifically Mr Wydell has raised a number of questions about the process associated with the drug and alcohol testing and related chain of custody; which we feel was undertaken satisfactorily.

As stated at our meeting of 2nd August, 2013, we are satisfied that the positive test you returned on 25th July 2013 is accurate. You also confirmed that you had used Marijuana the day before and advised that you did this as you thought you would not be required for work the next day. In saying this you demonstrated that you were aware that taking

such a substance would affect your capacity. You have confirmed that you are a casual user of the substance.

As you know Harbour City Ferries Code of Conduct has a 'zero' tolerance level for drugs and alcohol. It specifically states that:

> 18.1 All employees must have a zero content (regarded as less than 0.02g of alcohol per 100 ml of blood, and two free from the presence of other drugs whilst at work.
>
> 18.2 States that Marijuana is a drug subject to testing.

We have now carefully considered this matter, conducting an investigation; met with you, considered representations on your behalf and provided you with additional information as requested.

Following the chain of events outlined above, we have now concluded that you have breached Harbour City Ferries Code of Conduct. Further, we consider that this breach to be serious, causing considerable danger to the public, your crew and yourself and accordingly it is considered unacceptable.

Due to the gravity of this matter we have decided to terminate your employment with Harbour City ferries, effective immediately. We will pay you 5 weeks' notice, in lieu of service and will make arrangements to pay this with any accrued entitlements when you have returned all Harbour City Ferries property, which we would appreciate occurring as soon as possible.

We regret that this has had to occur; we have to ensure the safety of the travelling public, and your conduct has put this at considerable risk. We hope that you are able to put this matter behind you in time and look forward to a successful future.

Again, I refer you to Harbour City Ferries Employee Assistance programme, who will be able to offer you counselling if required."

[7] The Deputy President's conclusion[4] that the expression "... be free from the presence of other drugs whilst at work" was agreed between the parties to refer to a prohibition of a reading in excess of the Australian standard for a substance was not challenged at the hearing of the appeal.

[8] This Full Bench has some experience of applications involving the application and efficacy of such workplace policies. We are not persuaded that urine testing, the agreed method of drug testing at Harbour City, is a guide as to the actual presence of marijuana in an employee's system or any impairment arising as a consequence. It is a testing system which in this case indicated past use and no present impairment.

[9] Despite our reservations concerning the usefulness of Harbour City's policy as an effective method of drug detection, when considering leave to appeal and the merits of the appeal, we have identified and considered the misconduct of Mr Toms as his attending work in breach of the policy.

Background

[10] At 9:30 pm on the evening of 24 July 2013 Mr Toms smoked a marijuana cigarette to assist him with pain in his shoulder. On 25 July 2013 Mr Toms was telephoned by Harbour City and asked to replace a Master who was on sick leave. At that time Mr Toms was on holiday relief during which period he replaced other Masters who were on planned leave. He did not refuse the shift on the basis of any drug or alcohol intake. On 25 July, when Mr Toms was Master of the Marjorie Jackson, an accident occurred. Following the accident Mr Toms did not immediately reveal that he might have evidence of drug use in his system.

[11] The test administered on behalf of Harbour City was positive. There is no evidence however that Mr Toms was impaired by drug consumption. Harbour City's enquiry found that Mr Toms lost control of the vessel as a result of an error of judgement in manoeuvring the vessel and excessive speed in approaching and berthing.

[12] Deputy President Lawrence found that there was a breach of the Harbour City's Policy because there was a reading for cannabinoids in excess of the Australian standard. Having a reading of that kind is a breach of the policy. The Deputy President found that there was a valid reason for the dismissal of Mr Toms by Harbour City.

[13] A recent Full Bench[5] of the Fair Work Commission (the Commission) has discussed the principles applicable to appeals from unfair dismissal applications as follows:

> "[11] In unfair dismissal matters, permission to appeal can be granted only if the Commission considers that it is in the public interest to do so: s.400(1) of the Act. The way in which the public interest may be attracted has been described as follows:
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> > "... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."
>
> [12] The decision under appeal is a discretionary one. Such a decision can be successfully challenged on appeal only if it is shown, for instance, that the discretion was not exercised correctly. It is not open to an appeal bench to substitute its view on the matters that fell for determination before the Commissioner in the absence of error of an appealable nature in the decision at first instance. As the High Court said in *House v The King*:
>
> > "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for

> doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."" [Endnotes not reproduced]

[14] This is the approach we have applied to our consideration of Harbour City's appeal.

[15] In *Parmalat Products Pty Ltd v Wililo*[6] a Full Bench of the Commission stated the following in relation to permission to appeal in applications involving workplace occupational health and safety issues:

> "[18] In our view this case raises important questions about the respective rights and obligations of employees and employers in relation to safety requirements at the workplace. Employers have important statutory obligations to maintain a safe place of work. Those obligations have a high profile in NSW. Establishing and enforcing safety rules are an important obligation, a breach of which can lead to serious consequences.
>
> [19] In this case the employer considered, and established to the satisfaction of the Commissioner, that Mr Wililo had breached its safety rules and his conduct amounted to serious misconduct. Clearly disciplinary action was necessary and appropriate because a failure to do so sends a message to the workforce that safety breaches can occur with impunity. The application of the unfair dismissal provisions to this case is a matter of general importance and in our view clearly attracts the public interest. We therefore grant permission to appeal."

[16] This Full Bench is not authority for the proposition that the public interest is automatically attracted to any appeal involving workplace occupational health and safety issues. This would involve an automatic grant of permission to appeal in a large number of cases before the Commission. It must be a case by case consideration. This Full Bench also commented on applications where there was not only a valid reason for termination of employment for serious misconduct but also that there had been compliance with the requirements for procedural fairness.

> "[24] ..... The existence of a valid reason is a very important consideration in any unfair dismissal case. The absence of a valid reason will almost invariably render the termination unfair. The finding of a valid reason is a very important consideration in establishing the fairness of a termination**. Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open**."[7]

(our emphasis)

[17] We have had regard to the facts of this application. The application is concerned with serious misconduct which was a valid reason for the termination of Mr Toms' employment. The serious misconduct was the breach of an important policy by an employee at the most senior level of employment at Harbour City in a situation where there was compliance with procedural fairness.

[18] We regard this appeal as involving a consideration of matters of general importance attracting the public interest. We grant permission to appeal.

[19] It is clear that Harbour City identified Mr Toms' misconduct as a serious breach of their Code of Conduct which provides "zero tolerance" for drugs and alcohol.

[20] Deputy President Lawrence dealt with the breach of the Code of Conduct in his decision when considering valid reason. However, we consider that there is a wider context and a higher level of seriousness involved in the misconduct of Mr Toms which was not taken into account by Deputy President Lawrence.

[21] Mr Toms was aware of the Policy and its application. He was aware when he accepted the shift as Master of the Marjorie Jackson that it was likely that he would be in breach of the Policy if tested.

[22] Mr Toms could have refused the shift because he was in breach of the Policy without specification as to the cause.

[23] Although the Deputy President found that Mr Toms cooperated with the subsequent enquiry, it is clear from the evidence that, when the accident occurred, Mr Toms did not immediately reveal that it was likely that he was in breach of the Policy.

[24] When determining that the termination of Mr Toms' employment was harsh, unjust or unreasonable Deputy President Lawrence took into account:

- that Mr Toms had over 17 years satisfactory service with Harbour City and its predecessor;
- that Mr Toms' marijuana use arose from the need to sedate a painful shoulder;
- that Mr Toms' previous three drug tests had all been negative;
- that there was no impairment established;
- that there was no link between the drug test and the accident;
- that the accident caused little damage;
- that Mr Toms was assisting Harbour City by covering their shift;
- that the accident was reported appropriately and in a timely fashion;
- that Mr Toms was open and co-operative with the investigation;
- that when presented with a positive drug test Mr Toms admitted his fault and did so in a reasonable time frame after the accident;
- that Mr Brown and Captain Noronha continued to have confidence in Mr Toms after the accident;

- that Mr Toms had not been able to find alternate work;
- that his skills and qualifications did not translate easily to other employment and,
- that there were other sanctions short of dismissal which could have been more reasonably implemented in relation to the applicants breach of policy.

[25] We consider that Mr Toms' seniority and his very high level of responsibility are factors which attract sympathy when considering outcome, but equally those factors demand a high level of compliance with policy.

[26] In addition, Mr Toms failed to immediately inform Harbour City of the potential for a positive finding. He put off the moment of confession as long as he could. This was not taken into account by the Deputy President.

[27] The lack of any impairment arising from drug use, the absence of a link between drug use and the accident and the absence of substantial damage to the Marjorie Jackson are not factors relevant to the ground of misconduct identified as non-compliance with the Policy. The fact is that Harbour City required its policy complied with without discussion or variation. As an employer charged with public safety it does not want to have a discussion following an accident as to whether or not the level of drug use of one of its captains was a factor. It does not want to listen to the uninformed in the broadcasting or other communications industry talk about drug tests establishing impairment. It does not need to have a discussion with any relevant insurer, litigant or passenger's legal representative about those issues. What it wants is obedience to the policy. Harbour City never wants to have to have the discussion.

[28] The mitigating factors referred to and relied on by Deputy President Lawrence are not mitigating factors that address the core issue, which was the serious misconduct which led to the dismissal of Mr Toms. The core issue, the valid reason for termination of Mr Tom's employment was his deliberate disobedience, as a senior employee, of a significant policy. The Deputy President does not address Mr Tom's failure to comply with the Policy. The only mitigating factor relevant to this issue was **the use of** marijuana as pain relief. Consequent upon that explanation is the decision to accept a shift while aware of the likelihood of being in breach of the Policy.

Conclusion

[29] For these reasons we grant permission to appeal and allow the appeal. We quash the decision of Deputy President Lawrence and dismiss Mr Tom's application for relief pursuant to s.394 of the *Fair Work Act 2009* (the Act).

SENIOR DEPUTY PRESIDENT

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[1] PR549430

[2] Exhibit Harbour City 1

[3] Exhibit Toms 1

[4] Pr549430 at para 47

[5] *Baker v Patrick Projects Pty Ltd* 2014 FWCFB 2293 [PR549389]

[6] [2011] FWAFB 1166 at paras 18 - 19

[7] Ibid at para 24