[2020] FWC 1015 [Note: a correction has been issued to this document]
[Note: This decision has been quashed - refer to Full Bench decision dated 19 August 2020 [2020] FWCFB 3439]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Trevor Knowles
v
BlueScope Steel Limited
(U2019/11608)

COMMISSIONER RIORDAN SYDNEY, 11 MAY 2020

Application for an unfair dismissal remedy.

[1] Mr Trevor Knowles (the Applicant) has applied for an unfair dismissal remedy in accordance with section 394 of the Fair Work Act 2009, (the Act), following his termination from BlueScope Steel Limited (the Respondent) on 1 October 2019.

[2] The Applicant was represented by Ms Sandra Doumit, a Legal Officer for the Australian Workers Union, NSW Branch (AWU). Leave was granted to allow the Respondent to be represented by Mr Aaron Dearden, Partner, of Hall and Wilcox.

[3] At the time of granting Mr Dearden leave to appear for the Respondent, Mr Dearden suggested that I utilise the full breadth of my knowledge and experience in determining this matter. For the record, I am a qualified and licensed electrician. I have previously worked in a workshop / warehouse environment where an overhead crane was in operation. I have also previously been an authorised officer in accordance with the provisions of the New South Wales *Occupational Health and Safety Act 2000*.

Background

[4] The Applicant is 64 year of age and lives in the Illawarra region, on the South Coast of New South Wales.

[5] The Applicant commenced employment with the Respondent in early 1988. In 1989 the Applicant began working as a Despatch Operator and continued in that role until he was dismissed. At the time of his termination, the Applicant was working as a Level 3 Despatch Operator in the Respondent's Painting and Finishing Department (PFD) at the Springhill Works facility. The Applicant's employment at the time of his termination was covered by the BlueScope Port Kembla Steelworks and Springhill Enterprise Agreement 2019 (the Agreement).

[6] To ensure the Respondent operates safely and efficiently, the Respondent has a series of Standard Operating Procedures and Critical Safety Procedures (CSPs). CSPs are used for

functions where there is a heightened safety risk associated with the task. Employees are trained in the Respondent's CSPs when they commence their employment, this training is refreshed on an annual basis.

[7] In September 2018, the Applicant received a final warning for allegedly breaching CSP027. The Applicant climbed on a wagon (known as a Butter Box) while a Despatch Operator was moving a coil in his vicinity.

Letter of Final Warning

[8] Below is the Final Warning letter issued to the Applicant on 21 September 2018.

"Dear Trevor

The company has been investigating an incident invovling unsafe behaviour loading rail into butterboxes. I1404873. This incident occurrd on the 19 September 2018. The manner in which you accessed the butterbox, interated with crane13 and removed timbers form the cradles and received an injury has been under investigation. The investigation included review of CCTV footage and interviews of the relevant operators. You were suspended from Despactch operating duties pending the outcome of the investigation.

The investigation of the incident identified the following key points:

- *You failed to remain clear of wagons in breach of **CSP027 – Butter Box Loading in Bay 13***
- *You accessed the butterboxes in an unsafe manner*
- *You placed yourself in close proximity to a suspended load ie coil suspended from crane 13*
- *You exposed yourself to a fall, slip and trip hazard in walking along the butterboxes*
- *You performed a non standard task, not covered by any procedure without stopping and calling you supervisor to develop a JSEA.*
- *You descended from the rail wagon in an unsafe manner.*
- *You were injured and did report the injury when it occurred.*
- *You withheld information relevant to the incident when reporting the incident.*

Further, on 11 September you were involved in an incident being investigated where rail was loaded such that the wagon was unbalanced resulting in a significant lean, i1401086. The unsafe wagon was recognised when it arrived at its destination, the CRM works. On closer inspection coils in consecutive cradles were found to be touching and one coil was found suspended above the cradle. The investigation has been concluded. The finding is that the crane driver is responsible for ensuring butterboxes when loaded are balanced. Your failure to do so is in breach of CSP027.

It is acknowledged that you have been trained as a level 3 Despatch operator and accredited in CSP027 in June 2018.

The company is concerned about your behaviour as a Despatch operator and as an employee. You must follow and adhere to Critical Procedures at all times. You must

follow your training as a crane operator and loader. You must stop immediately after an incident and report all aspect penitent to any investigation. You must take the necessary steps to ensure that the product is not damaged through the performance of your duties. It is the company's expectation that you adhere to the company's Our Safety Beliefs' and to the 'Cardinal Rules'.

As a result of the investigation and the seriousness of the incident, you are being issued this ***Final Warning and two shifts suspension, unpaid****. I urge you to take this Final Warning seriously. Failure to address this behaviour may result in further disciplinary action up to and including termination of your employment.*

You are to receive retraining in the form of re-accreditation in CSP027. You are to be retrained in Our Safety Beliefs and The Cardinal Rules. You are expected to make a commitment to operate ~~the~~ safely, at all times thing to the appropriate care to perform all Despatch operator duties safely and adhering to your Standard Operating Procedures and training.

Further, you must adhere to the Critical Safety Procedures you have been accredited in. You will be suspended form operating cranes and confined to loader duties until you successfully complete these requirements.

I wish to remind you that an Employee Assistance Program is available to BlueScope employee if there are problems you require assistance with. They can be contacted on 1300 727 308. These services are free to our employees and their immediate family and remain private and confidential at all times.

A copy of this letter will be placed in your personnel file."[i]

The Incident

[9] The Respondent alleges that on 5 September 2019, the Applicant was operating Crane 60, loading coils on to the saddles in paint line CPL3, when the following series of events occurred:

"the Applicant loaded a Threader Coil (Threader) onto the entry saddle with insufficient space between a coil already loaded onto the saddle (Second Coil) to fully release the tongs. The Applicant hoisted while the furthest tong of the tong was pressed up against the Second Coil, causing the tongs to scrape against the face of the Second Coil. The Applicant did not long-travel before hoisting;

the Applicant attempted to place another coil (First Coil) onto the entry saddle next to the Threader but knocked the First Coil into the Threader, causing the Threader to be shunted along the entry saddle;

the First Coil was loaded onto the entry saddle with insufficient space next to the Threader to fully release the tongs, and an unsafe distance from the edge of the saddle;
the Applicant long travelled while the furthest tong of the tong was still engaged with the bore of the First Coil, causing the tongs to twist;

the Applicant hoisted the crane while the tongs were still engaged with the bore of the First Coil causing the First Coil to lift while not safely secured."[ii]

Termination letter

[10] Following an investigation by the Respondent, the Applicant was terminated on 1 October 2019. The Applicant's termination letter said:

"*Dear Trevor,*

Notification of Termination of Employment

Following an investigation of events that occurred on 5 September 2019, being the breach of a Critical Safety Procedure, on 16 September 2019 you were invited to attend a "show cause" meeting as you were advised that the Company was considering terminating your employment.

That meeting took place on 27 September 2019. At this meeting you were provided with an opportunity to submit any information you would like the company to consider to making a final decision regarding your employment.

The Company has considered the information provided by the Australian Workers' Union on your behalf and the discussions that took place during the meeting held with you on 27 September 2019.

The Company has determined that your action constitutes a breach of Critical Safety Procedure CSP031 – Moving Coils / Loading Trucks with Tongs or C-Hook & Unloading AGV Stands. In addition to breaching the Critical Safety Procedure, you drove the crane in an unsafe manner, caused damage to 2 coils and placed the tongs in a compromising position, risking the coil being tipped.

Having carefully considered all information gathered, the Company has made the decision to terminate your employment effective immediately. You will receive 5 weeks' pay in lieu of notice as well as any accrued entitlements you may have.

I would like to remined you that you are able to access the Employee Assistance Program on 1300 727 308 at this time as previously advised.

Your sincerely,"[iii]

[11] Below I have included a reproduction of the portion of CSP031 that the Respondent claims the Applicant breached during the Incident.

CRITICAL SAFETY PROCEDURE		
Task: CSP031 – Moving Coils / Loading Trucks with Tongs or C-Hook & Unloading AGV Stands		
Job Step	Hazard	Control
Place coil Down in desired location (field, truck etc.)	Fatality from toppled or dropped Coil.	Never move crane if people are in the line of fire Place coil in desired location gently. Open tongs fully then use long travel to clear the bore before hosting. This is to prevent the toes of the tongs

		catching bore and tipping coil. Watch load and tongs.
	Coil not stored safely / tipped / rolling coil.	Ensure Coils are place centrally in and supported by chocks in the coil field. Report damaged chocks to CMS controller.

Submissions

Applicant's Submissions

[12] The Applicant submitted that, as the Respondent has raised no jurisdictional objections, there are two issues that the Commission must determine, namely;

> "Whether the Applicant' dismissal was harsh, unjust or unreasonable having regard to section 387 of the Act; and
>
> If so – whether the Applicant should be reinstated or awarded compensation."[iv]

[13] Concerning the first question, the Applicant submitted that his dismissal was harsh and unjust and unreasonable for the following reasons:

> "The dismissal was unjust because the conduct did not rise to a level warranting disciplinary action;
>
> The dismissal was unreasonable because the investigation was not conducted in a manner which permitted the Applicant to properly defend himself;
>
> The dismissal was harsh because the penalty was disproportionate to the conduct.
>
> The dismissal was also harsh because the impact of the dismissal on The Applicant given his personal circumstances and length of service."[v]

[14] In addition to the above reasons, the Applicant asserted that the following issues are relevant considerations:

- There was no valid reason for his dismissal because:

  > "The damage the Applicant allegedly caused to the coil was minor and may not have been caused by the Applicant, and:
  >
  > CPS031 is inconsistent with best practice guidelines issued by the national safety agency."[vi]

- The Applicant was unable to adequately respond to the accusations the Respondent levelled at him because the Respondent failed to provide him with video footage of the coil throughout the production process. The Applicant claimed that this meant that he was unable to assess the Respondent's case against him promptly.

- The Applicant was subject to differential treatment on the basis that he is a union activist.

- The Applicant has worked at the Respondent for approximately 31 years, he is 64 years old and has used three-quarters of his superannuation savings to pay off debts, which he had previously been servicing with his regular income.

[15] Regarding remedy, the Applicant submitted that there was no practical impediment to reinstatement. The Applicant claimed that he is motivated to return to work, that he has a good relationship with the Respondent, that he can perform his role to a high standard, and that compensation would not be an adequate remedy.

Respondent's Submissions

[16] Concerning whether the dismissal was harsh, or unjust or unreasonable, the Respondent submitted that they had a valid reason to terminate the Applicant because the Applicant failed to comply with CSP031, in that he did not;

> "long-travel before hoisting after loading the Threader onto the entry saddle, and did not ensure the tongs were clear of the bore of the First Coil before hoisting."[vii]

[17] The Respondent claimed that this breach of CSP031 resulted in a serious risk to safety and caused loss to the Respondent. The Respondent further submitted that the Applicant failed to report the Incident, admitted to regularly breaching the Respondent's safety procedures (by hoisting first on a regular basis when disengaging form a coil), failed to show contrition during the investigation of the Incident and had on several occasions received written warnings for unsafe conduct. The Respondent highlighted that in September 2018, the Applicant received a final warning for breaching CSP027. The Respondent claims that, as a result, it has lost confidence that the Applicant can comply with the Respondent's CSPs.

[18] Regarding the Applicant's assertion that he was not adequately able to respond to the allegations levelled against him, the Respondent submitted that the video footage of the damaged coil at earlier stages of the production process is not relevant. Further, the Respondent submitted that they provided all materials that were relied upon by them when a decision was made to terminate the Applicant.

[19] The Respondent rejected the claim that its CSPs were contrary to national best practice guidelines.

[20] The Respondent submitted that in the context described above, the Applicant's personal circumstances and employment history do not weigh so heavily as to render the dismissal unfair. Further, the Respondent rejected the Applicant's claim that he was subject to differential treatment due to his role as a union delegate or that the dismissal was disproportionate to the conduct of the Applicant.

The Site Inspection

[21] On 17 December 2019, an inspection was conducted of the Springhill worksite (Site Inspection). During the Site Inspection, I observed several coils being loaded on to the saddle

in the paintline. I witnessed this from an area immediately adjacent to the paintline and from the cabin of Crane 60. From time to time, one of the arms of Crane 60 would retract at a slower speed than the other, i.e. the tongs did not retract simultaneously.

[22] I also observed a Despatch Operator driving Crane 60 from inside the crane cabin, I noted that Despatch Operator are provided with a system of lights that assists them in hoisting a coil safely, but no clear aids are provided when disengaging. Further, the western tong on the western or far side of the coil being unloaded and any smaller coil already on the saddle were unable to be seen from Crane 60's cockpit. The accumulative effect of this was that it was difficult, if not impossible, to determine when the tong on the western side of the coil had disengaged, even when the tongs had been 'opened fully', as required by CSP031. I also noted how easy it is to damage a coil. At my request, the Despatch Operator went to pick up a coil from the saddle. Unfortunately, one of the tongs hit the coil, in the process of getting into position to hoist the coil causing it damage.

[23] Throughout the inspection, I observed the general work environment in which Crane 60 operates. While there was one person working in the paintline (Entry Line Operator), they were not close to where the coils were being placed on the saddle. The remainder of the work observed in the immediate vicinity was carried out by automated vehicles.

Evidence

Mr Trevor Knowles

[24] The Applicant gave the flowing account of the Incident:

"5. *The PFD has two lines, which are referred to as line 1 and line 2. These lines hold the coils until they are ready to be Despatched.*

6. On 5 September 2019, I was operating crane 60 at the Bluescope site in Spring Hill.

7. At around 4:30pm, I was informed by my supervisor, Daniel Cadwellan, that all coils on both paint lines in the PFD needed to be removed, turned around and reloaded. This usually has to be done to turn the feed around. I am not aware of the reason that this needed to be done. Sometimes it is because the coils are scratched or because the underside of the coil will need to be painted.

8. ***This meant that at least 14 coils needed to be moved as quickly as possible so that the line kept running.***

9. While I was moving the coils, the crane phone rang. At this time, I had a coil suspended and ready to place on line 1. I paused crane operation and answered the phone. The line operator, Chris Fernandez, was on the line and we had a conversation to the following effect:

Mr Fernandez:	*"Trevor, I need an additional Threader Coil from the transfer car for line 1."*
Me:	*"No problem, I will bring one now."*

10. As soon as I hung up the phone with Mr Fernandez, I put down the suspended coil (the First Coil) and picked up a Threader Coil from the transfer car and placed it onto line 1 as requested. I then picked up the First Coil to load it onto line 1. (The First Coil is the damaged coil.)

11. I placed the First Coil down on line 1 and opened the tongs. At this moment the crane phone rang again. I paused operating the crane and answered the phone. It was Mr Fernandez again. We had a conversation to the following effect:

Mr Fernandez:	*"Trevor, I need another Threader Coil for line 2 now."*
Me:	*"Ok, where is it?"*
Mr Fernandez:	*"It's at 1143."*
Me:	*"No worries."*

*12. **After this conversation I moved the tongs up and maneuvered the tongs to hook the second Threader Coil**. After I placed the second Threader Coil on line 2, I moved a further four or five additional coils.*

13. Once these tasks were completed, it was approximately 6:45pm and I went to Despatch and left for the day with everybody else."[viii]

(My emphasis)

[25] During cross-examination, the Respondent sought to clarify The Applicant's recollection of the Incident. The Respondent put it to the Applicant that after the phone call with Mr Fernandez, the tongs were twisted in the coil and that he had hoisted rather than long travelling. There were some inconsistencies in the Applicant's responses. Notable, he seemed to both affirm and deny the Respondent's assertion:

"I don't know whether I did see them twisting, but how can I rephrase this, when I was on the phone with Chris he wanted a threader out of I153 or something, and I said, "Yes, I'll get it for you in a minute, Chris", and then the tongs popped and I long travelled out, but I didn't see the twist on it."

…

"So you accept that when the tongs was caught before it popped out that you tried to hoist; is that correct? ---I didn't know the tongs were caught"[ix]

[26] After the Respondent took the Applicant to the video footage of the Incident he accepted that at the point the tongs dislodged from the Coil he was hoisting. The following exchange confirms as much:

"Do you accept that you lifted – at the point where the tongs came out you were lifting at that point in time? --- yes."[x]

Further, the Applicant stated he believes that you get less damage when you hoist rather than long travelling when disengaging from a coil.

[27] It was the Applicant's evidence that he was unaware any coils had sustained any damage as a result of actions he took while operating Crane 60 on 5 September 2020. Further, the Applicant claimed that coil damage was a very common occurrence stating that almost every day of his 31-year tenure at the Respondent he has witnessed coils being damaged.

[28] The Applicant claimed that although there is a system of lights that assist in hoisting, there is no similar system in place for disengaging. Relevantly, the Applicant gave this evidence when the statements of both Mr Towers and Mr Meta clearly state that the lights could be used when disengaging. Further, the Applicant stated that when operating Crane 60, Despatch Operators are unable to see the western side of the coil that they are moving.

[29] The Applicant acknowledged that he had received a final warning on 21 September 2018. However, the Applicant disputed the appropriateness of the warning as he believes that he did not breach a specific safety procedure.

[30] The Applicant claimed that safety incidents were common, as were breaches of the CSPs. Annexed to the Applicant's witness statement were several instances where employees had breached safety procedures and had been subject to less severe punishments. Notably, Annexure G of the Applicant's witness statement provides an example which seems similar to the Incident. The employee, in this case, caused damage to a coil by breaching CSP031 in a similar way that the Applicant allegedly did. However, the employee responsible was only issued with a warning. The Applicant provided several other examples of BlueScope employees receiving varying punishments for breaching CSPs. In at least one of these examples, an employee was given a second final warning.

[31] It was the Applicant evidence that he often felt targeted due to his position as an AWU delegate. In support of this statement, the Applicant submitted that he was chosen, using an arbitrary selection process, to populate a new roster in which the workers on the roster would work shifts which did not attract penalty rates. The AWU disputed the roster in the Commission. A compromise was reached where the workers in the PFD participated in a rotating roster, where employees work day-shift on a cyclical basis. During cross-examination, the Applicant acknowledged that at the resolution of the dispute, he volunteered to be in the first roster group. Further, he acknowledged that when he volunteered to do so, he was aware that the Agreement included a retention clause which would benefit employees who participated in the rotating roster in the first six months of its operation. The Applicant denied that the retention clause was his motive for volunteering to participate in the rotating roster.

[32] The Applicant provided evidence of his financial position. When he was dismissed, he withdrew $230 000 from his superannuation account to pay off his home loan, car loan, caravan loan and his credit card. The balance of his superannuation is $70 000. He has cash assets of approximately $38 000, a re-locatable home, a caravan and two cars. The Applicant stated that he has no income, and although he has tried to obtain alterative employment, he has so far been unsuccessful.

[33] The Applicant claims that he has a good working relationship with the Respondent, and that he wants to return to work. The Applicant also committed to always long travel when disengaging from a coil in the future.

Mr Christopher Newbold

[34] Mr Newbold has been a Union Organiser with the AWU since May 2019. Before working for the AWU, Mr Newbold was an employee at the Respondent for approximately 25 years.

[35] The Respondent provided the AWU with all safety incident reports for breaches of the Respondent's safety procedures involving cranes. It was Mr Newbold's evidence that he reviewed these reports and that in his opinion, sixteen of the eighteen incidents involved safety breaches that were more serious than the Incident. Mr Newbold claims that of these incidents, only one employee was terminated and only one final warning issued.

[36] Mr Newbold submitted that in his experience, it is a common occurrence at the Respondent for employees to receive more than one final warning.

[37] Mr Newbold submitted that Work Safe's High-Risk work Licensing for Bridging and Gantry Cranes Information Sheet and the High-Risk work Licensing for Dogging Information Sheet, state that a dogger is required to direct a load where a crane operator cannot see the load for the entirety of the lift.

[38] It was Mr Newbold's evidence that while he was a union delegate at the Respondent, he was targeted by management. Mr Newbold testified that a line leader, Mr Matt Burke, had said to him, words to the effect;

> *"You should keep your nose out of the trial or else I make things very difficult for you here. We are already building a case against you."*[xi]

Further, Mr Newbold claimed that during enterprise agreement negotiations in 2018, he was continually required to complete particularly difficult tasks. He stated that other employees employed in the same role were not subject to this treatment.

[39] Mr Newbold testified that the Applicant is a well-respected and senior union delegate who has a great reputation amongst his colleagues.

Mr Allan Towers

[40] Mr Towers is a Shift Team Leader – Paintline. He is responsible for managing the operations of the continuous paintline. Mr Towers was working night shift on 5 September 2019 and commenced at 5:30 pm.

[41] Mr Towers claims that at 6:30 pm on 5 September 2019, he received a call from an Entry Line Operator who asked Mr Towers to inspect a coil on entry saddle 1. Mr Towers submitted that he made the following observations when he arrived at entry saddle 1:

> *"(a) the coil had been placed on the edge of entry saddle 1, furthest from the entry to the paintline and closest to the cabin of crane 60. Based on my experience, the coil was*

placed too close to the edge of the saddle, making it too dangerous for Mr Fernandes to attempt to move the coil toward the paintline entry. The coil was 10.32 tonne and I considered the way in which the coil was placed on the edge of the entry saddle created a risk that the coil would topple over;

(b) the West face of the coil had sustained two curved lines of damage. Based on my experience, the pattern of damage to the face of the coil indicated that it had been hit against another, smaller diameter, coil;

(c) there was damage sustained to the East side of the Threader Coil placed to the West of the damaged coil, which in my experience, indicated that the coil had been hit against the Threader Coil;

(d) the outer edge of the coil was lifting and had red scrape marks. I considered the red marks on the coil may have been caused by the tongs of crane 60 (which are covered in red polyurethane) scraping against it; and

(e) the inner edge of the bore was also damaged, which based on my experience, I considered to also be consistent with the tongs having scraped against the coil."[xii]

[42] Mr Towers testified that he instructed the operator to hold the coil from the paint line so that it could be reprocessed. He assessed that the reproduction of the coil would cost about $2000.

[43] Mr Towers submitted that he could not accept that the Applicant would not have recalled knocking the Threader Coil and that if a coil shunted another coil along the paint line, it is reasonably expected the coil would sustain damage. Further, he submitted that when an employee has damaged a coil, they are required to report it.

[44] Mr Towers submitted that he believes that if the operator follows the Respondent's CSPs, coils can be loaded on to the paint line without the need of a dogger. Concerning whether the lights on Crane 60 assist a Despatch Operator when they are disengaging a coil, Mr Towers stated the following:

"based on my skills and experience in operating crane 60, a crane operator is able to determine when the tongs are fully open and clear by the red, white and green lights on the top of the crane tongs all turning on after the tongs are operated open."[xiii]

[45] Relevantly, during cross-examination, Mr Towers acknowledged that the responsibility for a coil tipping once placed on the saddle becomes the responsibility of the Entry Line Operator.[xiv] Further, he acknowledged that the Applicant placed the coil securely on the saddle.[xv]

[46] Mr Towers stated that, prior to his involvement in this matter, he was unaware that some Despatch Operators use the bolt lines as a marker to guide coil placement on the saddles. Further, he was aware that there was nothing in the CSPs that indicated where a coil should be placed on the line.[xvi]

[47] Mr Towers conceded that the coil that the Applicant was handling during the incident was a soft iron coil. He stated that both hard iron and soft iron coils are processed by Crane 60

and that the Despatch Operators would not know what type of coil they were handling. Further, he acknowledged that soft iron coils are more likely to be damaged than hard iron coils.[xvii]

[48] Mr Towers testified that;

> "*(d) based on my skills and experience in operating crane 60, a crane operator is able to determine when the tongs are fully open and clear by the red, white and green lights, on the top of the Crane tongs all turning on after the tongs are operated open.*" [xviii]

Mr Daniel Cadwallen

[49] Mr Cadwallen has worked at BlueScope for thirteen years and is now the Finishing Team Leader of A Crew. He is the Applicant's direct supervisor. Once the Incident was brought to Mr Cadwallen's attention, he viewed video footage of the Incident, was involved in the early stages of its investigation and engaged with the Applicant in both formal and informal discussions.

[50] Mr Cadwallen was also the Applicant's direct supervisor in September 2018 when the Applicant received a final warning for allegedly breaching CSP027. It was Mr Cadwallen's evidence that the Applicant breached CSP027 as he:

> "*climbed on top of a truck/wagon while there were cranes operating overhead and without using a safety loading platform;*
>
> *stood in an unsafe zone while a crane suspended a coil in close proximity to him; and climbed off the wagon without the aid of a safety loading platform.*" [xix]

It was Mr Cadwallen's evidence that the Applicant was retrained in CSP027 after this event and that the Applicant received annual refresher training on all CSPs that are relevant to his role, including CSP031.

[51] Mr Cadwallen's account of the Incident corroborates the Respondent's submissions concerning the events that occurred. Mr Cadwallen stated that based on his experience, the Incident had a real potential to result in a coil tipping.

[52] Mr Cadwallen gave several accounts of conversations that had taken place with the Applicant on 6 September 2019. He contends that the Applicant's account of events changed from the first conversation to the last. He expressed concern that the Applicant was more concerned with whether he had damaged the coil rather than how he operated the crane.

[53] It was Mr Cadwallen's evidence that during a formal meeting, the Applicant stated words to the effect:

> "No, I don't long travel if I can help it. I just hoist." [xx]

Mr Cadwellen stated that he has serious concerns that if the Applicant was reinstated to his role that he would not operate a crane consistent with the Respondent's CSPs.

[54] During cross-examination Mr Cadwellen acknowledge he has never seen the Applicant hoist while disengaging.[xxi]

[55] The Applicant' most recent annual refresher of CSP031 was conducted on 10 August 2019. A copy of this assessment was attached to Mr Cadwellen's statement. Question 5 reads 'What must you do before hoisting after unloading a coil (with tongs and C-Hook). The Applicant responded.

> "Make sure clear of coil" [xxii]

Mr Cadwellen acknowledged that the Applicant did not refer to long travelling in his response to the above question. [xxiii] At the bottom of the practical assessment the following statement appears:

"On this date, this employee successfully demonstrated both the theoretical and practical understanding of the procedure."[xxiv]

Mr Cadwellen's is listed as the assessor, and his signature appears next to his name.

[56] Mr Cadwellen confirmed that while operating crane 60, the western face of a coil and the western tong is not visible. [xxv] Further, he acknowledged that it is possible to touch an adjacent coil without damaging that coil. [xxvi]

Mr Gary Meta

[57] Mr Meta has been the PFD Operations Manager at Respondent's Spring Hill Works site since 2011. Since commencing with the Respondent in November 1979, Mr Meta has occupied several management roles.

[58] Mr Meta claimed that it is critical that all employees follow the CSPs to minimise potential serious safety risks associated with the business.

[59] Mr Meta's witness statement outlined that Crane 60 has a system of three lights that are intended to operate as aids for Despatch Operators. Regarding the lights, Mr Meta stated the following:

> *"Affixed to the top of the crane tongs are 3 lights, visible from the crane cabin, which assist crane operators in identifying when the tongs are lined up with the centre of the coil bore, when the tongs are closed and locked in position, when the tongs are bearing weight of a load, and when the tongs are fully released. The light system operates in the following manner:*
>
> > *(a) the green light lights up when the tongs are clear of any obstruction. That is, the green light stays on when the tongs are not carrying a coil. As the tongs are lowered to pick up a coil, the green light turns off until the tongs come in line with the bore of the coil, indicating that the tongs are clear to be closed;*
> >
> > *(b) the white light lights up when the tongs are fully open or fully closed. That is, once the green light indicates the tongs are clear of a coil bore and an operator starts to close the tongs, the white light will turn off until the tongs are closed and locked in position. Similarly, when releasing the tongs, the white light will turn off until the tongs are fully opened; and*

> *(c) the red light lights up once the tongs are bearing weight or are under load."*[xxvii]

[60] In response to several of my questions while in the witness box, Mr Meta retracted the statement:

> *'Similarly, when releasing the tongs, the white light will turn off until the tongs are fully opened.'*

He stated that his understanding on the day of the Hearing was that the lights offer the Despatch Operator no assistance when disengaging from a coil. Further, In response to a question from Ms Doumit, Mr Meta conceded that, at the point he made his written statement he believed that statement correct.[xxviii]

[61] In his written statement, Mr Meta identified that from time to time, Crane 60's arms move at various speeds. He stated that the white lights could be used as a guide to determine when both tongs have been locked in position. At the Hearing, Mr Meta retracted this statement. Mr Meta's evidence evinces that he does not understand the function of the light system. However, he claimed that the operation of the lights wasn't a factor when determining whether to terminate the Applicant.[xxix]

[62] While preparing his witness statement, Mr Meta asked several Despatch Operators how they gauge whether there is appropriate space to load a coil on to the entry saddle. A typical response was that the Despatch Operators use the bolt lines on the saddle as a guide. During cross-examination, Mr Meta acknowledged that the Applicant placed the coil firmly on the saddle. Subsequently, Mr Meta testified that the position of the coil on the saddle creates two distinct tip risks. Firstly, a risk of a coil tipping arises when the Despatch Operator places the coil on the saddle. Secondly, a risk of a coil tipping arises when the Entry Line Operator raises the coil to move it along the saddle. Mr Meta acknowledged that the responsibility for a coil tipping as a result of the Entry Line Operator moving the coil on the saddle is that of the Entry Line Operator.

[63] Mr Meta testified that the Applicant completed refresher training in CSP031 in June 2019. A copy of the Applicant annual review of CSP031 was attached to Mr Meta's statement. This document was identical to the annual review of CSP031 submitted by Mr Cadwellen. In the bottom right-hand corner of that document the following note appears:

> *"Review per MES4106088, GM"*

[64] Mr Meta testified as to why long travelling when disengaging a coil is critically important.

> *"Long travel is required under CSP031 and is extremely important on the entry-line saddle because if a tong is caught in the bore of a coil (as was the case during the Incident) and a Despatch Operator attempts to hoist without long travel there is a risk that the unsecured coil will be suspended from the crane or one side of the coil will lift and the coil will then tip over.*
>
> ….

I was concerned by The Applicant' statements because they indicated that he does not normally or routinely follow the requirements of CSP031 to long-travel before hoisting and he was indifferent to the safety risks arising out of his failure to do so." [xxx]

Mr Meta attached a copy of the Respondent's Safety Beliefs to his witness statement. These beliefs state that management is accountable for safety performance. During cross-examination Mr Meta accepted that the above statement means that managers have a responsibility to ensure that people are acting safely.[xxxi] Mr Meta claimed that consistent with this responsibility, if he had seen the Applicant fail to long travel when disengaging he would have raised it with him.[xxxii] As above, Mr Meta reviewed Mr Knowels' annual review of CSP031 in which he did not state that he long travelled to clear the coil. For a manager who takes his responsibility for safety seriously and testified at length the critical nature of long travelling to clear the coil, this is concerning.

[65] Mr Meta claimed that the Applicant had received several written warnings while working for the Respondent. These warning included a final warning for breaching CSP027 in September 2018.

[66] Mr Meta stated that he has watched video footage of the Incident and that he gave an account that is consistent with the submissions made by the Respondent.

[67] Mr Meta stated that throughout the investigation, the Applicant lacked contrition and was focused on whether he had damaged a coil rather than whether he had breached the Respondent's CSPs.

[68] Mr Meta made the decision to terminate The Applicant based on the following:

"(a) The Applicant had received the Final Warning for a very serious breach of a CSP. The Final Warning was clear that any further safety breach would be viewed very seriously;

(b) following a CSP is a critical element of the job and it's a fundamental aspect of working safely. A failure to adhere to procedure is behaviour which puts The Applicant at risk regardless of which job he is performing;

(c) The Applicant undertook refresher training in CSP031 as recently as June 2019, however this had no effect in changing The Applicant' behaviour and attitude toward compliance with our CSPs;

(d) The Applicant was aware (or should have been aware) that the tongs were not free of the First Coil but chose to hoist in breach of CSP031. The Applicant' disregard for CSP301 constituted an unacceptable risk to himself, other people and BlueScope's business;

(e) the role of Despatch Operator requires a high risk licence and involves serious hazards. I considered The Applicant to be incapable of performing the role of a Despatch Operator safely given his approach to BlueScope's safety policies and procedures;

(f) the Incident itself was very serious and had a real possibility of resulting in a tipped coil; and

(g) The Applicant never reported the Incident, nor did he accept responsibility for the role he played in the Incident or the seriousness of failing to follow the CSP." [xxxiii]

(My emphasis)

[69] Mr Meta gave evidence that if the Applicant were to be reinstated, he would have serious concerns that the Applicant would not perform the inherent requirement of his position safely. His concerns were based on the following:

"(a) my original Concerns arising out of the Incident;

(b) The Applicant' conduct throughout the investigation, including his evasiveness during questioning and discrepancies in his statements throughout the various meetings;

(c) The Applicant' lack of contrition and failure to take responsibility for his conduct or acknowledge the risk that his actions exposed to himself, other employees and BlueScope's business;

(d) The Applicant has a history of poor safety practices. Following a breach of CSP027 warranting the Final Warning The Applicant was reaccredited in CSP027 and CSP031. The Incident occurred less than 2 months following The Applicant being re-accredited in CSP031. The Applicant has not responded to the previous disciplinary action or refresher training;

(e) this was not a minor incident. It was a serious incident which could have resulted in serious injury or fatality;

(f) I have no confidence that if he were to operate a crane he would be able to do it safely. In light of The Applicant' 2018 safety breach, I also have no confidence that he could be trusted to perform another role safely;

(g) The Applicant' lax attitude towards BlueScope's safety policies and procedures would be likely to expose himself and his colleagues to health and safety risks if he were reinstated; and

(h) BlueScope takes safety breaches very seriously and reinstatement of The Applicant would send a very damaging and negative message to BlueScope's employees and could undermine the importance of BlueScope's safety procedures." [xxxiv]

(My emphasis)

Statutory Provisions

[70] The relevant sections of the Act relating to an unfair dismissal application are:

396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy.

381 Object of this Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair dismissal that balances:

(i) the needs of business (including small business); and

(ii) the needs of employees; and

(b) to establish procedures for dealing with unfair dismissal that:

(i) are quick, flexible and informal; and

(ii) address the needs of employers and employees; and

(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

382 When a person is protected from unfair dismissal

A person is protected from unfair dismissal at a time if, at that time:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

384 Period of employment

(1) An employee's *period of employment* with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised; the period of service with the old employer does not count towards the employee's period of employment with the new employer.

385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.
see section 388.

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.

Section 396 – Establishing Jurisdiction

[71] Section 396 of the Act outlines several jurisdictional facts that must be addressed before the Commission turns to an assessment of the merits of a matter. I now turn to address each of these in turn.

Section 396(a) whether the application was made within the period required in subsection 394(2)

[72] It is agreed between the parties that the Applicant was dismissed on 1 October 2019. The Applicant's application was filed on 16 October 2019. The Application was made within the twenty-one day (21) statutory time frame mandated by section 394(2) of the Act.

Section 396(b) whether the person was protected from unfair dismissal

[73] BlueScope is a national system employer. As stated above the Applicant has been employed by the Respondent for a period in excess of 6 months. The Applicant's employment was covered by the Agreement. As such the Applicant is protected from unfair dismissal.

Section 396(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code

[74] BlueScope is a large entity that employs several thousand people; thus, the Small Business Fair Dismissal Code does not apply.

Section 396(d) whether the dismissal was a case of genuine redundancy

[75] The Applicant was dismissed for an alleged safety incident; thus, it was not a case of genuine redundancy.

Consideration

[76] When considering whether a termination of an employee was harsh, unjust or unreasonable, the oft-quoted joint judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines* (*Byrne*) (1995) 185 CLR 410 is of significance:

> "It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.
>
> … In *Lane v Arrowcrest Group Pty Ltd*, von Doussa J considered the example of the dismissal of an accountant who held a position of trust where it was discovered after the dismissal that the accountant had been systematically embezzling money from the employer. His Honour said it would be astonishing if the employer could not resist an allegation that the dismissal was harsh, unjust or unreasonable, within the meaning of the relevant award, by pointing to those facts discovered after the dismissal, so long as they concerned circumstances in existence when the decision was made. His Honour concluded:
>
> > "Whether the decision can be so justified will depend on all the circumstances. A circumstance, likely to favour the decision to dismiss, would be that fraud or dishonesty of the employee had caused or contributed to the employer's state of ignorance. A circumstance likely to weigh against the decision would be that the employer had failed to make reasonable inquiries which would have brought existing facts to its knowledge before the dismissal occurred.""[xxxv]

[77] In analysing *Byrne*, a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1 held:

"The above extract is authority for the proposition that a termination of employment may be:

• unjust, because the employee was not guilty of the misconduct on which the employer acted;
• unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or
• harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct"[xxxvi]

Section 387(a) Valid Reason

[78] The meaning of the phrase "valid reasons" has been universally drawn from the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371:

"In broad terms, the right is limited to cases where the employer is able to satisfy the Court of a valid reason or valid reasons for terminating the employment connected [2019] FWC 3332 10 with the employee's capacity or performance or based on the operational requirements of the employer. …

Section 170DE(1) refers to "a valid reason, or valid reasons", but the Act does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is: "2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the Macquarie Dictionary the relevant meaning is "sound, just, or well founded; a valid reason".

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 reason 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 each treated fairly…"[xxxvii]

[79] In *Rode v Burwood Mitsubishi* Print R4471, a Full Bench of the Australian Industrial Relations Commission held:

"… the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason."[xxxviii]

[80] In *Qantas Airways Ltd v Cornwall* (1998) 84 FCR 483, the Full Court of the Federal Court of Australia said:

> "The question is whether there was a valid reason. In general, conduct of that kind would plainly provide a valid reason. However, conduct is not committed in a vacuum, but in the course of the interaction of persons and circumstances, and the events which lead up to an action and those which the Respondent it may qualify or characterize the nature of the conduct involved."[xxxix]

[81] The Applicant was terminated on the cumulative grounds of 3 safety issues, namely:

i. The unsafe act of hoisting after he had placed the Threader Coil on saddle 1;
ii. The unsafe act of placing Coil 1 too close to the edge of saddle 1 creating a tip risk and
iii. The unsafe act of hoisting away from Coil 1 after the tongs had become stuck after initially long travelling.

I have taken this into account.

[82] I note the evidence of both Mr Meta and Mr Towers that the safety responsibility for a coil after it has been placed on to the saddle is that of the Entry Line Operator. How the employee operates the saddle is not the concern or the responsibility of the Despatch Operator. I do not accept Mr Meta's evidence that the Despatch Operator has a safety responsibility to place a coil over the top of the saddle mechanism. This requirement is not mentioned in any CSP and appears to be a recent invention of Mr Meta. The operation of the saddle cart is the responsibility of the Entry Line Operator. I have taken this into account.

[83] I have taken into account that Coil 1 was placed some 10 centimetres from the saddle, not on the edge, not within 5 centimetres, as suggested by the Respondent's witnesses. There was no added tip risk, for which the Applicant would be accountable and responsible, due to where Coil 1 was placed.

[84] I have taken into account that the Applicant long travelled after he placed Coil 1 onto the saddle. The western tong then got stuck in the coils core and the crane's line starts to twist. It is not in dispute that the Applicant receives a call from the Entry Line Operator requesting an additional Threader Coil onto the line to continue the production process. Under cross examination, the Applicant admitted that he then hoisted the coil and the tongs disengaged from the coil.

[85] I have taken into account that CSP031 does not provide any alternatives or remedies in relation to the scenario when one tong is clear of the coil and the other tong is stuck.

[86] I have taken into account that the Threader Coil was significantly smaller and totally obstructed from the view of the Applicant when trying to disengage the tongs from Coil 1. It was impossible for the Applicant to see the Threader Coil.

[87] I asked for an exact re-enactment to be filmed by the Respondent in relation to the location of the coils and the movement undertaken by the Applicant. [xl] Mr Meta worked as a groundman for this re-enactment, even though the Applicant never had the benefit of a groundman or dogger during his shift. Mr Meta was providing verbal communication/instructions via his mobile phone to a Supervisor in the crane as well as providing relevant hand signals. Despite, Mr Meta's best endeavours, when the Despatch Operator long travelled, the western tong did not clear the bore of the coil. The Despatch

Operator then returned the crane to the centre of the bore, at which time Mr Meta issued the instruction to hoist. The tongs then cleared the coil without any visible movement of the coil. No explanation was given as to why the tongs did not clear the coil when long travelling but they did clear the coil when the Despatch Operator hoisted. I have taken this into account.

[88] In *B, C & D v Australian Postal Corporation t/a Australia Post (Australia Post)* [2013] FWCFB 6191, a Full Bench of the Commission held:

> "A failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a "valid reason" for dismissal."[xli]

The Applicant's breach of CSP031 in not long travelling every time he disengages from a coil, prima facie, provides the Respondent with a valid reason to terminate the Applicant's employment. The Applicant is a long serving employee. The Respondent has a right to insist that its employees will follows its CSP's.

[89] I have taken into account that the Applicant had undertaken his annual CSP031 refresher training in June 2019. I note that in answer to the question:

> 'Section 3
>
> QS. What would you do before hoisting after unloading a coil (with tongs or C hook)?
>
> A: Make sure clear of coil'

Relevantly, this answer was deemed appropriate and correct by both Mr Cadwallen and Mr Meta.

Section 387(b) Notified of the reason

[90] It is not in dispute that the Applicant was notified of the reasons for his termination.

Section 387(c) Opportunity to respond

[91] It is not in dispute that the Applicant was provided with an opportunity to respond.

Section 387(d) Refusal to Support Person

[92] The Applicant was not refused the opportunity to have a support person present during the disciplinary process.

Section 387(e) Warning about unsatisfactory performance

[93] It is not in dispute that the Applicant received a final warning on 21 September 2018, in relation to a breach of CSP027. On this occasion, the Applicant was working on the ground and not driving a crane. I note that, in accordance with the Agreement, warnings have a currency for 12 months. The Applicant's previous final warning was issued 50 weeks prior to the Incident. I have taken this into account.

Section 387(f) Size of Enterprise – Procedures Followed

[94] The Respondent is a large employer and followed its structural disciplinary process.

Section 387(g) Dedicated HR Management

[95] The Respondent has a dedicated HR resource.

Section 387(h) Any other matte**r**

[96] I note that Mr Cadwellan was of the opinion that Coil 1 had been placed right on the edge of the saddle and that the Incident had a very real potential to result in a coil tip. Mr Meta was of the view that Coil 1 was only 5cm from the edge of the saddle. In reference to a question from me, Mr Meta agreed that the coil was in fact 10cm from the edge.[xlii] I have taken this into account.

[97] Mr Meta advised that a coil had previously tipped from saddle 1 onto the floor 10 years ago. Mr Meta acknowledged that the Entry Line Operator was held responsible for this incident. This means that, based on Mr Meta's lengthy experience in the Department, no coil has previously been tipped in the paintline area by a Despatch Operator. I have taken this to account.

[98] I have taken into account that there is no designated walkway next to Saddle 1. For anybody to be hurt by Coil 1 being tipped, they would have to be standing inside 1.2 metres, **actually obscuring the Despatch Operator's view of the tongs**. Even if the Despatch Operator was to flout the cardinal rule of not operating the crane if someone is in their line of sight, I don't believe any Despatch Operator would disengage the tongs of a coil with someone standing directly in front of the coil. Such a scenario is ridiculous, the person would be smashed in the face and chest with the back of the tong. As a result, the likelihood of anybody being injured from Coil 1 being tipped is basically zero. Mr Meta agreed that this outcome was unlikely:

> *"Mr Meta, I would suggest to you that it defies logic that any rational person, particularly somebody who has been trained in relation to the safety aspects of working in BlueScope and I believe BlueScope take safety very very seriously, that why anybody would be within 1.2 to 1.5 metres of the face of that coil, whilst the crane is in the process of disengaging itself?---**I think that's less likely; unlikely, low likely."**[xliii]*

I have taken this into account.

[99] Further, Mr Meta stated that when a scenario arises that is not covered by a CSP, the employee is expected and permitted to use their skill and experience to overcome the problem.

> 'But you're view at that point in time, was that there was a Respondent provided indicator that he could rely upon to know when the tongs were fully open?---In all honesty, we focused on the white lights and the use of the whites in hoisting a coil. That was our - and that's because in this - to be fair, in this situation we go back to the procedure and what's prescribed in the procedure. If it's prescribed in the procedure, then the operator is expected to follow what's prescribed. If it's not prescribed in there, then he has some room to do something else.'

I have taken this into account.

[100] In re-examination Mr Meta claimed that

> ' The only safe thing to do was to long travel back the other way, re-engage the coil, and take it off the saddle.' [xliv]

I have taken this into account that this wording is not contained in CSP031.

[101] I have taken into account that Mr Meta swore that his witness statement was taken as correct to the best of his knowledge. [xlv] Mr Meta's statement says:

> "Affixed to the top of the crane tongs are 3 lights, visible from the crane cabin, which assist crane operators in identifying when the tongs are lined up with the centre of the coil bore, when the tongs are closed and locked in position, when the tongs are bearing weight of a load, and when the tongs are fully released. The light system operates in the following manner:
>
> (a) the green light lights up when the tongs are clear of any obstruction. That is, the green light stays on when the tongs are not carrying a coil. As the tongs are lowered to pick up a coil, the green light turns off until the tongs come in line with the bore of the coil, indicating that the tongs are clear to be closed;
>
> (b) the white light lights up when the tongs are fully open or fully closed. That is, once the green light indicates the tongs are clear of a coil bore and an operator starts to close the tongs, the white light will turn off until the tongs are closed and locked in position. Similarly, when releasing the tongs, the white light will turn off until the tongs are fully opened; and
>
> (c) the red light lights up once the tongs are bearing weight or are under load."[xlvi]

[102] After questioning from myself and Mr Dearden, Mr Meta, after swearing that his statement was true and correct, recanted his position on the white lights.

> "No, but the white light - okay, that's fine. Just so we can get this right, so you've walked away this morning from the last sentence in 20(b). Is that right?---I'm not certain of that, so yes."[xlvii]

I have taken this into account.

[103] I have taken into account that, after watching the re-enactment videos, the lights on top of the crane tongs do not work in the manner testified by Mr Towers or as described in Mr Meta's statement. If it was impossible to see the western tong and the lights don't mean anything when the tongs are disengaging, I don't understand how Mt Meta could be so sure that the Applicant knew that he was not clear of the coil.

[104] I have taken into account the evidence of Mr Chris Newbold, whom I regard to be a witness of credit. In his written statement, Mr Newbold's unchallenged evidence is that he was

threatened by a line leader of the Respondent, Mr Matt Burke, due to his role as a union delegate. Mr Newbold testified;

> *"26. Throughout my time as a union delegate with BlueScope, I was often targeted by BlueScope management. In or around 2016, During the restructure and trial of new work practices in the Metal Coating Lines, Mr Matt Burke, a line leader, and I had a conversation to the following effect:*
>
> *Mr Burke: "You should keep your nose out of the trial or else I will make things very difficult for you here. We are already building a case against you."*
>
> *Me: "I am happy to continue this conversation with a higher level of management and with the union present."*
>
> *27. During the last Enterprise Agreement negotiation, in or around 2018, I was being targeted on the job on a regular basis. I was constantly under scrutiny by management. I other was continually moved to work areas particularly difficult tasks. Out of the 12 other Senior Process Operators I was the only one being regularly moved.*
>
> *28. Any incident that I had, I was dragged into the office and given warnings, improvement notices and threatened with dismissal. Where similar incidents occurred with other employees, no action was taken.*
>
> *29. The Applicant one of the most senior union delegates at BlueScope's Spring Hill site. He is highly respected and is empathetic towards all employees, regardless of their issue. He is regarded as the "go-to" person in the PFD area and most employees will go and see him if they have concerns with management.*
>
> *30. In my experience, an incident such as that alleged against The Applicant would not ordinarily be deemed serious enough to result in an employee's termination. I believe The Applicant has been targeted as a result of his affiliation with the AWU."*[xlviii]

I note that Mr Burke sat in the public gallery for the majority of the proceedings. The Respondent did not seek to put Mr Burke in the witness box to contradict this evidence

[105] I have viewed all of the video footage that has been provided on dozens of occasions. The Respondent has submitted that Coil 1 actually lifts when the Applicant hoists away from Coil 1 after the tongs had become stuck in the core. I do not agree. There is absolutely no movement of the coil. Mr Cadwellan agreed with this observation:

> 'You've just seen the video of the incident and you see that the coil actually remains firmly planted on the entry saddle throughout the entire video footage of the incident, would you agree?---Yes. To me it doesn't appear to move.'[xlix]

[106] I have taken into account the Full Bench decision in BlueScope Steel Limited v Zaki Habak (*Habak*) [2019] FWCFB 5702 when it was held:

> "We have also taken into account the gravity of the misconduct in considering the proportionality of the dismissal. The misconduct involved a substantial and wilful breach of the Appellant's policy. This policy was breached by the Respondent on three occasions in the last year. The tipping of the coil was a significant safety incident. This weighs strongly against a finding that dismissal was a disproportionate response."[l]

[107] In this matter, the Applicant has not previously breached CSP031. Some 50 weeks before the Incident, the Applicant, whilst working on the ground in a coil trailer known as a 'Butter Box', climber into the trailer and performed work in a manner that he claims was in accordance with regular workplace practice. This work practice was in breach of CSP027.

[108] The Habak decision can be distinguished on the evidence. I do note that the coil in this matter did not tip, in fact it did not move at all. Further, there was no walk way in the vicinity of the coil. If the Applicant had tipped Coil 1 a person would have to be standing within 1.5 metres of the front of the coil when the Applicant was disengaging the crane. I have taken this into account.

[109] Mr Cadwellan agreed that the Applicant would have stopped the process if an individual was in the vicinity of the coil. I have taken this into account.

> "The Applicant's evidence is that if he had an employee in the vicinity of the coil that he would stop?---Okay.[li]
>
> …….
>
> Do you have any reason to doubt The Applicant? No."[lii]

[110] I have taken into account the wording of CSP031. The possibility of tipping a coil only becomes a safety issue if there is a chance of a "Fatality from toppled or tipped coil". The control measure of CSP031 is "Never move crane if people are in the line of fire".

> "It didn't tip the coil over, but where's the safety risk?---Okay. It was lucky it didn't tip the coil over. The risk is to a person, is for someone that was in the vicinity."[liii]

There is no evidence or suggestion that the Applicant has attempted to disengage the tongs and move the crane whilst there is anybody in the 'line of fire'. Therefore, the critical and only hazard situation of CSP031 is not possible because the control measure has not been breached.

[111] I have taken into account that the initial investigation was undertaken under the premise of two false scenarios. Firstly, that the Applicant had not followed the white lights when disengaging the tongs from the coil and secondly, that the Applicant had placed Coil 1 on the edge of the saddle thus creating an increased tip risk.

[112] I have taken into account that the Applicant regularly hoisted away from the core of a coil rather than long travelled when he believed that he was clear of the core. He undertook this practice on the basis of efficiency, i.e. it was faster to hoist than it was to long travel and he needed to work quickly in order to get the job done.

[113] I have taken into account the contrary evidence of Mr Meta that he believes that it would be more efficient if all employees followed the precise wording of the CSPs.

[114] I have taken into account the evidence of Mr Cadwallen, in response to a question from me, that you could also ascertain if the tong was clear of the coil by hoisting as well as long travelling.

> 'I guess what I'm saying is he says here, "Make sure you're clear of the coil before hoisting", and in his interview he says if he's clear of the coil he doesn't long travel, he just hoists?---You can't be sure of being clear of the bore without long travelling.
>
> Because the cabin is facing the coil. The furthest tong isn't clearly visible. You can't see if it's out of the bore, so the only way to determine that it's out of the bore is long travelling and observing the tongs outside of the bore.
>
> I'm not sure that's very logical. How does hoisting not do exactly the same thing? Because hoisting to see if you're clear of the bore - if you aren't clear of the bore it will kick the coil up on that one side. So you're right, you will determine that it's not clear of the bore, but there is a risk of tipping the coil.' [liv]

[115] I have taken into account that Mr Cadwallen has never seen anybody, including an Entry Line Operator, close to the barrier, i.e. on the eastern side of the saddle, when a coil was being delivered to a saddle.

> 'No, I'm talking about have you ever seen anybody inside that enclosure whilst a coil is being delivered?---Not that far towards the barrier, I would say.' [lv]

[116] I have taken into account the financial impact that termination has had on the Applicant. The Applicant had significant debts that he was repaying with his regular income. Upon his dismissal, the Applicant has accessed 75% of his superannuation entitlement to pay off these outstanding debts.

[117] I have taken into account that the Applicant has little chance of finding employment within a 90-minute drive of his home, based on his mature age and specialised skill set.

[118] I have taken into account all of the submissions and evidence that have been submitted by the parties, including the information that I gained from the site inspection and from watching each of the videos on dozens of occasions.

[119] I make no comment in relation to the AWU's assertion that the National guidelines require a (dogger) to give directions to a Despatch Operator who is operating Crane 60 because the concealed tong of the crane. If the AWU wishes to pursue this issue then the appropriate venue is the PFD Work Health and Safety Committee or Safe Work NSW – not the Commission at first instance in the middle of an unfair dismissal application.

Determination

[120] Safety is a fundamentally important element of every Australian workplace. It should not be open for abuse by either side of the employment relationship. Employees should not use safety as an industrial tool to improve wages and conditions. Likewise, employers should not invent or falsely amplify safety hazards in order to discipline employees.

[121] There is no doubt that Despatch Operators who operate Crane 60 are highly skilled. It is not in dispute that the tongs in Crane 60 do not operate simultaneously on every occasion, there is no guide or view for the operator on the western or far side of the coil. Damage to coils from the operation of crane 60 is relatively common. The Site Inspection emphatically showed this outcome when a coil was damaged during the demonstration.

[122] For the Respondent to have a valid reasons to terminate the Applicant, it must be able to show that he has breached his safety obligations as an employee. In this circumstance, the Respondent must prove that the Applicant has breached CSP031.

[123] I am satisfied that the Applicant operated within his interpretation of CSP031. His commentary in relation to when he hoists or long travels is consistent with his answers on his annual re-accreditation, which was recently approved by Mr Cadwallen, as well as the evidence on the video footage of the Incident. Also, the Applicant was a witness in the recent unfair dismissal case of Mr Habak. He understands the importance of complying with the CSPs. The Applicant was also on a final warning for a breach of CSP027 some 50 weeks earlier. The Applicant was also aware that his movements were regularly watched by his Team Leader, Mr Cadwallen and that there are a number of video cameras that are permanently recording the movement of coils in the area. I do not accept that the Applicant would knowingly and blatantly breach a CSP. It would not be appropriate for the Respondent to condone the Applicant's work methods both in theory and in practice and then terminate him based on a strict and narrow interpretation of the CSP.

[124] I interpret the wording of CSP031 to mean that the tipping of a coil only becomes a safety hazard if there is risk of a fatality (or an injury) from that tipped coil. As can be seen from the evidence identified earlier, such an outcome was a virtual impossibility in this circumstance and an illogical conclusion. Even assuming that there would be a BlueScope employee who would be careless enough to stand within 1 metre from the back of a crane whilst it is disengaging its tongs from a coil, I am in absolutely no doubt, as was Mr Cadwallen, that the Applicant would immediately stop operating the crane until that person moved away. There is no evidence to suggest that the Applicant would operate in a manner to the contrary.

[125] The same scenario applies equally to the Threader Coil, except the employee would have to be standing approximately 0.5 metres away from the back of the tong whilst standing on the saddle. It is a preposterous supposition.

[126] I find that the Applicant has not breached CSP031. The Applicant has used his skills and experience to disengage from Coil 1, he did not put Coil 1 in a position that would increase the risk of it tipping when he disengaged from the coil and that he disengaged from the Threader Coil by hoisting in accordance with his usual practice and the answer on his most recent CSP031 re-accreditation. There was zero risk to any person being injured to any person in either circumstance.

[127] The tipping of a coil is not a safety risk or incident – unless there is a capacity for someone to get injured. In *Habak*, the coil tipped onto a pedestrian walkway. Admittedly, it was 11.30pm on a Saturday night and the nearest person to the coil was some 85 metres away, but it was possible that Mr Habak may not have seen someone walking along the walkway. Any person who may have been injured as a result of any coil tipping would have to be standing in front of the Despatch Operator, some 1.2 metres from the face of the Coil 1 and 0.5 metres for

the Threader Coil. Undoubtedly, there is some damage to a coil if it tips – but that is not a safety issue.

[128] As a result, I find that the Respondent did not have a valid reason to terminate the Applicant.

[129] If I am wrong on this issue and the Respondent did have a valid reason to terminate the Applicant, then I find that the Applicant's dismissal was harsh and unfair.

[130] The Applicant has worked for the Respondent for 30 years. He is an experienced Despatch Operator. His disciplinary record is not perfect, with regular concerns about his attendance and absenteeism over his career, but his record does not indicate that the Applicant was a poor performer or negligent performer. I find that the Applicant has a satisfactory disciplinary record for an employee with such lengthy service.

[131] Whilst it is always dangerous to compare penalties that have been imposed to different employees, I am satisfied that the Applicant has been treated harshly when compared to his peers. It is well established and understood that many employees at the Respondent have more than 1 final warning currently on their file. The AWU and Mr Newbold identified a number of recent examples of employees with this predicament. The current practice of the Respondent appears to be that if the first final warning was given to an employee for an incident that was unrelated to the second incident, then the employee is given a second final warning. This Incident involves the Applicant operating a crane. It is totally different to what the Applicant did in relation to working in a Butter Box in the vicinity of a suspended coil. For the Respondent to be consistent, it should have issued the Applicant with a second final warning.

[132] The Illawarra Region of NSW suffers from a high unemployment rate. The Applicant is 64 years of age and has been unsuccessful in applying for new employment. In my view, based on my knowledge of the employment opportunities in the Illawarra and surrounding areas, the Applicant is highly unlikely to find alternate employment. The Applicant's situation can be distinguished from that of Mr Sipple (see *Sipple v Coal & Allied Mining Services Pty Limited T/A Mount Thorley Warkworth Operations* [2015] FWCFB 2586) on the basis that the Applicant's skill set is highly specialised and of little use to any employer within 90 kilometres of his home. Such an outcome adds to the harshness of the termination.

[133] Even if the Applicant has breached CSP031, the breach is of such minor magnitude that termination is a harsh outcome. The Applicant's apparent breach would be that he hoisted the tongs rather than long travelling away from the Threader Coil and Coil 1. In relation to Coil 1, the CSP is silent of what process to follow if the tongs get caught. Mr Meta's evidence is that an employee is expected to use their skills and experience if the CSP is silent. That is what the Applicant did. In relation to the Threader Coil, the Applicant hoisted without long travelling. As a result of this action, the coil did not tip. The padding on the back of the tong rubbed along Coil 2, but this would have also occurred whether the Applicant had adopted to long travel. The Applicant claims that hoisting is the manner in which he disengages the tongs from the core of a coil on the majority of occasions. It is hard to believe that neither Mr Cadwallen or Mr Meta have never witnessed the Applicant operate in this manner, particularly Mr Cadwallen who is on the floor the majority of the time during the Applicant's shifts.

[134] I also find that the Respondent has condoned this practice of the Applicant's by not correcting his annual re-accreditation. The Applicant's answer is not correct. In a school or

university exam it would be marked as wrong because it did not contain the important and relevant information, which was "open tongs fully then use long travel to clear the bore". Instead, Mr Cadwallen marked the answer as correct and the Applicant continued to work in this manner.

[135] Whilst I can find no overt or clear evidence of the Applicant being discriminated against because of his role as a union delegate, I note that the Applicant appeared as a witness in support of Mr Habak in an earlier proceeding. I also note the unchallenged evidence of Mr Newbold that when he was employed by the Respondent he was bullied, harassed and threatened by a senior member of management from this Department due to this union activities.

[136] For the reasons stated above, I find that the Applicant has been unfairly dismissed.

Remedy

[137] There are a number of relevant provisions of the Act in relation to remedy:

> **Section 390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> > (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
> >
> > (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The FWC may make the order only if the person has made an application under section 394.
>
> (3) The FWC must not order the payment of compensation to the person unless:
>
> > (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
> >
> > (b) the FWC considers an order for payment
>
> **391 Remedy—reinstatement etc.**
>
> *Reinstatement*
>
> (1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
>
> > (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
> >
> > (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer; the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;
(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the

person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled; (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

[138] The Applicant seeks the primary remedy of the Act, ie, reinstatement. The Applicant is keen to return to work. The Applicant has given a commitment that he will always long travel when disengaging from a coil.

[139] The Respondent has submitted that reinstatement would be inappropriate on the basis that they simply couldn't trust the Applicant to comply with his operational and safety training all of the time. The Respondent claimed that the Applicant is an unnecessary safety risk to himself, his work colleagues and the Respondent.

Consideration

[140] The Applicant was on a final warning for breaching a critical safety procedure. The Applicant claims that he was simply following a work practice that had been in place for many years. Whilst I accept that the Applicant was acting for the productivity benefit of the Respondent, working under a suspended load is simply inherently unsafe. I can see no issue with the Applicant having received a final warning for his actions in that circumstance. I have taken this into account.

[141] I have taken into account that neither Mr Cadwallen or Mr Meta want the Applicant to be reinstated.

[142] In *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 *(Perkins)*, the Full Court of the Industrial Court said:

"Trust and confidence is a necessary ingredient in any employment relationship. … So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.

At the same time, it must be recognised that, where an employer, or a senior officer of an employer, accuses an employee of wrongdoing justifying the summary termination

of the employee's employment, the accuser will often be reluctant to shift from the view that such wrongdoing has occurred, irrespective of the Court's finding on that question in the resolution of an application under Di 3 of Pt VIA of the Act.

If the Court were to adopt a general attitude that such a reluctance destroyed the relationship of trust and confidence between employer and employee, and so made reinstatement impracticable, an employee who was terminated after an accusation of wrongdoing but later succeeded in an application under the Division would be denied access to the primary remedy provided by the legislation. Compensation, which is subject to a statutory limit, would be the only available remedy. Consequently, it is important that the Court carefully scrutinise any claim by an employer that reinstatement is impracticable because of a loss of confidence in the employee.

… It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.

It may be difficult or embarrassing for an employer to be required to re-employ a person the employer believed to have been guilty of wrongdoing. The requirement may cause inconvenience to the employer. But if there is such a requirement, it will be because the employee's employment was earlier terminated without a valid reason or without extending procedural fairness to the employee. The problems will be of the employer's own making. If the employer is of even average fair-mindedness, they are likely to prove short-lived. Problems such as this do not necessarily indicate such a loss of confidence as to make the restoration of the employment relationship impracticable."[lvi]

(My emphasis)

[143] In *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, a Full Bench of the Commission conveniently summarised this issue:

"The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.

- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.

- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.

- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.

- The fact that it may be difficult or embarrassing for an employer to be required to reemploy an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate. Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party."[lvii]

[144] I note Mr Meta's evidence that the Applicant has not transgressed in the last 50 weeks in relation to CSP027. In other words, he has taken note of his final warning.

[145] The Applicant has given a commitment to the Respondent and the Commission that he will always long travel when disengaging from a coil in the future. Based on his unblemished behaviour in relation to CSP027 in the last 50 weeks, I see no evidence or reason to suggest that he will not comply with this commitment in relation to CSP031.

[146] Compensation is not an appropriate remedy in this circumstances. The opportunities for the Applicant to obtain alternative employment are negligible. A compensation payment is given, in my view, in a similar way as a redundancy payment. It is provided to allow an employee to continue to afford to live whilst they look for a new job. The Applicant does not have that opportunity in the area in which he resides. As a result, the Applicant faces the real prospect of ongoing unemployment until he reaches the qualifying age for the pension. Such an outcome is inherently unfair.

Conclusion

[147] I am satisfied and find that the Respondent did not have a valid reason to terminate the Applicant. The Applicant did not cause a safety incident. The Coils did not tip, in fact, neither coil was raised even a millimetre. An invisible employee or an illusory recalcitrant visitor could not have been injured in this circumstance. The absence of a valid reason makes the termination of the Applicant harsh and unreasonable.

[148] If I am wrong and the Respondent did have a valid reason to terminate the Applicant, then I find that the termination was harsh and unfair based on the reasons the reasons identified above, especially when the Applicant worked in accordance with his most recent accreditation.

[149] Whilst I accept that reinstatement will be initially embarrassing for Mr Meta and Mr Cadwallen, I can see no reason why the employment relationship cannot be re-established.

[150] On the basis that I have found that the Respondent did not have a valid reason to terminate the Applicant following the Full Court decision in *Perkins*, I find that the appropriate remedy is reinstatement.

[151] I Order, in accordance with section 391(1)(a) of the Act, the Applicant be reinstated to his former role.

[152] I also Order, in accordance with section 391(2) of the Act, that the Applicant maintain his continuity of employment.

[153] I also Order, in accordance with section 391(3) of the Act, that the Applicant be paid for any lost time since the date of his termination.

[154] I so Order.

COMMISSIONER

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[i] Witness statement of Mr Gary Meta dated 23 January 2020 Annexure GM – 28.

[ii] Outline of Submissions for the Respondent dated 23 January 2020 [16].

[iii] Witness statement of Mr Gary Meta dated 23 January 2020 Annexure GM – 12.

[iv] Outline of Submissions for the Applicant dated 24 December 2019 [4].

[v] Outline of Submissions for the Applicant dated 24 December 2019 [21].

[vi] Outline of Submissions for the Applicant dated 24 December 2019 [9].

[vii] Outline of Submissions for the Respondent dated 23 January 2019 [33].

[viii] Witness statement of Mr Trevor Knowles dated 23 December 2019 [5]-[13].

[ix] Transcript 6 February 2020 [318-[354].

[x] Transcript 6 February 2020 [478].

[xi] Witness statement of Mr Christopher Newbold dated 23 December 2019 [26].

[xii] Witness statement of Mr Allan Towers dated 23 January 2020 [15].

[xiii] Witness statement of Mr Allan Towers dated 23 January 2020 [38].

[xiv] Transcript 6 February 2020 [1006] - [1010].

[xv] Transcript 6 February 2020 [1026].

[xvi] Transcript 6 February 2020 [1022] - [1023].

[xvii] Transcript 6 February 2020 [1026] - [1034].

[xviii] Witness statement of Mr Allan Towers dated 23 January 2020 [38].

[xix] Witness statement of Mr Daniel Cadwallen dated 23 January 2020 [16].

[xx] Witness statement of Mr Daniel Cadwallen dated 23 January 2020 [61].

[xxi] Transcript 6 February 2020 [1089], [1104]-[1105].

[xxii] Witness statement of Mr Daniel Cadwallen dated 23 January 2020 Annexure DC – 2.

[xxiii] Transcript 6 February 2020 [1127].

[xxiv] Witness statement of Mr Daniel Cadwallen dated 23 January 2020 DC – 2.

[xxv] Transcript 6 February 2020 [1226] – [1227].

[xxvixxvi] Transcript 6 February 2020 [1250].

[xxvii] Witness statement of Mr Gary Meta dated 23 January 2020 [20].

[xxviii] Transcript 7 February 2020 [1572].

[xxix] Transcript 7 February 2020 [1602].

[xxx] Witness statement of Mr Gary Meta dated 23 January 2020 [69]-[71].

[xxxi] Transcript 7 February 2020 [1503].

[xxxii] Transcript 7 February 2020 [1516].

[xxxiii] Witness statement of Mr Gary Meta dated 23 January 2020 [99].

[xxxiv] Witness statement of Mr Gary Meta dated 23 January 2020 [106].

[xxxv] (1995) 185 CLR 410, 465-7.

[xxxvi] (1998) 84 IR 1, 10.

[xxxvii] (1995) 62 IR 371, 372-3.

[xxxviii] Print R4471 [19].

[xxxix] (1998) 84 FCR 483, 492A.

[xl] Video footage

[xli] [2013] FWCFB 6191 [36].

[xlii] Transcript 7 February 2020 [1658].

[xliii] Transcript 7 February 2020 [1683].

[xliv] Transcript 7 February 2020 [2037].

[xlv] Transcript 7 February 2020 [1346].

[xlvi] Witness statement of Mr Gary Meta dated 23 January 2020 [20].

[xlvii] Transcript 7 February 2020 [1392].

[xlviii] Witness statement of Mr Christopher Newbold dated 23 December 2019 [26] – [30].

[xlix] Transcript 6 February 2020 [1218].

[l] [2019] FWCFB 5702 [42].

[li] Transcript 6 February 2020 [1187].

[lii] Transcript 6 February 2020 [1193].

[liii] Transcript 7 February 2020 [1677].

[liv] Transcript 6 February 2020 [1134]-[1136].

[lv] Transcript 6 February 2020 [1171].

[lvi] (1997) 72 IR 186, 191-2.

[lvii] [2014] FWCFB 7198 [27]-[28].