



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Menelas Michalitsis**

v

**Dig Dig Demolition Pty Ltd**

(U2023/11033)

COMMISSIONER ALLISON

MELBOURNE, 29 APRIL 2024

*Application for an unfair dismissal remedy*

[1] This decision concerns an application made by Mr Menelas Michalitsis (**Mr Michalitsis or the Applicant**) under s.394 of the *Fair Work Act 2009* (**the Act**) seeking a remedy for an alleged unfair dismissal. Mr Michalitsis was employed as a truck driver by Dig Dig Demolition Pty Ltd (**Dig Dig or the Respondent**). His employment was terminated on 19 October 2023 for grounds allegedly relating to a serious occupational health and safety incident. This decision considers whether Mr Michalitsis termination was harsh, unjust or unreasonable.

[2] I acknowledge that the last 10 months have no doubt been difficult for Mr Michalitsis who has struggled with personal health issues in addition to the termination of his employment. However, ultimately, having assessed all the circumstances of this matter and the relevant statutory considerations and legal principles, I have determined that Mr Michalitsis' termination was not harsh, unjust, or unreasonable. I set out my reasons below.

## Background

[3] The following paragraphs outline the background to the matter. I note that significant portions of the background are contested between the parties. Where findings on contested points are required, they will be made later in the decision.

[4] Dig Dig is a small demolition business that offers services to residential properties in the Eastern suburbs of Melbourne and the Mornington Peninsula. At the time of the hearing Dig Dig employed 12 employees.<sup>1</sup> I note that at the time of termination Dig Dig employed 15 employees<sup>2</sup> and therefore did not meet the definition of small business under the Act.

[5] Mr Michalitsis commenced employment with Dig Dig on 28 June 2022 as a truck driver. Mr Bryn Lynch, Managing Director of Dig Dig, hired Mr Michalitsis after ensuring he held a valid "White Card" certifying that he had completed requisite industry health and safety training to work on construction sites, and a heavy vehicle driving licence.

[6] Mr Lynch completed an induction process with Mr Michalitsis when he commenced his employment. This included requiring Mr Michalitsis to review and sign Dig Dig's Occupational Health and Safety (OHS) Policy, Drug and Alcohol Policy and employee details forms. Mr Michalitsis then received one week of on-the-job training with Mr Adam Schutz, another Dig Dig truck driver.<sup>3</sup>

[7] On 28 June 2023, Mr Michalitsis and two other Dig Dig employees – namely, Mr Schutz and Mr Paul Soden - were assigned to a demolition job at an old church hall in Rosanna. Mr Schutz was driving the excavator machine. Mr Michalitsis and Mr Soden had brought their trucks to the site to be loaded with rubbish and debris. Mr Michalitsis and Mr Soden were responsible for assisting the excavator operator by spotting for him and picking up some smaller rubbish and debris and loading it into the bins.<sup>4</sup>

[8] At some stage during the day an incident occurred where an excavator machine reversed quickly towards Mr Michalitsis who was sitting with his back towards the excavator. This incident will be referred to as the **Excavator Incident** or the **Incident**.

[9] There is video footage of the Excavator Incident which has been admitted to evidence (the **footage**).<sup>5</sup> The footage shows a man in a high-vis vest walking on a pile of rubble near where an excavator machine is working. The man appears to dust down a large block of debris, before turning around and sitting on the block with his back to the excavator. The man then becomes preoccupied with something in his hands (possibly a phone but it is not clear on the footage). At around the same time as the man turns his back to sit down the excavator starts to reverse quickly towards the man. The excavator stops, what appears to be only a short distance from the man – the actual distance is contested between the parties. At this stage the man turns and sees the excavator, gets up abruptly and moves off the pile of rubble to a position under nearby trees.

[10] I note that both at a previous hearing in this matter and at the start of this hearing Mr Michalitsis would not confirm that he was the man in the high-vis vest in the footage. Later under cross-examination Mr Michalitsis stated “*I assume it's me*”<sup>6</sup> when asked to identify the person in the footage and, thereafter, confirmed his acceptance that the footage pictures him.<sup>7</sup> Mr Michalitsis explained in evidence that he did not recognise himself in the video, although he never denied being involved in such an incident.<sup>8</sup> In any event, based on the video footage, the evidence of Mr Soden who witnessed the Excavator Incident, and evidence that there were only three Dig Dig workers on site – Mr Schutz who was driving the excavator, Mr Soden who was spotting, and Mr Michalitsis – the only person the man in the high-vis vest could be is Mr Michalitsis. Accordingly, I have determined that the person in the video was Mr Michalitsis.

[11] The Excavator Incident was witnessed by Mr Soden. While Mr Michalitsis and Mr Soden provide conflicting evidence around some of the details of the Excavator Incident, it is not contested that Mr Soden was very concerned for Mr Michalitsis' safety. Mr Soden provided the following evidence:

*“I then looked down and noticed that the Applicant was sitting on a concrete pad (part of the old stairs leading into the church) with his back facing the excavator....*

*[The excavator] then started to reverse towards him. I began to yell at the Applicant – something like “get up, get up” – and made repetitive hand motions towards him indicating that he needed to move....*

*I was quite shaken after seeing what I thought was the Applicant nearly getting run over.”<sup>9</sup>*

[12] When Mr Soden returned to the factory later that day, he notified Mr Lynch of the Excavator Incident that had occurred at the worksite. Mr Soden told Mr Lynch words to the effect that it was lucky there were two trucks coming back and not one because the Applicant had nearly got run over.<sup>10</sup>

[13] Mr Lynch provided evidence that after being informed of the incident, he spoke to Mr Michalitsis that afternoon about the Excavator Incident. Mr Lynch provided evidence that Mr Michalitsis had told him, words to the effect, that Mr Michalitsis had been bending down to tie his shoelaces, that the excavator was 10 meters away and that Mr Soden was exaggerating the incident.<sup>11</sup>

[14] Mr Michalitsis does not recall this conversation having occurred.<sup>12</sup>

[15] On 29 June 2023, Mr Michalitsis made a bullying complaint (the Bullying Complaint) against Mr Schutz. The complaint related to an altercation between Mr Schutz and Mr Michalitsis that day, unrelated to the Excavator Incident. Also on this day, Mr Michalitsis ceased work and commenced a period of absence due to an injury.

[16] On 4 July 2023, Mr Lynch commissioned HR Gurus, a Human Resources consulting business, to conduct investigations into the Excavator Incident and the Bullying Complaint. Ms Louise Betts, Senior Human Resources Consultant, was assigned to perform the investigation.

[17] On 5 July 2023, Ms Betts emailed Mr Michalitsis a letter notifying him that she was investigating the Excavator Incident, the Bullying Complaint, and another unrelated matter. The heading on the letter states “Investigation into Allegations of Misconduct”. The letter proposed that Mr Michalitsis attend a meeting with Ms Betts on 7 July 2023 as part of the investigation process.<sup>13</sup>

[18] On 6 July 2023, Mr Michalitsis and Ms Betts had a telephone conversation. In that call Mr Michalitsis expressed that he was unable to partake in the proposed meeting on 7 July because of the medication he was taking.

[19] The parties led conflicting evidence on other matters covered in that phone call. Ms Betts states that in this call, Mr Michalitsis told her, in effect, that he was happy for her to review the footage and speak with other witnesses, and to then put any information to him in writing before he was required to respond further.<sup>14</sup> In contrast, Mr Michalitsis asserts that the reference to Ms Betts conducting her investigation before seeking his involvement was only regarding the Bullying Complaint. In respect of the Excavator Incident, Mr Michalitsis claims that Ms Betts confirmed that she would contact him at a later date.<sup>15</sup>

[20] On 12 July 2023, Ms Betts sent an email to Mr Michalitsis asking him to “*please send me an update on your availability to participate in the workplace investigation.*”<sup>16</sup>

[21] Ms Betts ultimately proceeded with her investigations into the Bullying Complaint and the Excavator Incident. In relation to the Excavator Incident, she reviewed the footage and collected statements from Mr Lynch, Mr Soden and Mr Schutz.

[22] On 1 August 2023, Ms Betts sent letters to Mr Michalitsis and Mr Schutz outlining her findings regarding the Bullying Complaint.<sup>17</sup> Ultimately, Ms Betts found that the allegation of workplace bullying against Mr Schutz was unsubstantiated.

[23] On 18 August 2023 and 5 September 2023, Mr Michalitsis sent emails to Ms Betts raising issue with her finding in the Bullying Complaint.

[24] Ms Betts finalised the report into the Excavator Incident and provided it to Mr Lynch on 25 August 2023.<sup>18</sup> In the report Ms Betts states the following:<sup>19</sup>

*“...on balance, I find the allegation that Mark Michalitsis engaged in unsafe conduct contrary to Section 25 of the OH&S Act 2004, by failing to take reasonable care for his own health and safety and failing to take reasonable care of the health and safety of persons who may be affected by the employee’s acts or omissions at the workplace, is substantiated.*

*Particularly having regard to Mark’s dishonesty as to where he was standing and his distance from the machine, I consider it is open to Dig Dig to reach a view that the conduct in which Mark has been found to have engaged amounts to serious misconduct. Aside from giving rise to a breach of trust and confidence in and of itself, the nature of the dishonest statement tends to show a disregard for Mark’s safety obligations.”*

[25] After receiving the report, Mr Lynch decided to commence disciplinary action against Mr Michalitsis. On 26 September 2023, Mr Lynch sent Mr Michalitsis a letter via email setting out the findings of the investigation in relation to the Excavator Incident and providing Mr Michalitsis with an opportunity to show cause why his employment should not be summarily terminated on grounds of gross misconduct (the **show cause letter**).

[26] For reasons set out in my earlier decision in this matter relating to jurisdiction, *Michalitsis v Did Dig Demolition Pty Ltd* [\[2023\] FWC 3430](#) (the **earlier decision**), Mr Michalitsis did not receive the show cause letter.<sup>20</sup>

[27] On 6 October 2023, Mr Lynch sent Mr Michalitsis a letter, via email, terminating his employment (the **Termination Letter**). The Termination Letter relevantly states:

*“I refer to the letter and camera footage sent to you on 26 September 2023, inviting you to show cause as to why your employment should not be summarily terminated on the grounds of gross misconduct, relating to a potentially fatal near-miss incident that occurred on 28 June 2023 in respect of which you:*

- *failed to take reasonable care of your own health and safety, by placing yourself at risk of being driven over by a reversing excavator;*
- *failed to take reasonable care of the health and safety of the excavator operator who was at risk of a psychological injury had you been driven over by the reversing excavator;*
- *failed to take reasonable care of the health and safety of the driver who witnessed the incident, who was at risk of a psychological injury had you been driven over by a reversing excavator;*
- *failed to adhere to safe work methods;*
- *failed to take reasonable care of the health and safety of others in the workplace;*
- *failed to report to Management any incidents of unsafe work; and*
- *were dishonest about how you reported that this incident occurred when questioned.*

...

*You have demonstrated no insight into the seriousness of the safety breach, and have shown no remorse, contrition or intention to repair the breach of trust and confidence and disregard for your safety obligations which has occurred. I can accordingly have no confidence that you would not engage in similar misconduct again in the future.*

*I have therefore made the decision to summarily terminate your employment with Dig Dig Demolition on the grounds of serious misconduct effective immediately.”*

[28] For reasons set out in my earlier decision, Mr Michalitsis did not receive that letter until 19 October 2023 and his termination took effect on that date.<sup>21</sup> On 9 November 2023 Mr Michalitsis filed an application for an unfair dismissal remedy.

[29] From July 2023 to his termination Mr Michalitsis provided Dig Dig with a number of medical certificates. The certificate covering the period 10 – 24 July 2023 refers to a number of physical restrictions on Mr Michalitsis’ capacity to work, but not psychological restrictions.<sup>22</sup> A later certificate covering the period 23 September – 7 October 2023 refers both to physical and psychological restrictions and states, amongst other things that “pain medication affects his concentration and memory.”<sup>23</sup> It is uncontested that Mr Michalitsis has remained on strong pain medication that impacts his concentration and memory. Mr Michalitsis also tendered a psychological report dated 16 November 2023 which refers to a number of psychological injuries related to his physical injury including “poor concentration and attention.”<sup>24</sup>

## **Hearing and Evidence**

[30] After taking into account the views of the Applicant and the Respondent, I determined a hearing would be the most effective and efficient way to resolve whether the termination was harsh, unjust or unreasonable.<sup>25</sup> The hearing was held on 22 February 2024.

[31] At the hearing, Mr Michalitsis gave evidence on his own behalf. As noted at [29] above Mr Michalitsis provided medical evidence that he is on strong medication that impacts his recollection. This posed some difficulties during the hearing as there were at least two key alleged events relied on by the Respondent, including the Excavator Incident, which Mr Michalitsis did not recall. I have had regard to Mr Michalitsis' condition when making findings in relation to these matters.

[32] The Respondent purported to call five witnesses as follows:

- Mr Bryn Lynch, Managing Director of Dig Dig;
- Ms Lousie Betts, Senior HR Consultant of HR Gurus;
- Mr Paul Soden, Truck Driver of Dig Dig;
- Mr Adam Schutz, former Operator of Dig Dig; and
- Mr David Howard, Director of Agile Workplace Solutions.

[33] Mr Howard was not required for cross-examination by the Applicant and his statement was tendered unchallenged. Mr Schutz was ultimately unable to attend the hearing for cross-examination. With agreement from the parties, I have considered Mr Schutz's statement and have afforded it the status of submission, rather than tendered evidence, and have adjusted the weight placed upon it accordingly.

### **Initial matters**

[34] There are a number of threshold matters to be considered prior to an application proceeding to a merits hearing. These include:

- whether the application was made within the period required in subsection 394(2);
- whether the person was protected from unfair dismissal;
- whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- whether the dismissal was a case of genuine redundancy.

[35] I am satisfied that all the prerequisite threshold matters have been met. My earlier decision determined that the application was made within time. While the Respondent initially raised a jurisdictional objection that it was a small business and the dismissal had been consistent with the Small Business Fair Dismissal Code, this objection was withdrawn before the hearing. The parties do not dispute that Mr Michalitsis was protected from unfair dismissal and that the dismissal was not a case of genuine redundancy.

## **Was the dismissal harsh, unjust or unreasonable?**

[36] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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.

[37] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>26</sup> I set out my consideration of each below.

### ***a. Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?***

[38] The overwhelming majority of oral and written submissions in this matter went to the consideration of whether there was a valid reason for dismissal.

[39] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”<sup>27</sup> and should not be “capricious, fanciful, spiteful or prejudiced.”<sup>28</sup>

[40] The reason given by Dig Dig for Mr Michalitsis' termination in the Termination Letter (set out at [27] above) was for “*gross misconduct relating to a potentially fatal near-miss incident*”.

[41] In summary, Mr Michalitsis contended there was not a valid reason for termination because:

- The Excavator Incident was not a serious OHS incident, and/or
- Involvement in the Excavator Incident did not justify dismissal, and/or
- The actual reason for termination was in “*retribution*” for the Bullying Complaint he had made against Mr Schutz.

[42] In oral and written submissions, the Respondent contended that the Applicant’s “gross misconduct” in relation to the Excavator Incident established numerous valid reasons for dismissal that could be relied on separately or together. In summary, the reasons identified by the Respondent were:

- That the Applicant failed to take reasonable care of his own health and safety, by placing himself at risk of being driven over by a reversing excavator;
- That the Applicant failed to take reasonable care of the health and safety of the other employees, namely the excavator operator Mr Schutz and Mr Soden.
- That the Applicant’s conduct following the Excavator Incident - including allegedly lying to Mr Lynch about the incident – led to a breach in trust and confidence between the parties that is incompatible with an ongoing employment relationship.<sup>29</sup>

[43] Dig Dig also disputed Mr Michalitsis’ claim that the actual reason for termination related to the Bullying Complaint.

[44] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct actually occurred (not just that the employer had reasonable grounds to suspect it occurred) and justified termination.<sup>30</sup> In this case the Commission must determine whether Mr Michalitsis engaged in the misconduct alleged by Dig Dig relating to the Excavator Incident as set out at [42] above. If such conduct is established, I must then consider whether this conduct justified termination.

**i. Did the Conduct Occur**

*Conduct: Did the Applicant fail to take reasonable care of his own health and safety?*

[45] Mr Michalitsis submitted that the Excavator Incident did not give rise to a serious safety concern because:

*“The alleged conduct did not place ... the Applicant... in a position of danger... and a person exercising normal and expected caution on a building or demolition site would not have regarded the incident as potentially life threatening.”<sup>31</sup>*

[46] In support of this position Mr Michalitsis made the following inter-related points:



- Mr Michalitsis’ considerable experience in the construction industry and 12 months experience working around an excavator meant he was able to assess any potential safety risks and ensure he was not in danger.
- Mr Michalitsis was never in the excavator’s field of operation.
- The excavator was a safe distance away – stopping “well clear” of him and not coming any closer.<sup>32</sup>
- Mr Michalitsis was sitting between the excavator tracks, rather than in line with the tracks, and this considerably reduced any danger.

[47] I will consider each of these points in detail below.

[48] The Respondent relied on the video footage, eye-witness evidence of Mr Soden and expert witness evidence of David Howard to argue the Excavator Incident was a serious OHS incident.

[49] I consider, on the evidence before me, that the Excavator Incident was a serious OHS incident where Mr Michalitsis failed to take reasonable care of his own health and safety. The video footage of the Excavator Incident is quite alarming. From the point of view of the reasonable person watching the footage, Mr Michalitsis appears in clear danger of being hit by the excavator. I provide more detail in relation to this finding as I consider each of Mr Michalitsis arguments below.

*Applicant’s Experience in Construction and Demolition*

[50] I have taken into consideration Mr Michalitsis’ argument that his conduct was not unsafe for someone with his experience. I reject this argument. Mr Soden has worked in demolition for 36 years and was an eyewitness to the Excavator Incident. Mr Soden’s evidence is that he thought Mr Michalitsis’ conduct was “*stupid and extremely dangerous.*”<sup>33</sup>

[51] I have also taken into account the expert witness evidence of David Howard, Director of Agile Workplace Solutions. Mr Howard has conducted and/or led over 300 investigations relating to workplace fatalities and serious incidents. Based on his considerable qualifications and experience, I am comfortable he brings substantial expertise to reviewing video footage of this nature.

[52] Mr Howard’s evidence includes an investigation report regarding the Excavator Incident.<sup>34</sup> I observe the following opinions of Mr Howard in the report:

“Question 1: Did the conduct of the Applicant create a risk to his health and safety?”

*“Unquestionably yes. The Applicant would have almost certainly been killed or been seriously injured had the excavator collided with him”....*

Question 5: Should a reasonable employee in the position of Michalitsis have foreseen the risk?

... “A reasonable employee, **even one not as experienced as the Applicant**, would have no doubt foreseen the risk of being struck by the machine while sitting within the operating area of the machine with his back turned away from the machine as it was operating.”

(emphasis added).

*The Applicant was not within in the Field of Operation*

[53] Mr Michalitsis also submits that he had positioned himself “*such that he was outside the excavator’s field of operation,*” and that “*it was not going to run over him or even come closer than it did... in the video*”<sup>35</sup>

[54] In support of this contention, Mr Michalitsis argued the excavator stopped in a regular, predictable spot.<sup>36</sup> He stated that from his considerable experience working around the excavator, he was “*well aware where the excavator would stop*” and this meant there was “*no risk at all*”<sup>37</sup> with his sitting position. He claimed that the soft ground around the excavator at the worksite limited its range of movement and that it went “*backwards and forwards at numerous occasions during the day*” in the same location as a result.<sup>38</sup>

[55] The Applicant further relied on the written statement of Mr Schutz, which states:

*“As I was reversing, I could hear Paul yelling but not what he was saying. I then stopped the excavator but only because I reached a position where I was comfortable I could pick up my next load.”*<sup>39</sup>

[56] The Applicant argued that Mr Schutz’s statement supported the position that the excavator had reached its predicted position to perform its function, and was not going to reverse any further.

[57] The Respondent’s witnesses gave contrary evidence in relation to whether Mr Michalitsis was in the excavator’s field of operation. Mr Soden expressly disagreed with Mr Michalitsis’ assessment as to his risk of being driven over and stated:<sup>40</sup>

*“it was just luck that [Mr Schutz] stopped the excavator where he had to pick up his next load. Had his next load been further back, he might have continued moving backwards to where the Applicant was.”*

[58] Mr Lynch claimed that Mr Schutz would choose where to move the excavator based on what material he had in the bucket and to ensure even distribution of the rubbish into Mr Soden’s truck.<sup>41</sup> He stated Mr Schutz could have chosen to move the excavator further forward or backward,<sup>42</sup> including to Mr Michalitsis’ sitting position, and that him not doing so was “*only from sheer luck, not for any other reason.*”<sup>43</sup> Accordingly, he contended that “*the argument being that [Mr Schutz] was in his spot and he wasn’t going to deviate from that spot is false.*”<sup>44</sup>

[59] Mr Howard’s expert commentary on the footage in this respect is as follows:

*“The video shows that much of the building had already been demolished and debris was well spread in a large radius around the machine. **The entire area of debris would be considered to be the machine’s operating area** and, without direct communication with the operator, it would be **impossible for any person to anticipate the movement of the machine.**”<sup>45</sup>*

**(emphasis added)**

[60] I do not accept Mr Michalitsis’ argument that he was not in the excavator’s field of operation. On the evidence before me it is clear that the excavator driver exercises discretion in determining how far to move the excavator to perform its function and Mr Michalitsis was sitting in a position that the excavator may have moved to. Accordingly, I conclude Mr Michalitsis was in the excavator’s field of operation.

*The Excavator was a Safe Distance Away*

[61] The parties led competing evidence concerning how close the excavator was to Mr Michalitsis during the Excavator Incident. Evidence was provided by Mr Michalitsis, Ms Betts, and Mr Soden concerning this issue.

[62] Mr Michalitsis initially claimed that at its closest point, the excavator was 4 or 5 metres from him.<sup>46</sup> However, later in his testimony he appeared to concede that it came within 2 to 3 metres.<sup>47</sup> In Ms Betts’ investigation report, she concluded, with reference to the video footage and the known dimensions of the excavator, that at its closest, it came within approximately 1.75 metres of Mr Michalitsis.<sup>48</sup> Mr Soden, who was an eyewitness to the Incident from an elevated viewpoint, believed that the distance was closer still and gave evidence that the distance *“was a metre.... it was so close, it was – there was only seconds away from something major happening.”*<sup>49</sup>

[63] In submissions, the Applicant claimed that the OHS risk was overstated because the excavator had stopped a safe distance away.<sup>50</sup> The Respondent submitted that I should prefer either Ms Betts’ or Mr Soden’s evidence but ultimately the variation between testimonies on distance did not make a significant difference to whether the Excavator Incident was a serious OHS incident.<sup>51</sup>

[64] Having considered the evidence before me, I am satisfied that the excavator reversed quickly and was within an *unsafe* distance from the Applicant, being somewhere between 1 and 2.5 meters away. Even if I had found that the closest distance was 3 to 4 metres away, I note Mr Howard’s opinion that *“the entire area of debris would be considered to be the machine’s operating area, and without direct communication with the operator, it would be impossible for any person to anticipate the movement of the machine.”*<sup>52</sup> I disagree with the Applicant’s submission that the safety risk was overstated.

*The Applicant was Sitting between the Tracks*

[65] A further factual dispute arose surrounding the precise alignment of Mr Michalitsis with the excavator tracks, and whether that impacted on the safety concerns arising from the Incident. The excavator has two tracks that jut out approximately 50-70 cm from the back of the vehicle.<sup>53</sup>

[66] Mr Michalitsis claimed that at the time of the Incident, he was sitting in between the excavator tracks.<sup>54</sup> He states that if the excavator had continued to reverse, the tracks would have missed him, and he was therefore in no immediate danger of being crushed by the excavator. Rather than the excavator tracks running over him, he assessed the extent of the risk to be that *“the base of the excavator would have bumped my helmet and I would have got a scare rather than getting squashed,”*<sup>55</sup> and accordingly, that the severity of the Excavator Incident was extremely diminished.<sup>56</sup>

[67] Mr Soden has provided two statements describing the Excavator Incident. The first was provided as part of Ms Betts’ investigation into the Incident and stated that the Applicant was *“sitting in between the actual tracks that the machine runs on.”*<sup>57</sup> The second is his witness statement to the Commission which states that Mr Michalitsis was *“sitting directly in line with the tracks of the excavator.”*<sup>58</sup>

[68] Mr Howard’s assessment of the risk was as follows:

*“The Applicant would have almost certainly been killed or at the least, seriously injured, had the machine run its tracks over him.*

*Had the tracks missed him on either side, he could still have been exposed to being hit in the back and head by the machine’s body moving at pace. His injuries would have been extremely serious if not fatal.”*

[69] In closing submissions, the Applicant observed the disparity between Mr Soden’s two statements and submitted that a finding should be made that the Applicant was not directly aligned with the excavator tracks.<sup>59</sup> The Applicant argued that had the excavator continued to reverse, then *“had the tracks got parallel with the Applicant he would have moved at that point had he not already moved.”*<sup>60</sup>

[70] The Respondent relies on the evidence of Mr Howard and submitted *“it makes no difference whether it was one of the tracks of the excavator or the middle of the excavator that, had the excavator continued reversing, would have struck him. The consequence would have been almost surely the same; significant injury, probably death.”*<sup>61</sup>

[71] With all due respect to the Applicant, I reject the argument that sitting in between the tracks reduces the seriousness of the safety risk. In assessing the gravity of the risk, I prefer the expert evidence of Mr Howard in comparison to the Applicant’s. I accept the Respondent’s submission, and so in the circumstances I do not find it necessary to make a finding as to whether Mr Michalitsis sat between the tracks, or in line with the tracks, during the Excavator Incident.

[72] Accordingly, I have found that the Excavator Incident was a serious occupational health and safety incident. I further find that the Applicant failed to take reasonable care of his own health and safety by choosing to sit in close proximity to an operational excavator with his back

towards it. I reject the argument that given Mr Michalitsis' experience, he could reasonably assume he was not in danger. Mr Michalitsis' considerable experience should have ensured he was even more aware of the great risk he placed himself and others in by sitting in the location he did.

*Conduct: Did the Applicant fail to take care of the Health and Safety of Others?*

[73] It was never contested that *should* Mr Michalitsis *have been* hit by the excavator, there would have been significant psychological ramifications for Mr Schutz as the driver of the excavator and Mr Soden as a witness to the Incident. However, in closing submissions, the Applicant submitted that as Mr Michalitsis had not been hit by the excavator, neither Mr Soden or Mr Schutz *actually* suffered any psychological (or other) injury as a result of the Excavator Incident.

[74] I reject the Applicant's suggestion that an incident is only a serious OHS incident if workers are injured or killed. The Excavator Incident put Mr Michalitsis, Mr Soden and Mr Schutz at risk of serious injury. For the same reasons given above in respect of my finding that Mr Michalitsis failed to take reasonable care of his own health and safety, I find that Mr Michalitsis failed to take reasonable care of the health and safety of others.

*Conduct: Did the Applicant's conduct after the Excavator Incident lead to a breach of trust and confidence?*

[75] The Respondent argued that following the Excavator Incident the Applicant engaged in conduct which led to a breach in trust and confidence between the parties incompatible with an ongoing employment relationship. This included allegedly lying to Mr Lynch about the incident, failing to engage in an investigation about the incident, and failing to acknowledge the seriousness of the incident.<sup>62</sup>

[76] In relation to the claim Mr Michalitsis did not engage in the investigation into the Excavator Incident, on the evidence before me, I do not find this misconduct. It is uncontested that Mr Michalitsis did not engage in Ms Bett's investigation process. However, while the Respondent argues this fact should weigh against the Applicant, I am prepared to accept the Applicant's evidence that he did not participate in the investigation process because of his medical condition.

[77] The major area of contention between the parties relating to the Applicant's conduct following the Excavator Incident concerned an alleged conversation between Mr Lynch and Mr Michalitsis following the incident.

[78] Mr Lynch gave evidence that he questioned Mr Michalitsis about the Incident following his return to the Respondent's yard. Mr Lynch provided evidence that he asked Mr Michalitsis about the incident and Mr Michalitsis responded in substance as follows:

- Mr Michalitsis asked Mr Lynch how he had heard about the Incident, to which Mr Lynch replied Mr Soden had told him;

- In relation to the Excavator Incident, Mr Michalitsis said he had been bending down to tie his shoelaces and that the excavator was 10 meters away; and
- Mr Michalitsis said that Mr Soden, who had reported the matter to Mr Lynch, was exaggerating the incident.<sup>63</sup>

[79] Mr Michalitsis has consistently stated he cannot recall this conversation. However, in cross examination he conceded that while he could not recall the conversation, he would have said something like that in relation to Mr Soden exaggerating the incident.<sup>64</sup>

[80] I find, on balance, that the conversation did happen as Mr Lynch recalls. I make this finding noting that Mr Lynch has consistently given evidence that he remembers the conversation, and it was reported to Ms Betts in her initial investigation and referred to in her report. I have also had regard to the fact that Mr Michalitsis is on medication that impacts his memory. In this respect I note that Mr Michalitsis did not appear to deny the conversation happened, but simply claimed that he could not recall it. He also could not specifically recall being involved in the Excavator Incident as presented in the footage, and initially claimed he did not believe the person in the footage was him.<sup>65</sup> This suggests Mr Michalitsis' memory of the 28 June 2023, the day the Excavator Incident and the alleged conversation occurred, is not particularly good.

[81] The Respondent submits that the inconsistencies between the video footage and Mr Michalitsis' responses to Mr Lynch – particularly the assertion by Mr Michalitsis that he was tying his shoelaces and 10 meters away - support a finding that Mr Michalitsis was deliberately dishonest and sought to mislead Mr Lynch as to the facts of the Incident.<sup>66</sup>

[82] As the Applicant was unable to recall the conversation, he gave no explanation at the hearing for his faulty description of the Excavator Incident to Mr Lynch.

[83] Given the discrepancy between Mr Michalitsis' description and the Excavator Incident the two most likely conclusions open to me are either that Mr Michalitsis was deliberately downplaying the incident, or alternatively that Mr Michalitsis had no appreciation that the Excavator Incident was a significant OHS risk and even on the day of the Incident did not pay any regard to the details surrounding the Incident.

[84] Given the Applicant cannot recall the conversation and cannot provide any explanation for his description, I am prepared to find, on balance, that rather than Mr Michalitsis being dishonest, he did not appreciate the gravity of the incident. This finding is fortified by the fact that throughout the hearing Mr Michalitsis has not appeared to understand the seriousness of the OHS incident he was involved in.

[85] I further find that the Applicant's conduct in failing to appreciate the gravity of the safety risk led to a breach of trust and confidence in the employment relationship as Dig Dig could *"have no confidence that [Mr Michalitsis] would not engage in similar misconduct again in the future."*<sup>67</sup>

[86] Accordingly I have found that Mr Michalitsis engaged in misconduct including:

- Failing to take reasonable care of his own health and safety, by placing himself at risk of being driven over by a reversing excavator;
- Failing to take reasonable care of the health and safety of the other employees, namely the excavator operator Mr Schutz and Mr Soden;
- Conduct following the Excavator Incident that has led to a breach of trust and confidence.

[87] I will now consider whether this conduct justified dismissal.

## ii. Did the conduct Justify Dismissal?

### *Submissions*

[88] Mr Michalitsis argued that even if the Commission found that his involvement in the Excavator Incident was misconduct, it could not constitute a valid reason for dismissal because the conduct was not significant enough to justify dismissal. The Applicant relied on *Bista v Glad Group Pty Ltd*<sup>68</sup> to support this position.

[89] The Applicant argued Mr Michalitsis' conduct did not result in any significant injury or death, rather the termination was based on what "might have happened."<sup>69</sup> The Applicant submitted that counselling or a warning, instead of termination, would have been an appropriate response to Mr Michalitsis' conduct.

[90] Dig Dig submitted that summary dismissal was a sanction reasonably open to the Respondent in the circumstances. It argued Mr Michalitsis' conduct could have led to extremely serious consequences, including death or serious injury of Mr Michalitsis, on-going psychological trauma for Mr Schutz and Mr Soden, and potentially criminal charges and substantial financial penalties for Dig Dig under workplace manslaughter legislation.<sup>70</sup>

[91] Dig Dig relied on a number of other Commission cases where dismissal on the grounds of a serious safety incident has been upheld,<sup>71</sup> including *Smith v Mt Arthur Coal Pty Ltd*,<sup>72</sup> *Singh v Fenner (Australia) Pty T/A Fenner Dunlop Engineered Conveyor Solutions*<sup>73</sup> (**Fenner Dunlop**), *Henderson v Bradken Resources Pty Ltd*,<sup>74</sup> and *Parmalat Food Products Pty Ltd v Wililo*.<sup>75</sup>

[92] In addition, Dig Dig submitted that this was a case that warranted summary dismissal because "*the Respondent could not satisfy itself that such conduct would not be repeated in future.*"<sup>76</sup>

### *Consideration*

[93] The definition of Serious Misconduct in the Fair Work Regulations for the purposes of summary termination<sup>77</sup> includes "*conduct that causes serious and imminent risk to ... the health or safety of a person.*"<sup>78</sup> There is no question that involvement in a serious occupational health and safety incident can, in certain circumstances, be a valid ground for termination.

[94] In *Fenner Dunlop*<sup>79</sup>, Commissioner Gregory determined that an Applicant who he had found had been involved in a serious safety incident involving placing his hand near an operating machine, was not unfairly dismissed by the Respondent. Commissioner Gregory made the following relevant comments:

*“The obligation to provide and maintain a safe and healthy workplace must be paramount consideration in any workplace.*

*... It is... acknowledged that the appropriate response to some safety breaches can involve counselling, retraining, or the provision of a warning.*

*However, it is also clear that simply providing a warning and, in effect, a second chance, cannot be the appropriate response in every case involving a safety breach, particularly if the importance of establishing and maintaining a safe and healthy workplace is to be emphasised and supported. In some cases the nature of the breach will warrant summary dismissal. I am satisfied that this is the case in the present matter, given the nature of the safety breach involved, and its potential consequences. I am also satisfied it has led to a situation in which Fenner Dunlop can no longer have confidence Mr Singh will act, at all times, in accordance with its safety requirements and protocols.”*

[95] Similarly in this case, I am of the view that summary dismissal was reasonably open to Dig Dig in the circumstances. The Excavator Incident was a serious OHS matter that both had potentially devastating outcomes for Mr Michalitsis and his co-workers, and potentially exposed Dig Dig to significant fines and criminal charges. Mr Michalitsis’ conduct caused “*serious and imminent risk*” to both his own and others’ health and safety. In addition, I am satisfied that Mr Michalitsis’ attitude towards the Excavator Incident, including his faulty reporting to Mr Lynch and his ongoing failure to recognise the gravity of the OHS incident meant Dig Dig could not be confident that Mr Michalitsis would not be an ongoing safety risk at highly dangerous worksites.

[96] As noted above, the Applicant relied on *Bista* to argue that the conduct was not significant enough to warrant termination. In *Bista*, Mr Bista’s conduct which resulted in termination was “*making a cup of coffee at the premises of a tenant shortly before commencing his shift.*”<sup>80</sup> Hatcher VP, as he was then, found “*In my view, any reasonable person would regard his conduct as involving no more than a trivial misdemeanour.*”<sup>81</sup>

[97] For the reasons given above the conduct in this matter cannot be considered a “trivial misdemeanour.” Mr Michalitsis placed himself and others in a very dangerous position. I find the conduct justified dismissal, and that summary dismissal was an option reasonably open to the Respondent.

### **iii. Bullying Complaint – a reason for termination?**



[98] The Applicant argued that the actual reason for termination was the fact he had made a bullying complaint against Mr Adam Schutz on 30 June 2023.

[99] As I have found that Mr Michalitsis' conduct relating to the Excavator Incident formed a valid reason for termination, there is no need to consider other potential reasons for termination. However, in any event, there is no evidence before me to support a finding that Dig Dig's response to the Bullying Complaint was inappropriate or that the termination was based on Mr Michalitsis lodging the Complaint. In my view Dig Dig took reasonable steps in response to Mr Michalitsis' Bullying Complaint. Dig Dig referred the Bullying Complaint to Ms Betts, a third party, to investigate. It was reasonably open to Ms Betts to come to the view that the bullying allegation was not substantiated but that some inappropriate conduct had occurred. Dig Dig took steps to verbally counsel Mr Schutz about his conduct and indicated it would issue him a warning. This warning was not issued before Mr Schutz was made redundant in December 2023. Accordingly, I do not find the Bullying Complaint was the reason for termination.

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[100] For reasons given above, I find that there was a "*sound, defensible and well founded*" reason for dismissal of the Applicant relating to his conduct in regard to a serious OHS incident. Accordingly, I find there was a valid reason for the dismissal related to the Applicant's conduct.

***b. Was the Applicant notified of the valid reason?***

[101] For the purposes of s.387(b), notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,<sup>82</sup> and in explicit, plain and clear terms.<sup>83</sup>

[102] On 5 July 2023, the Applicant received a letter from Ms Betts setting out that she was conducting an investigation into a number of matters including the Excavator Incident.

[103] Ms Betts' letter was headed "INVESTIGATION INTO ALLEGATIONS OF MISCONDUCT" and included the following statement: "*After I have concluded my investigation, I will then determine – on balance – whether I believe any inappropriate conduct has occurred. You will be advised of that determination.*"<sup>84</sup>

[104] The letter did not explicitly include reference to the fact Mr Michalitsis may be terminated if the allegations against him were substantiated.

[105] While the Respondent emailed the Applicant a show cause letter dated 26 September 2023, as per my earlier decision in this matter, I find that Mr Michalitsis did not receive the show cause letter prior to his dismissal.

[106] I am satisfied that Mr Michalitsis was notified that his conduct in the Excavator Incident was being investigated and that his conduct may be found to be misconduct. I am not satisfied that he was explicitly notified he may be terminated as a result of the investigation.

[107] Accordingly, I find this consideration a neutral factor, not weighing for or against a finding that the dismissal was harsh, unjust or unreasonable.

***c. Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?***

[108] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.<sup>85</sup>

*Submissions*

[109] The Applicant led evidence that he notified Ms Betts on 6 July 2023 that he was not able to participate in the investigation of the Excavator Incident because of medical restrictions. The Applicant argues, in effect, that he was entitled to assume Ms Betts accepted this position because of her response in the telephone conversation and/or the email dated 12 July 2023 when she sought an update on Mr Michalitsis' availability to participate in the workplace investigation. The Applicant argues he was not given an opportunity to respond.

[110] The Respondent submitted that the Applicant was given an opportunity to respond in either Ms Betts' investigation process or the show cause process. It argues that rather than being unable to participate, Mr Michalitsis chose not to engage in Ms Betts' investigation surrounding the Excavator Incident and notes that his doctor's certificates in the period 10 July – 27 July did not include any reference to mental incapacity.<sup>86</sup> Following the investigation, the Respondent contends that Mr Michalitsis was given ample opportunity to respond to the show cause letter.<sup>87</sup>

[111] In the alternative, Dig Dig submits that even if Mr Michalitsis did not receive the show cause letter, this was not due to opportunistic conduct of the Respondent. Furthermore the Respondent submitted that the Applicant's misconduct was such that as held in *Macumber v Ace Bottle Printers Pty Ltd*,<sup>88</sup> (**Macumber**) "*no explanation or mitigation could conceivably emerge so as to avoid the logical consequences of dismissal having regard to the serious nature of the Applicant's conduct.*"<sup>89</sup>

*Consideration*

[112] In the investigation report provided to Mr Lynch, Ms Betts made the following recommendation:

*"On the face of it, I consider it open to Dig Dig to form a view that my substantiated findings in respect of Allegations 1 and 2 give rise to serious misconduct.*

*Mark Michalitsis has **not yet had an opportunity to respond to the allegations**, as he requested the investigation be completed before he responded.*

*HR Gurus recommends Dig Dig provide Mark Michalitsis with the opportunity to respond to the allegations and findings in this report and provide him access to the*

*footage of the incident prior to making any decision about the nature of any disciplinary action that may be taken in respect of the allegations.*"<sup>90</sup>

*(emphasis added)*

[113] Having regard to the above, I find that the Applicant did not have an opportunity to respond prior to Mr Lynch forwarding him the show cause letter. In my earlier decision, I found that Mr Michalitsis did not receive the show cause letter prior to his termination, and accordingly did not have the opportunity to respond at this time either.

[114] Accordingly, I find that the Applicant was not given an opportunity to respond. This weighs in favour of a finding that the dismissal was harsh, unjust or unreasonable.

[115] Noting this, the alternative submissions made by the Respondent at [111] above are important, and I will return to them when I weigh up all considerations below.

***d. Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?***

[116] Both Ms Betts' letter dated 5 July 2023 and the show cause letter offered Mr Michalitsis the opportunity to bring a support person.

[117] If Mr Michalitsis had had the opportunity to respond to either letter because he was not ill at the time, or because he received the show cause letter, I am satisfied that he would have been allowed to have a support person. Accordingly, I find this a neutral factor in determining whether the dismissal was harsh, unjust or unreasonable.

***e. Was the Applicant warned about unsatisfactory performance before the dismissal?***

[118] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

***f. To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?***

***g. To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?***

[119] I will deal with these two considerations together.

[120] At the time of the dismissal, the Respondent had 15 employees. If Dig Dig had had one less employee at the time of the dismissal Dig Dig would have been considered a small business for the purpose of the Act and the small business Fair Dismissal Code.

[121] Dig Dig has no dedicated human resources management specialist or expertise. Accordingly, Dig Dig engaged HR Gurus to investigate the Excavator Incident.

[122] The Respondent submitted that to the extent that the FWC identifies any deficiencies in the process adopted by the Respondent, the deficiencies should be disregarded owing to the Respondent's small size and the fact they have no dedicated human resources management. Noting this the Respondent also submitted that Dig Dig spent considerable financial resources in engaging HR Gurus to ensure a fair process was followed.

[123] The Applicant did not make submissions in relation to this matter.

[124] I accept that the Respondent's small size and lack of human resources manager, to the extent that there were some procedural deficiencies, should be taken into account. In particular, I have taken this into account in relation to my finding under *c. Opportunity to Respond*, above. In my view, a larger organization with a human resources manager may have been expected to make more efforts to follow up the unanswered show cause letter to ensure the Applicant had received notification of reason for termination and given an opportunity to respond.

#### ***h. Any other relevant matters***

[125] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

##### *Lack of training*

[126] The parties provided conflicting evidence surrounding whether Dig Dig provided appropriate safety training and instituted safe work practices at its worksites. Mr Michalitsis initially claimed he did not receive safety induction training at the Rosanna site, or indeed any other worksite, but later conceded that he had received on-the-job training in his first week.<sup>91</sup> This concession was consistent with Mr Lynch's evidence that when Mr Michalitsis commenced employment with Dig Dig, he received on-the-job training, including safety training. Mr Lynch also provided uncontested evidence that during Mr Michalitsis' induction, he was required to confirm he held a "White Card" which certified he had completed the requisite industry health and safety training to work on construction sites, and to review and sign Dig Dig's OHS policy. I find that on balance, Mr Michalitsis received some safety training during his first week with Dig Dig.

[127] Mr Michalitsis by his own admission is an experienced construction worker who was well aware of safety risks. If this were not the case, lack of training, may have been an issue in this matter, despite the Respondent's small size. However, given Mr Michalitsis evidence regarding his experience, and my finding that some safety training occurred in the first week, this factor is neutral in considering whether the termination was harsh, unjust and unreasonable.

##### *Dismissal disproportionate sanction*

[128] The Applicant submitted that even if Mr Michalitsis' conduct relating to the Excavator Incident was a valid reason for termination, termination was a disproportionate sanction. The

Applicant argued that the Respondent should first have counselled Mr Michalitsis on its workplace safety requirements, and then issued appropriate warnings as required.

[129] For the same reasons as I have outlined above at [89]-[98], I do not find termination was a disproportionate response to the Applicant's conduct. Summary dismissal was an option reasonably open to the Respondent in these circumstances.

*Prior misconduct*

[130] The Respondent detailed a number of other allegations of misconduct against Mr Michalitsis unrelated to the Excavator Incident. The Respondent argued that should I not find the Excavator Incident constituted a valid reason for dismissal, these other incidents could be grounds for termination. Alternatively, it submits that had the Applicant not been terminated because of the Excavator Incident, it is likely he would have been terminated shortly thereafter. As I have found there was a valid reason for termination in relation to the Excavator Incident, I have decided not to detail or consider these other allegations in this decision.

*Lapsed Period of Time between Incident and Termination*

[131] The Applicant submitted that the period of time which elapsed between the Excavator Incident and the termination supports his contention that the termination was effectively in retribution for a bullying complaint.<sup>92</sup> This submission was not developed further in written submissions or at hearing and accordingly I am unable to determine its veracity. However, I observe and accept the evidence of Mr Lynch and Ms Betts outlining the steps taken in the investigation process. I find that Mr Lynch acted promptly after being informed of the Excavator Incident and the Bullying Complaint, and Ms Betts proceeded to investigate them on instruction from Mr Lynch. Any delays in the investigation appear to have been made to accommodate Mr Michalitsis' medical circumstances during his period of leave.

*Harshness*

[132] The Applicant did not make any submissions in relation to harshness. Despite this, I have had regard to the evidence before me relating to the Applicant's personal health issues, the strong medication the Applicant is required to take and the fact that the Applicant has a family to support.<sup>93</sup> As will become clear below, while I have considerable sympathy for the Applicant, ultimately these considerations have not displaced my decision that the termination of the Applicant for involvement in a serious occupational health and safety incident was not an unfair dismissal.

***Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?***

[133] I have made findings in relation to each matter specified in section 387 as relevant.

[134] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>94</sup>

[135] Ultimately I have found that the termination was not harsh, unjust or unreasonable.

[136] As discussed above, I have found that there was a valid reason for termination relating to Mr Michalitsis conduct regarding the Excavator Incident. I have found that summary dismissal was not a disproportionate response to this conduct, given the gravity of the safety risk, the potential consequences of Mr Michalitsis' actions and Mr Michalitsis' apparent lack of understanding of the OHS risks which meant the Respondent could not be confident engaging him in the future.

[137] I have taken into account that while Mr Michalitsis was given notice that his conduct in the Excavator Incident was being investigated, he was not given specific notice that he could be terminated for his involvement in the Incident. I have also taken into account the Mr Michalitsis was not given an opportunity to respond as he was unable to partake in the investigation because of medical reasons, and because he did not receive the show cause letter.

[138] However, procedural deficiencies will not necessarily render a dismissal harsh, unjust and unreasonable.<sup>95</sup> In the case before me I find the procedural deficiencies do not render the dismissal harsh, unjust or unreasonable. Even if Mr Michalitsis had been given an opportunity to respond, it is highly unlikely that any response Mr Michalitsis could have given would have resulted in Dig Dig deciding not to terminate him. Video footage and Mr Soden's evidence independently confirmed Mr Michalitsis was responsible for the Incident. Furthermore, the majority of arguments actually made by Mr Michalitsis at hearing predominantly support his submission that the Excavator Incident was not a serious occupational health and safety risk. I do not believe that these arguments would have led to Dig Dig making a decision not to terminate Mr Michalitsis. In this regard, I am of a similar view as held by Cambridge C in *Macumber* that *"In the rather extreme circumstances of this case, there would, in reality, be no basis upon which the applicant could provide any conceivable response that could in any way justify or mitigate the misconduct..."*<sup>96</sup> In fact, the arguments made by the Applicant appear to reinforce a key reason for Dig Dig's decision to terminate him, namely that Mr Michalitsis has *"demonstrated no insight into the seriousness of the safety breach"*.

[139] I have also taken into account that Dig Dig took steps to try to ensure fairness for the Applicant, including hiring a third party to conduct the investigation into the Excavator Incident. This is not a case where the employer purposely or negligently denied the employee an opportunity to respond. Dig Dig did attempt to provide Mr Michalitsis with an opportunity to respond. It was not Dig Dig's fault that the show cause letter went to Mr Michalitsis' junk mail. To the extent that there were procedural fairness deficiencies in the Respondent not following up Mr Michalitsis' response to the show cause letter, I am of the view that the Respondent's small size and lack of human resources manager should be taken into account as mitigating factors.

[140] None of the "other relevant matters" raised in the submissions by either party have impacted on my decision that the dismissal was not unfair.

[141] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable.

[142] As I have found that the termination was not harsh, unjust or unreasonable, I have not considered remedy for unfair dismissal. However, I note that the Applicant is not seeking

reinstate, but compensation. In the event that I am wrong, and the dismissal was unfair, the evidence before me is that the Applicant has not had any capacity to work since the date of his termination, and therefore it is unlikely that the Applicant would be entitled to receive any compensation.

### Conclusion

[143] I again acknowledge that Mr Michalitsis must have had a difficult 10 months, coping both with personal health issues that require him to take strong medication, and the termination of his employment.

[144] However, for reasons given above, including the seriousness of the OHS incident that the Applicant was involved in, I have found that the dismissal was not harsh, unjust or unreasonable, and I am not satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act. The application is therefore dismissed.



COMMISSIONER

*Appearances:*

*B Shaw* for the Applicant  
*G Lake* for the Respondent

*Hearing details:*

2024  
February 22  
Melbourne

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<sup>1</sup> U2023/11033 Transcript, *Menelas Michalitsis v Dig Dig Demolition Pty Ltd* 22/02/2024 (Transcript), PN721.

<sup>2</sup> Exhibit R3 at [24], Digital Hearing Book 22/2/2024 (DHB) 79.

<sup>3</sup> Exhibit R3, [6] – [8], DHB 75 – 76.

<sup>4</sup> Exhibit R2, [7], DHB 124.

<sup>5</sup> Exhibit R3, annexure BL-5, DHB 102.

<sup>6</sup> Transcript, PN63.

- <sup>7</sup> Ibid, PN82.
- <sup>8</sup> Ibid, PN106.
- <sup>9</sup> Exhibit R2, [11] – [15], DHB 124 – 125.
- <sup>10</sup> Ibid, [22], DHB 126.
- <sup>11</sup> Exhibit BL-1, [8], Digital Hearing Book 13 December 2023 (**EOT DHB**) 63 – 64.
- <sup>12</sup> Transcript, PN182-PN188.
- <sup>13</sup> Exhibit R1, Annexure LB-1, DHB 151.
- <sup>14</sup> Ibid, [7], DHB 144.
- <sup>15</sup> Transcript PN405 – PN417.
- <sup>16</sup> Exhibit A2.
- <sup>17</sup> Exhibit R1, Annexures LB-3, LB-4, DHB 163 – 165.
- <sup>18</sup> Ibid, [26], DHB 148.
- <sup>19</sup> Exhibit BL-1, Annexure 1, EOT DHB 74.
- <sup>20</sup> [\[2023\] FWC 3430](#), [16] – [25].
- <sup>21</sup> Ibid, [52].
- <sup>22</sup> EOT DHB 48.
- <sup>23</sup> Ibid, 50.
- <sup>24</sup> Annexure MM-2, EOT DHB 54.
- <sup>25</sup> *Fair Work Act 2009* (Cth) s.399.
- <sup>26</sup> *Sayer v Melsteel Pty Ltd* [\[2011\] FWAFB 7498](#), [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].
- <sup>27</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- <sup>28</sup> Ibid.
- <sup>29</sup> Transcript, PN868, PN881 – PN883, PN887.
- <sup>30</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7] and *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- <sup>31</sup> Applicant’s Submissions, [4], DHB 73.
- <sup>32</sup> Applicant’s Submissions in Reply, [8] – [9], DHB 220.
- <sup>33</sup> Exhibit R2, [11], DHB 124.
- <sup>34</sup> Exhibit R5, Annexure DH-2, DHB 195.
- <sup>35</sup> Applicant’s Submissions in Reply, [8] – [9], DHB 220.
- <sup>36</sup> Transcript PN197.
- <sup>37</sup> Ibid PN199.
- <sup>38</sup> Ibid PN204, PN449.
- <sup>39</sup> Statement of Adam Schutz at [17], DHB 137. As noted at [33], Mr Schutz did not attend the hearing to attest to his statement. However, the Respondent agreed to allow the above quote by Mr Schutz uncontested into evidence (Transcript PN802.)
- <sup>40</sup> Exhibit R2, [17], DHB 125.
- <sup>41</sup> Transcript PN709.
- <sup>42</sup> Ibid PN693.
- <sup>43</sup> Ibid PN691.
- <sup>44</sup> Ibid PN709.
- <sup>45</sup> Exhibit R5, Annexure DH-2, DHB 198.
- <sup>46</sup> Transcript PN152.
- <sup>47</sup> Ibid PN431.
- <sup>48</sup> Exhibit BL-1, annexure BL-1, EOT DHB 73.



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- <sup>49</sup> Transcript PN631 – PN632.
- <sup>50</sup> Applicant’s Submissions in reply, [6] – [9], DHB 220.
- <sup>51</sup> Transcript PN896.
- <sup>52</sup> Exhibit R5, Annexure DH-2, DHB 198.
- <sup>53</sup> Transcript PN769.
- <sup>54</sup> Exhibit A1, [4], DHB 61.
- <sup>55</sup> Transcript PN174.
- <sup>56</sup> Ibid PN171.
- <sup>57</sup> Exhibit BL-1, Annexure BL-1, EOT DHB 74.
- <sup>58</sup> Exhibit R2, [11], DHB 124.
- <sup>59</sup> Transcript PN842.
- <sup>60</sup> Ibid PN843.
- <sup>61</sup> Ibid PN891.
- <sup>62</sup> Ibid, PN868, PN881-PN883, PN887.
- <sup>63</sup> Exhibit BL-1, [8], EOT DHB 63-64.
- <sup>64</sup> Transcript PN196.
- <sup>65</sup> Ibid PN106.
- <sup>66</sup> Respondent’s Submissions, [5.31] – [5.37], DHB 212.
- <sup>67</sup> Exhibit BL-1, Annexure 10, EOT DHB 100.
- <sup>68</sup> [\[2016\] FWC 3009](#) (*Bista*).
- <sup>69</sup> Transcript PN843.
- <sup>70</sup> Ibid PN897 – PN900.
- <sup>71</sup> Respondent’s submissions, [5.13] – [5.20], DHB 209 – 210.
- <sup>72</sup> [\[2015\] FWC 4194](#).
- <sup>73</sup> [\[2015\] FWC 5583](#) (*Fenner Dunlop*).
- <sup>74</sup> [\[2013\] FWC 4201](#).
- <sup>75</sup> [\[2011\] FWAFB 1166](#).
- <sup>76</sup> Respondent’s submissions, [5.74], DHB 216.
- <sup>77</sup> See s.123(1)(b) of the Act which operates to ensure that employees who have engaged in serious misconduct are not covered by Notice requirements under s.117 of the Act.
- <sup>78</sup> *Fair Work Regulations 2009* (Cth) reg 1.07(2)(b).
- <sup>79</sup> *Fenner Dunlop*, [73] – [74].
- <sup>80</sup> *Bista*, [34].
- <sup>81</sup> *Bista*, [43].
- <sup>82</sup> *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, [151].
- <sup>83</sup> *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).
- <sup>84</sup> Exhibit A2, Annexure LB-1, DHB 152.
- <sup>85</sup> *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].
- <sup>86</sup> Transcript PN383.
- <sup>87</sup> Ibid PN929.
- <sup>88</sup> Respondent’s Submissions, [5.44], DHB 213.
- <sup>89</sup> [\[2019\] FWC 2059](#) (*Macumber*), [32].
- <sup>90</sup> Exhibit BL-1, Annexure 1, EOT DHB 76.
- <sup>91</sup> Transcript PN369.

<sup>92</sup> Applicant Submissions, [2], DHB 73.

<sup>93</sup> U2023/11033 Transcript, *Menelas Michalitsis v Dig Dig Demolition Pty Ltd* 13/12/2023, PN63.

<sup>94</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6] – [7].

<sup>95</sup> *Commission to De Silva v ExxonMobil Chemical Australia Pty Ltd* [PR910623](#) [2000] at [75] – [77].

<sup>96</sup> *Macumber*, [35].