



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Oliver Doherty**

v

**Defend Fire Services Pty Ltd T/A Defend Fire**  
(U2024/74)

COMMISSIONER CRAWFORD

SYDNEY, 3 JUNE 2024

*Application for relief from unfair dismissal – serious safety breach - dismissal not unfair – application dismissed*

## Background

[1] Oliver Doherty (**Mr Doherty**) commenced full-time employment with Defend Fire Services Pty Ltd (**Defend Fire Services**) on 23 June 2021 as a Fire Technician. Mr Doherty also later commenced an adult sprinkler fitter apprenticeship. Mr Doherty was based in the Northern Territory and had been performing work on a Darwin Youth Justice Centre project. Mr Doherty was summarily dismissed for serious misconduct on 21 December 2023.

[2] Mr Doherty filed an unfair dismissal application with the Fair Work Commission (**Commission**) on 2 January 2024. Defend Fire Services filed an employer response form on 10 January 2024. No jurisdictional objections were raised by Defend Fire Services.

[3] Mr Doherty's application was not resolved during conciliation. Directions were issued for the filing of material and the application was listed for determinative conference/hearing via video on 22 May 2024.

[4] Mr Doherty represented himself at the determinative conference/hearing. Defend Fire Services was represented by:

- Zalea de Wet (Workplace Relations Advisor)
- Michael Nuthall (Managing Director)
- Zylia Nuthall (Owner)

[5] At the commencement of the proceeding, I indicated my provisional view was the proceeding should be conducted as a determinative conference so I can take a more active role in understanding the evidence. There was no opposition to this. The proceeding was conducted as a determinative conference.

## **Material relied upon**

### ***Mr Doherty***

**[6]** Mr Doherty relied on the following evidence and submissions in support of his unfair dismissal application:

- Form F2 Unfair dismissal application. Given the application contains some evidence from Mr Doherty about his employment and dismissal, I marked the application **Exhibit A1**.
- An email from Mr Doherty to the Commission dated 16 April 2024. The email contains evidence from Mr Doherty about his employment and dismissal. I marked the email **Exhibit A2**.
- A screenshot of a Facebook message where an individual is asking for advice about how to install part of a fire sprinkler system. Mr Doherty says the post is from an apprentice engaged by Defend Fire Services to work on the same job Mr Doherty was working on and that it demonstrates the lack of training and assistance provided by Defend Fire Services. I marked the screenshot **Exhibit A3**.
- A covering email from Mr Doherty to the Commission dated 16 April 2024. The email refers to attached phone records, WhatsApp messages, and an email relating to Mr Doherty's dismissal. I marked the email **Exhibit A4**.
- A screenshot of Mr Doherty's phone records which shows "Zaylia" called Mr Doherty at 1:40pm presumably on 21 December 2023. It appears "Zaylia" is the name given to Mrs Nuthall in Mr Doherty's phone. There is also a screenshot of WhatsApp messages from a Defend Fire NT group chat which record Zylia Nuthall posting "Oliver Doherty no longer works for Defend Fire" at 11:14am on 21 December 2023. There is also a screenshot of an email from Mrs Nuthall to Mr Doherty sent 12:40pm on 21 December 2023 which had Mr Doherty's termination letter attached. I marked these documents collectively **Exhibit A5**.
- A copy of Mr Doherty's termination letter dated 21 December 2023. In summary, the termination letter states Mr Doherty was being dismissed because of the following instances of serious misconduct:
  1. Using a work vehicle for personal travel without authorisation and failing to maintain the vehicle in a suitable condition.
  2. Concealing a roll groover attachment tool in a work vehicle when Mr Doherty had been asked to return it.
  3. Concerns about Mr Doherty's presentation and actions on his work site.
  4. Sending an abusive text message to his supervisor, Shayne Laurie, on 18 October 2023.

5. Unreasonable lengthy absences from work without reasonable grounds.

I marked the termination letter **Exhibit A6**.

- An email from Mr Doherty to the Commission dated 17 May 2024. The email contains evidence from Mr Doherty about his employment and dismissal. I marked the email **Exhibit A7**.
- A response submission from Mr Doherty filed on 17 May 2024. The submission contains evidence from Mr Doherty about his employment and dismissal. I marked the submission **Exhibit A8**.
- A reference letter for Mr Doherty from Rory Milner (Site Super for Haikos Constructions) dated 7 March 2024. Mr Milner's letter speaks highly of Mr Doherty's work on the Darwin Youth Justice Centre project. I marked Mr Milner's reference letter **Exhibit A9**.
- A reference letter for Mr Doherty from Shona Claydon (HSEQ Manager – JMG Maintenance and Fabrication Pty Ltd (**JMG**)) dated 10 March 2024. Mr Doherty worked for JMG in 2020. Ms Claydon's letter speaks highly of Mr Doherty as an employee and indicates he passed numerous drug and alcohol tests during his employment. I marked Ms Claydon's reference letter **Exhibit A10**.
- A reference email for Mr Doherty from Leon Sailor (former employee of Defend Fire Services) dated 19 February 2024. Mr Sailor's letter speaks highly of Mr Doherty's work for Defend Fire in 2021. I marked Mr Sailor's reference email **Exhibit A11**.

[7] Mr Doherty answered some questions from me under an affirmation and was cross-examined on his evidence during the determinative conference on 22 May 2024.

[8] Mr Doherty's oral evidence included that after a period of absence due to mental health issues, Mr Doherty returned to work in early December 2023 and performed work for around four days. Mr Doherty stated that he knew he was "not right" to perform work at this time due to his mental health issues. Mr Doherty stated he was "forced" to return to work because Defend Fire Services had indicated it would need to retrieve Mr Doherty's work vehicle so it could be used for other purposes, if Mr Doherty's absence continued into the future.

[9] Mr Doherty also admitted making highly offensive and threatening statements about Mrs Nuthall after he was dismissed.

[10] Mr Doherty made oral closing submissions at the end of the determinative conference.

### *Defend Fire Services*

[11] Defend Fire Services relied on the following evidence in opposition to Mr Doherty's unfair dismissal application, the accuracy of which was confirmed under an affirmation by Mr Nuthall:

- Form F3 Employer response dated 10 January 2024. I marked the response form **Exhibit R1**.
- A submission with attached evidence filed on 10 May 2024. The attached evidence was:
  - A statement from Mr Nuthall dated 9 May 2024. Mr Nuthall’s statement contains evidence about Defend Fire Services’ operations and about its various concerns with Mr Doherty. The statement includes the following:

“During the Applicant’s unplanned, unexplained and lengthy absence from work between 13 and 20 December 2023, the Respondent became aware that the Applicant was using his allocated work vehicle extensively for private purposes. The software tracker system shows that the Applicant travelled around 576km with the Respondent’s vehicle over a wide area in the Northern Territory during this time. It also showed unusual hours of vehicle idling in the middle of the night. The vehicle tracker often placed the Applicant’s work vehicle at a pub on days during which the Applicant was absent from work, and in particular in the last week prior to his dismissal on 21 December 2023.”
  - Mr Doherty’s letter of offer from Defend Fire Services which was signed by Mr Doherty on 5 July 2021.
  - A copy of Mr Doherty’s termination letter.
  - A copy of an excerpt from Defend Fire Services’ personal/carer’s leave policy.
  - A spreadsheet which shows the hours Mr Doherty worked and took off from 6 July 2023 to his dismissal on 21 December 2023. The spreadsheet also records the periods of absence that Mr Doherty provided a medical certificate for.
  - A copy of Defend Fire Services’ Vehicle Policy.
  - A document containing data about Mr Doherty’s use of his work vehicle from 13 to 21 December 2023. The document indicates Mr Doherty travelled 576km during this period.
  - A statement from Adam Landon (Diesel Fleet Mechanic) dated 24 April 2024. The statement raises various issues with Mr Doherty’s behaviour prior to his dismissal including in relation to the roll groover attachment tool. Given Mr Landon did not attend the determinative conference and could not be cross-examined, I do not consider I can place any significant weight on his statement.
  - A statement from John Zafiriou (Fire Systems Technician) dated 24 April 2024. The statement raises various issues with Mr Doherty’s behaviour prior to his dismissal. Given Mr Zafiriou did not attend the determinative conference and

could not be cross-examined, I do not consider I can place any significant weight on his statement.

- Photographs of alcohol and small plastic bags allegedly containing illicit drug residue which were found in Mr Doherty's work vehicle on 20 December 2023.
- A copy of a medical certificate found in Mr Doherty's work vehicle on 20 December 2023. Defend Fire Services accepted Mr Doherty did not consent to it being provided with this personal medical information. I do not intend to place any weight on the certificate given those circumstances.
- A screenshot of offensive and threatening WhatsApp messages that Mr Doherty sent after his dismissal regarding Defend Fire Services and Mrs Nuthall.
- A copy of the message Mr Doherty sent Mr Laurie on 18 October 2023. There are many expletives in the message and Mr Doherty is complaining about not getting a wage increase.
- A statement from Donovan Else (Sprinkler Fitter) dated 9 May 2024. Mr Else provides evidence about Mr Doherty's behaviour after his dismissal and a threatening statement Mr Doherty made about Mrs Nuthall. Mr Doherty admitted making the relevant statement.
- An excerpt from Defend Fire Services' payroll records which shows the earnings of Mr Doherty and its other employees for 1 July 2022 to 30 June 2023.
- An email from Mr Laurie to Mr and Mrs Nuthall which requests increases to Mr Doherty's remuneration based on amounts agreed between Mr Laurie and Mr Doherty.
- An excerpt from Defend Fire Services' payroll records which shows Mr Doherty's annual leave balance as at 15 February 2024. The record appears to show Mr Doherty is owed \$3,950.96 for accrued annual leave.

I marked this material collectively as **Exhibit R2**.

- Emails exchanged between Mrs Nuthall and the Commission regarding the proceeding and Defend Fire Services' position concerning remedy. I marked the emails **Exhibit R3**.

[12] Mr Nuthall answered some questions from me and was cross-examined on the evidence.

[13] Ms de Wet, Mr Nuthall and Mrs Nuthall all made oral submissions at the end of the determinative conference.

### **Statutory provisions – initial jurisdictional matters**

When can the Commission order a remedy for unfair dismissal?

[14] Section 390 of the FW Act provides that the Commission may order a remedy if:

- (a) Mr Doherty was protected from unfair dismissal at the time of being dismissed; and
- (b) Mr Doherty has been unfairly dismissed.

[15] Both limbs must be satisfied. I am therefore required to consider whether Mr Doherty was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that Mr Doherty was so protected, whether Mr Doherty has been unfairly dismissed.

When is a person protected from unfair dismissal?

[16] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (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.

When has a person been unfairly dismissed?

[17] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

- (a) the person has been dismissed;
- (b) the dismissal was harsh, unjust or unreasonable;
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code (SBFDC); and
- (d) the dismissal was not a case of genuine redundancy.

**Consideration – initial jurisdictional matters**

[18] There was no dispute and I find that Mr Doherty's employment with Defend Fire Services terminated at the initiative of Defend Fire Services effective 21 December 2023. I am therefore satisfied that Mr Doherty has been dismissed within the meaning of s.385 of the FW Act.

[19] Under s.396 of the FW Act, the Commission is obliged to decide the following matters 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 SBFDC;
- (d) whether the dismissal was a case of genuine redundancy.

[20] It is not disputed and I find that Mr Doherty's application was filed within the relevant 21-day period.

[21] It is not in dispute, and I find that Mr Doherty was protected from unfair dismissal. Mr Doherty had completed the minimum employment period and the *Plumbing and Fire Sprinklers Award 2020* applied in relation to the employment. Mr Doherty's earnings were below the high-income threshold.

[22] Defend Fire Services' employer response form states it had 48 employees when Mr Doherty was dismissed. That means it is not a small business and the SBFDC is not relevant.

[23] Defend Fire Services has not argued Mr Doherty's dismissal was a case of genuine redundancy and it clearly was not.

[24] Given my findings in relation to these initial matters, I am required to determine whether Mr Doherty was unfairly dismissed.

### **Statutory provisions - unfair dismissal**

[25] 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.

[26] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me.<sup>1</sup>

### **Consideration – unfair dismissal**

#### Was there a valid reason for the dismissal related to Mr Doherty’s capacity or conduct?

[27] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”<sup>2</sup> and should not be “capricious, fanciful, spiteful or prejudiced.”<sup>3</sup> However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>4</sup>

[28] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>5</sup> “The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.”<sup>6</sup>

[29] I find that there was a valid reason for Mr Doherty’s dismissal, but not for any of the precise reasons identified by Defend Fire Services in Mr Doherty’s termination letter. That discrepancy does not prevent me finding there was a valid reason for dismissal. What is required is that Defend Fire Services had a valid reason for dismissal, it need not be the reason given to the Mr Doherty at the time of dismissal.<sup>7</sup>

[30] I find that Mr Doherty committed a serious breach of his statutory and contractual<sup>8</sup> obligations concerning safety at work when he drove to the Darwin Youth Justice Centre worksite and performed work in early December 2023. Section 28 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (Northern Territory) states:

#### **“Duties of workers**



While at work, a worker must:

- (a) take reasonable care for his or her own health and safety; and
- (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
- (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and
- (d) cooperate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.”

[31] Mr Doherty’s evidence was that he was “mentally ill” and “wasn’t ready” when he worked “6hrs the first day 4 then next 6hrs on the Monday and I think 4 or 5 on the Tuesday.”<sup>9</sup> Mr Doherty stated in oral evidence that he was “not the same person” at this time. Mr Doherty justified his actions by stating he was “pushed back to work”. I do not accept Mr Doherty was “pushed back to work” merely because Defend Fire Services indicated it would take possession of Mr Doherty’s work vehicle if his prolonged absence continued. Mr Doherty was provided with this vehicle to use for work purposes. Although some private use may have been permitted, that was obviously not the primary purpose of the vehicle. It is unsurprising that Defend Fire Services would seek to take possession of the vehicle so it could be used for work purposes, in circumstances where it understood Mr Doherty would be absent for a prolonged period. Given Mr Doherty by his own admission had serious mental health issues at this time, I do not understand why Mr Doherty was so concerned about Defend Fire Services taking possession of the vehicle. Based on his own evidence, there is significant doubt that Mr Doherty was even fit to safely drive the vehicle at this time. In any event, Mr Doherty decided that keeping the work vehicle was his priority and that he was prepared to attend work in an unfit state to keep the vehicle. That decision created a substantial safety risk for Mr Doherty and any other employees or contractors working on the site. I find this serious breach of safety laws to be serious misconduct that provided a valid reason for dismissal.

[32] Given this finding, I do not strictly need to make findings in relation to each reason for dismissal identified in Mr Doherty’s termination letter. In any event, for completeness I make the following findings:

1. *Using a work vehicle for personal travel without authorisation and failing to maintain the vehicle in a suitable condition.*

I do not consider Defend Fire Services established that Mr Doherty was not permitted to use his work vehicle for any private travel. Although Mr Doherty’s letter of offer states “fuel cards for business use only”, that hypothetically would not prevent Mr Doherty paying for fuel from his own money and driving the work vehicle for personal use. In any event, the evidence suggests Mr Doherty had been using the work vehicle for some personal travel without issue since 2021 and that Defend Fire Services must have been aware of this. I consider Defend Fire Services should have put Mr Doherty

on notice if it intended to strictly prohibit personal use of the vehicle. I do not consider using the work vehicle for private travel and the poor state of the vehicle when it was found on 20 December 2023 provide a valid reason for the dismissal.

However, as referred to above and below, I think the more serious problem was that Mr Doherty admitted to driving the work vehicle when he was unfit due to serious mental health issues.

2. *Concealing a roll groover attachment tool in a work vehicle when Mr Doherty had been asked to return it.*

I do not consider the evidence led by Defend Fire Services establishes Mr Doherty intended to steal this tool, although I accept it is possible. I do not have sufficient evidence to determine whether Mr Doherty failed to comply with a lawful and reasonable direction to return the tool because I am unable to rely on Mr Landon's evidence, given he did not attend the determinative conference for cross-examination.

3. *Concerns about Mr Doherty's presentation and actions on his work site.*

I consider this is a broad reference to the same issue that I have found was a valid reason for Mr Doherty's dismissal. Specifically, Mr Doherty attended the worksite in early December 2023 for four days when he was not fit to do so.

4. *Sending an abusive text message to his supervisor, Shayne Laurie, on 18 October 2023.*

I do not consider the sending of this message provided a valid reason for Mr Doherty's dismissal. No action was seemingly taken in relation to the message after it was sent on 18 October 2023. Although the language in the message is not appropriate, I suspect that type of language would not be foreign to employees working on this type of construction site. I also consider the primary purpose of the message was for Mr Doherty to express frustration about not getting a wage increase, as opposed to wanting to abuse Mr Laurie.

5. *Unreasonable lengthy absences from work without reasonable grounds.*

I do not consider Mr Doherty's absences were a valid reason for dismissal, although I accept Mr Doherty failed to provide sufficient medical evidence to explain all of his absences. As referred to above, I consider Mr Doherty should have been absent from work at all relevant times prior to his dismissal because he was unfit to work due to a serious mental illness. I consider it was actually Mr Doherty's attendance at work and driving of the work vehicle when he was unwell that was problematic, as opposed to his absences from work.

[33] Defend Fire Services referred several times in the determinative conference to Mr Doherty admitting he made a threatening statement about Mrs Nuthall after he was dismissed. I remain of the view I expressed during the determinative conference that this conduct cannot be relied upon in relation to valid reason because it occurred after the dismissal took effect. That makes it materially different to evidence of facts that existed at the time of dismissal but

only emerged after the dismissal took effect. As stated by the High Court (my emphasis): “if there were, in fact, any circumstances **in existence at the time of the termination** of the agreement which could have justified the respondent in so terminating it, then it may justify the termination by subsequent proof of those circumstances...”<sup>10</sup>

[34] However, I consider the threatening statement is a very serious matter. Mr Doherty accepted this and expressed regret for his actions. I consider the message can potentially be taken into account as an “other relevant matter” in determining compensation under s.392(2) of the FW Act, noting Mr Doherty did not seek reinstatement.

[35] I find there was a valid reason for dismissal because Mr Doherty committed a serious breach of safety laws by attending work when he knew he was not fit.

Was Mr Doherty notified of the reason for dismissal?

[36] Proper consideration of s.387(b) requires a finding to be made as to whether Mr Doherty “was notified of that reason”. Contextually, the reference to “that reason” is the valid reason found to exist under s.387(a).<sup>11</sup>

[37] 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>12</sup> and in explicit<sup>13</sup> and plain and clear terms.<sup>14</sup>

[38] Defend Fire Services accepted Mr Doherty was not notified of its reasons for dismissal before the decision was made. Ms de Wet referred to safety concerns for staff if a meeting was convened with Mr Doherty. I accept those concerns were genuinely held. However, a proper process could have occurred largely in writing including by the provision of a show cause letter.

[39] I also note the valid reason I have found for dismissal was alluded to, but not communicated in clear terms, even in the termination letter.

[40] I consider this factor weighs in favour of a finding of unfair dismissal.

Was Mr Doherty given an opportunity to respond to the valid reason?

[41] 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>15</sup>

[42] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.<sup>16</sup> Where the employee is aware of the precise nature of the employer’s concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.<sup>17</sup>

[43] Defend Fire Services accepted Mr Doherty was not provided with an opportunity to respond to its reason for dismissal before the decision was made. Ms de Wet referred to safety concerns for staff if a meeting was convened with Mr Doherty. I accept those concerns were

genuinely held. However, a proper process could have occurred largely in writing including by the provision of a show cause letter.

[44] I also note the valid reason I have found for dismissal was alluded to, but not communicated in clear terms, even in the termination letter.

[45] I consider this factor weighs in favour of a finding of unfair dismissal.

**Did Defend Fire Services unreasonably refuse to allow Mr Doherty to have a support person present to assist at discussions relating to the dismissal?**

[46] There were no discussions prior to the dismissal on 21 December 2023 at which the Applicant could have requested a support person to be present. I consider this to be a neutral factor.

**Was Mr Doherty warned about unsatisfactory performance before the dismissal?**

[47] The dismissal related to Mr Doherty's conduct. This factor is not relevant.

**To what degree would the size of Defend Fire Services' enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[48] I accept Defend Fire Services is a reasonably small business and that this had an impact on the procedural deficiencies associated with the dismissal.

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

[49] Ms de Wet is a Workplace Relations Advisor for Defend Fire Services. As a result, I do not consider the procedural deficiencies can be attributed to a lack of human resource management specialists.

**What other matters are relevant?**

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

[51] I consider Mr Doherty's serious mental illness around the time of his dismissal is a relevant matter.

[52] I also accept Mr Doherty's evidence that being overworked on the Darwin Youth Justice Centre project with a lack of support contributed to the onset of his condition. I consider this is a relevant matter.

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

[53] I have made findings in relation to each matter specified in s.387. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>18</sup>

[54] Having considered each of the matters specified in s.387 of the FW Act, I am not satisfied that the dismissal of Mr Doherty was harsh, unjust or unreasonable.

[55] Although there were serious procedural deficiencies with the termination process, it is well established that findings of procedural fairness deficiencies will not inevitably lead to a conclusion that a dismissal was unfair. A Full Bench stated the following in *Federation Training v Sheehan*:<sup>19</sup>

“It is trite to observe that any issue/s of procedural unfairness may not be of such significance as to outweigh the substantive reason/s for an employee’s dismissal, particularly in cases of misconduct where the proven misconduct is of such gravity as to outweigh any other considerations in respect to ‘harshness’, such as age, length of service, employment record, contrition or personal and family circumstances.”

[56] I have found that Mr Doherty committed serious misconduct which posed a threat to the safety of himself and other workers and that this provided a valid reason for dismissal. I consider the seriousness of the misconduct effectively outweighs the procedural fairness deficiencies in the overall assessment. I also consider the procedural fairness issues must be viewed in the context of Defend Fire Services dealing with an employee that was clearly behaving aggressively and erratically, due to a serious mental illness. It was a difficult situation for Defend Fire Services to manage given the need to protect its reputation and employees.

[57] The “other matters” identified above concerning Mr Doherty’s illness and what may have contributed to it, are factors that weigh in favour of a finding of harshness. However, I consider the serious safety risk Mr Doherty created for himself and others by attending the worksite, and also potentially for members of the public driving on the roads he used to attend the worksite, means that the dismissal was not harsh in all the circumstances.

[58] Further, even if I had found Mr Doherty was unfairly dismissed, I would have determined that it was not appropriate to make any compensation order in Mr Doherty’s favour because of the severity of his threat regarding Mrs Nuthall after his dismissal.

### **Annual leave**

[59] Defend Fire Services proposed that it pay Mr Doherty’s accrued leave entitlements and the application for unfair dismissal be dismissed, as its suggested remedy.<sup>20</sup> Ultimately, I agree with this proposal. Defend Fire Services is at risk of a civil contravention if it has not paid Mr Doherty his accrued annual leave entitlements. It would be appropriate to urgently address this issue.

### **Conclusion**

[60] I am not satisfied that Mr Doherty was unfairly dismissed within the meaning of s.385 of the FW Act.

[61] The application is dismissed.



COMMISSIONER

*Appearances:*

*Mr Doherty* representing himself.

*Ms de Wet, Mr Nuthall and Mrs Nuthall* on behalf of Defend Fire Services.

*Determinative conference:*

2024.

*Via video.*

22 May.

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<sup>1</sup> *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

<sup>2</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

<sup>5</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7].

<sup>6</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

<sup>7</sup> *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [\[2016\] FWCFCB 4185](#), [45] citing *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359, 377-8.

<sup>8</sup> There is an implied obligation on an employee to comply with lawful and reasonable directions from their employer. The Vehicle Policy contains a lawful and reasonable direction for employees to comply with safety laws. Mr Doherty breached this direction. I also suspect Defend Fire Services has a separate safety policy, but this was not provided to the Commission.

<sup>9</sup> Exhibit A2.

<sup>10</sup> *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21, per Starke J.

<sup>11</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFCB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFCB 533](#), [55].

<sup>12</sup> *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

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<sup>13</sup> *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

<sup>14</sup> *Ibid.*

<sup>15</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>16</sup> *RMIT v Asher* (2010) 194 IR 1, 14-15.

<sup>17</sup> *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

<sup>18</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>19</sup> [\[2018\] FWCFB 1679](#) at [55].

<sup>20</sup> Exhibit R3.