DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Gergely Laszlo Szentpeteri
v
Serco Australia Pty Ltd
(U2024/258)

DEPUTY PRESIDENT DOBSON BRISBANE, 12 JUNE 2024

Application for relief from unfair dismissal – sleeping on duty – security detention services officer – valid reason – alleged conduct substantiated - whether fitness for work a mitigating factor – serious misconduct – dismissal not unfair - application dismissed

[1] On 7 January 2024, Mr Gergely Laszlo Szentpeteri (Applicant) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Serco Australia Pty Ltd (Respondent). The Applicant seeks reinstatement of his employment with the Respondent and backpay of income.

When can the Commission order a remedy for unfair dismissal?

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

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

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

When is a person protected from unfair dismissal?

[4] 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?

[5] 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; and

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

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

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

Background

[6] The factual background to the matter is as follows:

(a) Mr Szentpeteri commenced employment with the Respondent on 1 March 2019 as a Detention Service Officer and was dismissed on 13 December 2023. The Applicant was notified of the dismissal on 13 December 2023;

(b) The reason given by the Respondent for terminating the Applicant's employment was due to serious misconduct;

(c) On 23 November 2023, the Respondent was rostered and worked at Brisbane Immigration Detention Centre (**BIDC**);

(d) On 24 November 2023, the Respondent issued a letter to the Application suspending him from duties with pay effective from that date while the Respondent conducted an investigation into his conduct during his shift on 23 November 2023; and

(e) On 28 November 2023, the Respondent issued a Notification of Formal Disciplinary meeting letter to the Applicant.

[7] The issues raised were reflected in the Respondent's termination of employment letter[1] sent to the Applicant on 13 December 2023 which stated, inter alia:

> "1. On 23 November 2023, between 3.17pm and 3:44pm, while sitting on a sofa in the E Block common room at the Brisbane Immigration Detention Centre (BIDC):
>
> a) You were asleep on duty
> b) You were inattentive to your duties
> c) You intentionally wore sunglasses to prevent the CCTV capturing your eyes being closed. Specifically, you put on sunglasses when entering an indoor area
> d) You failed to maintain a constant line of sight of a vulnerable detainee you were responsible for monitoring in accordance with your Constand Enhanced Monitoring duties and responsibilities"
>
> 2. On 23 November 2023, at approximately 15:17 hours to 15:44 hours, while you were sitting on a sofa in the E Block common room, you did not notice or react to two detainees who entered the common room, including one detainee who took items from a table less than 1 metre away from your body while you were responsible for a vulnerable detainee on Constant Enhanced Monitoring.
>
> 3. On 23 November 2023, at approximately 15:44 hours, while sitting on the sofa in the E Block common room:
>
> a) You did not respond to attempts made by Facility Operations Manager Chris Gurnett to gain your attention by calling your name out whilst he was standing next to you.
> b) You became responsive only when Facilities Operations Manager Chris Gurnett tapped you on the shoulder the second time.
>
> 4. By your actions on 23 November 2023 as set in Allegations 1-3 above:
>
> a) You failed to maintain a state of readiness on duty.
> b) You failed to conduct yourself in a manner than ensured your ability to respond throughout your period of duty.
> c) You compromised the safety of a vulnerable detainee under your immediate care.
> d) You failed in your duty of care towards the detainee you were responsible for ensuring the safety of.
> e) You compromised the safety and security of BIDC.
> f) You neglected your duties as a DSO.
> g) You failed to maintain safe work practices and take reasonable care of your own and others health and safety by way of your actions.
>
> 5. During your meeting with Residential Manager Tony Tusa at approximately on 23 November 2023, you were dishonest in your response when you denied that you were asleep.
>
> Based on the evidence available to Serco allegations 1a, 1b, 1d, 2, 3, 4 and 5 have been substantiated on the balance of probabilities. Allegation 1c is not substantiated on the balance of probabilities.
>
> …"

[8] Mr Szentpeteri filed his Form F2 Application for unfair dismissal remedy on 7 January 2024, which was 27 days after his termination, being five days late. On 5 February 2024, the Respondent filed a Form F3 employer response to Mr Szentpeteri's application. In its Form F3, the Respondent raised a jurisdictional objection to Mr Szentpeteri's application on the basis his application was filed out of time (i.e. lodged more than 21 days after the dismissal took effect).

[9] On 21 February 2024, Commissioner Crawford convened a determinative conference/hearing with the parties to determine the Respondent's jurisdictional objection. He dismissed the jurisdictional objection and determined Mr Szentpeteri could be allowed a further

period to make his application, and that it was appropriate to extend the period for him to file his application to 8 January 2024. His reasons for dismissing the jurisdictional objection are traversed in his decision [2024] FWC 504.

[10] On 11 March 2024, the file was allocated to my Chambers. On 13 March 2024, I issued directions (**directions**) and listed the matter for a case management conference on 18 March 2024 and for a determinative conference/hearing (Merits) on 24 April 2024. The matter was unresolved following the conference and the Applicant elected to continue his application.

[11] Following the conference and in the weeks preceding the hearing, the Applicant sent several emails to my Chambers in relation to the management of his matter and seeking on numerous occasions, an adjournment of the listed hearing. These will be described below.

Applicant's requests for adjournment of hearing or remote hearing

[12] During the period from 2 April 2024 until 19 April 2024, the Applicant sent at least four separate requests for an adjournment of the matter and/or request for a remote hearing of the matter for a range of differing reasons. I asked my Chambers to express concern about dealing with the matter in a timely manner and with due regard for the significant contest of facts. Ultimately this resulted in the matter being heard by Microsoft Teams with the Applicant overseas at 10am on 24 April 2024.

Respondent's application for an order for the Applicant to produce documents

[13] The Respondent's written submissions, filed 10 April 2024, stated that they intended to seek the Commission's permission to make further submissions regarding any order of compensation on account of not having had the benefit of documents to verify the Applicant's attempts at mitigating loss because of the dismissal.

[14] On 12 April 2024, my Chambers responded to the Respondent stating that the directions already required material in relation to the Applicant's actions to mitigate any loss by 10 April 2024 and accordingly the granting of further permission to file the same was unlikely.

[15] Shortly after, the Respondent's representative emailed in response, stating the Respondent's intention was to seek orders for the production of travel documents and evidence of mitigation, and for any further submissions to be made during the hearing contingent on any documents produced and in cross examination.

[16] On 14 April 2024, the Respondent filed a Form F52 Application for an Order for the Production of Documents (**production order**), and a draft order. The Respondent's application was for documents to be returnable to the Commission by 10.00am on 23 April 2024 and made available for the Respondent to uplift and copy prior to the hearing on 24 April 2024.

[17] Following some clarification, on 17 April 2024, I granted the production order pursuant to s 590(2)(c) of the Act. The production order required the Applicant to produce the following to the Commission by 10.00am on 23 April 2024:

> "A copy of all documents, records bank statements, pay slip, email/text messages booking confirmation that evidence:

(a) The Applicant's employment with the entity referred to as "Treasury Casino";
(b) Any income received by the Applicant for the performance of work in the period 13 December 2023 to 15 April 2024;
(c) Any application for paid employment (including any response to any application for paid employment) in the period 13 December 2023 to 15 April 2024."

[18] At 7.02am on 23 April 2024, my Chambers received an email from the Applicant producing documents in compliance with the production order. The email attached the following documents:

(a) The Applicant's Contract of Employment with 'Treasury Brisbane', dated 5 September 2023;
(b) The Applicant's 14 payslips from Treasury Brisbane for the period from 3 October 2023 to 14 April 2024;
(c) A screenshot of the jobs the Applicant had applied for through his Seek profile, purportedly including his role with Treasury Brisbane; and
(d) The Applicant's bank statements for the periods from 24 January 2024 to 23 April 2024 and from 7 August 2023 to 5 February 2024.

[19] In his email to Chambers at 7.02am on 23 April 2024, the day before the hearing, the Applicant requested for his bank statements to be treated with confidentiality, and for my Chambers to redact those bank statements so as to only indicate payments made by his new employer. At 10.16am that morning, my Chambers responded to the Applicant by email, instructing him to conduct the redactions he considered necessary on the bank statements and provide them to Chambers by 4.00pm AEST that day.

[20] At 10.22am, my Chambers received an email from the Respondent's representatives noting they were not in receipt of any responses to the production order for the Applicant to produce documents by 10am that morning. The Respondent's representative also requested permission to inspect any documents to be produced as well as seeking permission to attend any hearing.

[21] At 11.12am, my Chambers emailed the parties granting the Respondent leave to be represented at the Hearing and providing the documents furnished by the Applicant which he had not requested be redacted, namely his payslips, his employment contract and his Seek profile screenshot. The email noted to parties that the Applicant had been directed to undertake the necessary redactions himself and provide the material to the Respondent by 4.00pm that day.

[22] At 4.17pm that afternoon, my Chambers received an email from the Applicant, where the Applicant forwarded his earlier email from that morning at 7.02am, to the Respondent, enclosing all the furnished documents without redactions. The Applicant later said he did not have the time to do the redactions.

[23] At the hearing, the documents were subsequently entered into evidence.

[24] The contents of the documents became relevant to my consideration of the Applicant's mitigation of any loss arising from the alleged unfair dismissal, which I consider later.

The hearing

[25] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing. After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing for the matter (s.399 of the FW Act).

Permission to appear

[26] The Respondent sought to be represented before the Commission by a lawyer.

[27] Relevantly, section 596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[28] Section 596(2) provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter before the Commission only if:

(a) it would enable the matter to be deal with more efficiently, taking into account the complexity of the matter; or

(b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or

(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

[29] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the FW Act.[2] The decision to grant permission is a two-step process. First it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.[3]

[30] On the question of representation, the Applicant did not raise any objections to the Respondent being represented.

[31] On the question of representation, the Respondent submitted that allowing a lawyer to represent the Respondent would enable the matter to be dealt with more efficiently, taking into account the matter's potential complexity. The Respondent notes that cross examination of the witnesses would be required including on CCTV footage material and this causes the complexity.

[32] I accept the submissions made by the Respondent and I note that the Applicant did not raise any objection.

[33] Having considered those matters, I determined that allowing the Respondent to be represented by a lawyer would enable the matter to be dealt with more efficiently including in the cross examination and taking into account the complexity of the matter.

[34] I have therefore decided to exercise my discretion to grant permission for the Respondent to be represented.

[35] Accordingly, at the hearing on 24 April 2024, the Applicant was self-represented and the Respondent was represented by Mr Paul Brown of Baker & McKenzie.

Witnesses

[36] The Applicant gave evidence on his own behalf.

[37] The following witnesses gave evidence on behalf of the Respondent:

- Sumeet Bhindi, employed by the Respondent 'as a Regional People & Capability Manager East';
- Mr Tony Tusa, employed by the Respondent as a 'Residential Manager'; and
- Mr Gary Hall, employed as a Centre Manager of the Respondent.

Submissions

[38] The Applicant filed submissions in the Commission on 27 March 2024 and 17 April 2024. The Respondent filed submissions in the Commission on 10 April 2024 and 18 April 2024.

Outline of Submissions from the Applicant

[39] In the Applicant's outline of argument as to the merits of his application, he submitted that the reason he had been given for his dismissal was serious misconduct for 'falling asleep on duty, neglecting my duties, dishonesty' during an alleged incident on 23 November 2023.[4]

[40] In his outline of argument, the Applicant contended that whilst he acknowledged that the incident on 23 November 2023 had occurred and he was 'seemingly sleeping sitting on a sofa on duty', he disagreed with the Respondent's characterisation of that as serious misconduct and negligence.[5] The Applicant submitted that he had sustained a permanent psychological injury during his employment with the Respondent, and quoting with reference to the report of 26 March 2024 (some 3 ½ months after the dismissal had occurred) by Dr Hoong tendered to the Medical Assessment Tribunal:

> "On 23 November 2023. Mr. Szentpeteri fell asleep at work. There is a high possibility that this behaviour is strongly related to his PTSD (please refer to DSM V criteria above). Mr. Szentpeteri has not listened to my recommendation to cease work and his reason given was due to his financial hardship."[6]

[41] In relation to his termination being due to serious misconduct, the Applicant submitted that his actions were not wilful or deliberate and neither was he negligent or dishonest. The

Applicant submitted that the whole incident was due to his medical conditions (PTSD, permanent impairment) and that he had fallen asleep "without … even realising it at the time.".[7]

[42] The Applicant submitted that the dismissal was harsh on the basis of his medical condition. The Applicant viewed that as this was the first time falling asleep during work after his injury, it was harsh to dismiss him, as he would have seen a doctor to arrange for medical treatment to prevent it reoccurring. He believed that his psychological injury made it harder for him to identify when he became unfit for work. The Applicant stated that his medical condition occurred as a direct result of being assaulted on 'multiple occasions during the course of my duties'. He emphasised an assault in January 2023 after which he reported 'feeling restless, tired, sleepless and anxious' to his doctor but the doctor viewed he was fit for work. The Applicant submitted that the Respondent should have considered these factors and the Applicant's four years of service and instead presented him a final warning and given him the opportunity to seek further medical treatment and potentially workers' compensation. The Applicant submits the Respondent's decision to terminate his employment was harsh.

[43] The Applicant also submitted the Commission should consider the medical circumstances surrounding the alleged misconduct. The Respondent's submission that the Applicant had been cleared fit to work by an independent medical examiner should be considered in the context of the Medical Assessment Tribunal's finding that the Applicant had sustained a permanent impairment, and the Respondent should have seriously considered this mitigating factor before terminating his employment.

[44] In relation to remedy sought, the Applicant submitted that he sought to be reinstated, back paid his lost wages from the date of dismissal to the date of reinstatement and that he then be retrenched and paid his retrenchment entitlements as the Respondent has offered voluntary redundancy to employees after the Applicant was dismissed.

[45] In his outline of submission, in relation to finding new employment, the Applicant submitted that he was continuing to work greater hours at the Treasury Casino at a lower pay rate but has 'been applying to jobs in mining and security, but (had) been unsuccessful so far'.[8] The Applicant expressed he believed this was due to the Respondent not providing a reference. The Applicant also provided that he ended his employment with the Treasury Casino on 4 April 2024 due to his mother's death.[9]

[46] In support of his outline of submission, the Applicant filed a witness statement, which annexed the documents he sought to rely upon to support his application. The Applicant filed medical reports by Dr Sam (Waisam) Hoong dated 26 May 2023[10], and 26 March 2024[11]; an extract of the email the Applicant sent to Mr Gary Hall of the Respondent responding to allegations the Respondent raised against the Applicant[12] and the Medical Assessment Tribunal Decision issued by the Office of Industrial Relations (Queensland), dated 5 March 2024.[13]

Outline of Submissions from the Respondent

[47] The Respondent relies on it's Form F3, with three attachments, filed on 5 February 2024. The Respondent filed its outline of submission and its witnesses' statements of on 10 April 2024.

[48] The Respondent submits that Mr Szentpeteri's application should be dismissed, or that, in the alternative of the Commission finds the Applicant's dismissal was unfair, that the Applicant's reinstatement should not be ordered, given the misconduct and its impact on the trust and reliability required to perform the role of detention officer. The Respondent deals this more fully in the following paragraphs.

[49] The Respondent submits that the Applicant was dismissed because of the Applicant's conduct at the BIDC during a work shift on 23 November 2023, which the Respondent considered to be misconduct.

[50] The Respondent referred to allegations against the Applicant from that shift particularised in its letter of termination constituting the alleged misconduct which informed the Respondent's decision to terminate the Applicant's employment[14]. Those allegations are set out at paragraph [7] of this decision.

[51] The Respondent submitted that the Applicant's dismissal was not harsh with reference to the *Fair Work Act's* criteria for harshness in section 387. The Respondent submitted that the Applicant engaged in misconduct which precluded him from performing all aspects of his role, with the potential to impact employees' and detainees' welfare such that there was a valid reason for dismissal in the circumstances arising from the 23 November 2023 incident[15]. They suggested the Applicant was 'provided with a high level of procedural fairness prior to the dismissal in that he was given an adequate opportunity to respond to allegations of misconduct and the possibility of termination of his employment …", citing the provision of a suspension letter, notification of a formal disciplinary meeting and the opportunity to attend it, and the written submission the Applicant provided instead of attending the disciplinary meeting. The Respondent submits that there are no mitigating factors that ought to convince the Commission that the Applicant's termination due to misconduct, was harsh.[16]

[52] In relation to remedy, the Respondent submitted that reinstatement is inappropriate due to the nature of the Applicant's misconduct removing the necessary trust and confidence in the Applicant, and how important that is to a detention facility worker. In respect of compensation, the Respondent submits that any order of compensation paid to the Applicant should be reduced pursuant so s392(3) of the Act, and that due to the seriousness of the misconduct it should be reduced by 80%.[17]

Has the Applicant been dismissed?

[53] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[54] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

(a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or

(b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[55] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[56] There was no dispute and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

[57] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[58] Under section 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 Small Business Fair Dismissal Code;

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

Was the application made within the period required?

[59] Section 394(2) requires an application to be made within 21 days after the dismissal took effect. This issue has already been addressed by Commissioner Crawford.[18]

Was the Applicant protected from unfair dismissal at the time of dismissal?

[60] I have set out above when a person is protected from unfair dismissal.

Minimum employment period

[61] It was not in dispute, and I find that the Respondent is not a small business employer, having 15 or more employees at the relevant time.

[62] It was not in dispute, and I find that the Applicant was an employee, who commenced their employment with the Respondent on 1 March 2019 and was dismissed on 13 December 2024, a period in excess of 6 months.

[63] It was not in dispute, and I find that the Applicant was an employee.

[64] I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

Application of an enterprise agreement

[65] It was not in dispute, and I find that, at the time of dismissal, the Serco Immigration Services Enterprise Agreement applied to the Applicant's employment.

[66] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[67] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code if:

(a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and

(b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[68] I find that the Respondent was not a small business employer within the meaning of s.23 of the FW Act at the relevant time, having in excess of 14 employees (including casual employees employed on a regular and systematic basis). I am therefore satisfied that the Small Business Fair Dismissal Code does not apply, as the Respondent is not a small business employer within the meaning of the FW Act.

Was the dismissal a case of genuine redundancy?

[69] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

(a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[70] It was not in dispute, and I find that the Applicant's dismissal was not due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[71] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

[72] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Was the dismissal harsh, unjust or unreasonable?

[73] 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.

[74] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[19]

[75] I set out my consideration of each below.

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

[76] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[20] and should not be "capricious, fanciful, spiteful or prejudiced."[21] 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.[22]

[77] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[23] "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."[24]

[78] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant's conduct because the Applicant had been sleeping at work. However, as noted by Vice President Ross, then of the Australian Industrial Relations Commission, "…the question of whether sleeping at work constitutes a valid reason for termination depends on the circumstances. The relevant factual matrix must be considered. Issues such as the frequency

and duration of sleeping, the nature of the work being performed and the responsibilities of the employee concerned, will all be relevant."[25]

Submissions

[79] The Applicant submitted that there was no valid reason for the dismissal related to the Applicant's capacity or conduct because whilst he acknowledged that there was an incident on 23 November 2023, it did not amount to serious misconduct and negligence[26].

[80] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant's capacity or conduct because he had fallen asleep on duty, neglecting his duties and was dishonest during the investigation[27].

[81] The Respondent submitted that the four factual findings from their investigation were as follows:

- that the Applicant was asleep on duty; and
- that the Applicant was inattentive to his duties; and
- that the Applicant intentionally wore sunglasses inside the facility so as to prevent the CCTV from capturing his eyes being closed; and
- that the Applicant failed to maintain a constant line of sight of a vulnerable detainee that he was responsible for monitoring in accordance with his Constant Enhanced Monitoring duties and responsibilities.

Evidence

[82] In support of his submissions that his health conditions ought to be considered in relation to the 23 November 2023 incident, the Applicant annexed to his witness statement the following documents to support his submissions:

- A medical report by Dr Sam (Waisam) Hoong (**Dr Hoong**) dated 26 May 2023;
- A further medical report by Dr Hoong dated 26 March 2024;
- His written submission to the Respondent provided in lieu of his attendance at his disciplinary meeting/hearing; and
- A Medical Assessment Tribunal Decision dated 5 March 2024 from the Office of Industrial Relations (Queensland).

[83] Dr Hoong is a clinical psychologist. Dr Hoong's first medical report of May 2023 followed a referral from the Applicant's GP after an incident on 15 January 2023 in which the Applicant allegedly suffered personal injury.

[84] Dr Hoong's report noted, inter alia, that the Applicant experienced three incidences of physical violence from detainees while working on shift for the Respondent between 2021 and 2022, a particular incident of a detainee threatening the Applicant on 15 January 2023[28]; and the Applicant's reports of a range symptoms following the incidents, including difficulties falling asleep and staying asleep.[29]

[85] Upon administering a number of tests, Dr Hoong expressed in her report that the Applicant met the criteria for Post-Traumatic Stress Disorder and Mixed Depression and Anxiety, that she did not believe the Applicant was able to perform his current role, noting 'All his scores (depression, anxiety, PTSD) are all at the Severely high range'; and that the Applicant would require weekly therapy for 12 months.

[86] It is unclear what precipitated Dr Hoong producing a further medical report dated 26 March 2024, which is substantially similar to her report dated 26 May 2023. There are a number of differences, but notably (and as cited in the Applicant's Outline of Submission), Dr Hoong stated:

> "On 23 November 2023. Mr. Szentpeteri fell asleep at work. There is a high possibility that this behaviour is strongly related to his PTSD (please refer to DSM V criteria above). Mr. Szentpeteri has not listened to my recommendation to cease work and his reason given was due to financial hardship."

[87] The Medical Assessment Tribunal Decision the Applicant annexed to his witness statement arose from the Applicant making an application for compensation with WorkCover Queensland following the 15 January 2023 incident. The matter was referred to the tribunal to determine whether the Applicant had sustained a degree of permanent impairment and, if so, to what degree. The Tribunal's decision accepted that the Applicant had developed emotional symptoms consistent with the diagnosis of Adjustment-Disorder with Anxious Mood and had sustained a degree of permanent impairment, with the degree of permanent impairment resulting from the relevant injury being 5 percent.[30]

[88] The Applicant's written submission to the Respondent, offered instead of his attendance at his disciplinary meeting/hearing, responded to the Respondent's allegations outlined in its disciplinary letter of 28 November 2023.[31]

[89] The Respondent's allegation 1a was that the Applicant was asleep on duty.[32] The Applicant conceded in his response that it was possible he had fallen asleep without realising it, and if he had fallen asleep, it was due to the PTSD he had sustained previously.[33]

[90] The Respondent's allegation 1b was that the Applicant was inattentive to his duties.[34] The Applicant conceded that he 'appeared to be inattentive' to his duties, again citing his PTSD causing him to be in 'bad condition'.[35]

[91] The Respondent's allegation 1c was that the Applicant had intentionally worn sunglasses to prevent CCTV from capturing that his eyes were closed, noting the Applicant had adorned sunglasses when moving indoors.[36] The Applicant rejected the allegation as false and contended that because of his PTSD, he had started experiencing 'severe headaches' sometimes when watching television, and so he had adorned sunglasses to 'lessen the headache' and 'reduce the flashing effect' of the television being watched by a detainee.[37]

[92] The Respondent's allegation 1d was that the Applicant failed to maintain constant line of site of a vulnerable detainee he was responsible for monitoring in accordance with Constant Enhanced Monitoring duties and responsibilities.[38] The Applicant conceded such failure was possible as he had closed his eyes to reduce his headache, again citing his 'bad condition' resulting from his PTSD.[39]

[93] The Respondent's allegation 2 was that on the same day, within a 27 minute window, the Applicant had not noticed or reacted to two detainees entering a common room and one detainee taking items from a table less than 1 metre from where the Applicant had been sitting on a sofa while he had been responsible for a vulnerable detainee on Constant Enhanced monitoring.[40] The Applicant's response was he did not understand the allegation or what he should have done in the circumstances, and considered the detainees' behaviour as 'a normal, everyday occurrence in the centre' such that any reaction from him would have been excessive.[41]

[94] The Respondent's allegation 3a was that the Applicant did not respond to the Facility Operations Manager Chris Gurnett calling out the Applicant's name while standing next to him. Allegation 3b was that the Applicant only responded when Mr Gurnett tapped the Applicant's shoulder a second time.[42] The Applicant's contended he did not recall Mr Gurnett calling out his name and that this could not be verified by CCTV because it does not record voices. The Applicant claimed that Mr Gurnett had treated him negatively, previously, but conceded he responded to Mr Gurnett after sensing Mr Gurnett tapping his shoulder.[43]

[95] The Respondent alleged that as a consequence of allegations 1-3, the Applicant had failed to maintain 'a state of readiness' on duty (allegation 4a); failed to conduct himself in a manner ensuring his ability to respond throughout his period of duty (allegation 4b); compromised a vulnerable detainee's safety who was under the Applicant's immediate care (allegation 4c), and failed in his duty of care towards the detainee of whom he was responsible for ensuring their safety (allegation 4d); and compromised BIDC's safety and security (allegation 4e), neglected his duties as a DSO (allegation 4f) and failed to maintain safe work practices and take reasonable care of the health and safety of himself and others through his actions (allegation 4g). [44]

[96] In response to allegations 4a to 4g, the Applicant noted he was still unsure if he had indeed fallen asleep, but conceded all of the allegations were possibly true if so, except for 4f. The Applicant contended if he had been unable to perform his duties, it was not due to negligence but due to him being in 'bad condition' from his PTSD.[45]

[97] The Respondent's allegation 5 was that the Applicant had been dishonest in denying he had been asleep when meeting with Residential Manager Tony Tusa on or around 23 November 2023.[46] The Applicant 'strongly' rejected the allegation, contending his answer was not dishonest, that he genuinely believed he had not, but he still did not know if he did, 'however from the CCTV description it is possible'. He recalled having a severe headache due to sleep deprivation and 'flashing images on TV', closing his eyes for what 'only felt like a second to me' and that the next thing he could recall was Mr Gurnett tapping his shoulder.

[98] The Respondent's letter went on to particularise the breaches of discipline they considered the Applicant's actions may have breached.

[99] In summary, the Respondent alleged the Applicant's actions may have breached up to seven items within the *Detention Service Officer Success Profile*, including two job behaviours and two key accountabilities. The Applicant, it submitted, had breached seven items within the Respondent's Code of Conduct. The Applicant, it submitted, further breached six items within the DIBP FDSP Code of Conduct. Further, the Applicant breached two requirements within the

Professional Conduct Policy SIS-OPS-PPM-0042. The Respondent submitted that the Applicant breached the *Serco Immigration Services Enterprise Agreement* 2023. Furthermore, it was submitted that the Applicant did not fulfil the requirement contained in his employment contract to comply with company policies and procedures, work health and safety obligations, and to act in good faith and work to the best of his abilities. Finally, it was submitted that the Applicant did not maintain the Respondent's Core Values of Trust and Care.[47]

[100] In his written response of 10 December 2023, the Applicant did not respond to whether the conduct amounted to the breaches of discipline alleged by the Respondent.

Witness Statement of Mr Sumeet Bhindi

[101] Mr Sumeet Bhindi is the Regional People & Capability Manager East for the Respondent based at the BIDC. Mr Bhindi assisted in the employee conduct investigation and disciplinary procedures surrounding the termination of the Applicant and was involved in preparing the letter of termination. Mr Bhindi presented the Respondent's code of conduct which the Applicant was required to comply with.

[102] On 30 August 2023 Mr Bhindi received the Applicant's request to be returned to his normal duties and discussed this matter with Mr Hall as the Respondent was concerned the Applicant may not be fit to return to his duties. Mr Bhindi then requested the Applicant attend an independent medical examination with Dr Robin O'Toole. Dr O'Toole examined the Applicant on 11 September 2023 and Mr Bhindi received the report from Dr O'Toole on 10 October 2023. The report satisfied Mr Bhindi and the Respondent that the Applicant was able to return to work.

[103] Mr Bhindi was alerted that the Applicant was asleep whilst on duty on 23 November 2023 and he was involved in the decision to officially suspend the Applicant on 24 November 2023 in light of the Respondent's concerns with this serious misconduct.

[104] Mr Bhindi provided an account of the process undertaken in the termination of the Applicant's employment and provided that the Applicant had been invited to a formal disciplinary meeting. The meeting was to take place on 29 November 2023, however the Applicant provided a medical certificate stating that he would be unfit for work until 3 December 2023. The meeting was rescheduled to 4 December 2023, however the Applicant provided that he had tested positive to COVID-19 on 29 November 2023 and that the earliest he could attend would be 7 December 2023. Mr Bhindi rescheduled the meeting to 7 December 2023. A further medical certificate was provided by the Applicant stating he would be unfit for work until 10 December 2023, and the meeting was rescheduled again to 11 December 2023. On 8 December 2023, the Applicant requested that his solicitor attend the hearing, and when this was granted by the Respondent, advised that she would not be available on 11 December 2023. After Mr Bhindi confirmed that his solicitor could attend by telephone, the Applicant did not provide his availability. The Applicant then advised on 10 December 2023, that he had decided to respond in writing, rather than attend the hearing without his solicitor.

Witness Statement of Mr Tony Tusa

[105] Mr Tony Tusa is employed by the Respondent as the Residential Manager based at BIDC. Mr Tusa supervised the Applicant and was the Respondent's lead in suspending the Applicant for the misconduct on 23 November 2023.

[106] Mr Tusa stated that on 23 November 2023 he spoke to the Applicant in the morning and the Applicant informed Mr Tusa that he was about to go to Hungary for an extended period of time. Mr Tusa confirmed that the Applicant had not requested annual leave for this trip.

[107] Mr Tusa stated that on and around 22 November 2023, that a rotational "line of sight, enhanced monitoring arrangement was in place for certain detainees, one of which, the Applicant was responsible for on 23 November 2023. Mr Tusa provided that the duties of the Applicant on 23 November 2023 included provision of "one on one" supervision of a high-risk detainee, who he was supposed to monitor consistently in line of sight.

[108] Mr Tusa provided that the Applicant was aware of the requirements, procedures and policies in place for an enhanced monitoring arrangement. At approximately 3.50pm on 23 November 2023, Mr Tusa was alerted to a report that the Applicant had been found sleeping at his post whilst required to perform enhanced monitoring. Mr Tusa spoke with the Applicant following this notification and suspended the Applicant for the remainder of the day.

[109] Mr Tusa provided that Fatigue Management is a topic raised by management of the Respondent and discussed with Employees on a regular basis through tool-box talks. The tool-box talk regarding fatigue management provides that "[a]ll Staff are expected to arrive to their shift prepared and in state (*sic*) of mental alertness and readiness." And that staff are to "[t] to [their] supervisor' if they think they are 'at risk of fatigue'. It also provides that "[s]leeping whilst on shift will not be tolerated and will result in disciplinary action."[48]

Witness Statement of Mr Gary Hall

[110] Mr Gary Hall is employed by the Respondent in the role of Centre Manager at BIDC.

[111] Mr Hall stated that upon the Applicant's initial return from medical leave on 5 March 2023, the Applicant submitted numerous medical certificates explaining his absences from work were in reference to an incident on 15 January 2023. On 30 August 2023, a medical practitioner issued a certificate stating that the Applicant was fit to return to 'normal duties' on 1 September 2023.

[112] Mr Hall provided that when the Applicant furnished this certificate, he asked the Applicant to also obtain clearance from his treating psychologist before being permitted to return to work. The Applicant reportedly insisted that he be permitted to return to work. Mr Hall discussed the Applicant's request with Mr Bhindi and reported that they were concerned about the genuineness of the Applicant's engagement with the psychological sessions recommended by the Applicant's doctor.

[113] On 31 August 2023, Mr Hall emailed the Applicant requesting information as to why the Applicant's certificate reported that he would be fit to return to work in the future but not at the date of consultation. Mr Hall also determined that the Respondent should commission an independent medical examination (**IME**) of the Applicant, and accordingly, he emailed the Applicant about an IME on 1 September 2023.

[114] On 11 September 2023 the Applicant undertook an IME with Dr Sid O'Toole as instructed by Mr Hall for the Respondent. A medical report prepared by Dr O'Toole was prepared and presented to the Respondent dated 10 October 2023. Following this medical report which determined that the Applicant was fit for work, Mr Hall advised Mr Bhindi that the Applicant should be permitted to return to work.

[115] Mr Hall received and considered the email from the Applicant dated 10 December 2023, which replied to the allegations of misconduct raised by the Respondent. Mr Hall stated that the Applicant had been deemed fit for work by an independent doctor after five months of leave and as such engaging him was reasonable. Mr Hall asserted that Serco was not aware of any complaints by the Applicant of "differential treatment" nor about complaints of "stress" from his duties.

[116] Mr Hall stated that the reason the Applicant had not been on the Emergency Response team was due to the Respondent's concerns arising from his repeated absences prior to 10 October 2023. The Respondent did not ban the Applicant from any part of the premises and his allocation as a property officer was made to improve the Applicant's capabilities. The Applicant did not raise with the Respondent or his manager any concerns about relapse or in respect of his mental health. He noted that the Applicant had accepted all shifts offered to him following 10 October 2023. Mr Hall stated the Respondent was never informed by the Applicant of a need to wear sunglasses indoors and the Applicant was not required to be seated in front of the TV. The Respondent had not received any complaint from the Applicant about the actions of Mr Gurnett.

[117] On 13 December 2023 the Respondent dismissed the Applicant and Mr Hall issued the termination letter. Mr Hall was directly involved in the Respondent finding that the Applicant was asleep on duty, was inattentive to his duties, wore sunglasses indoors to hide that he was asleep on duty and that in doing so he failed to maintain constant line of sight on a vulnerable detainee he was responsible for monitoring. As such, Mr Hall formed the view that the Applicant had not raised any credible issue to explain the derogation of his duties which resulted in the Applicant's employment being terminated.

The 23 November 2023 incident

[118] On 23 November 2023, the Applicant was engaged by the Respondent at their BIDC.

[119] The Respondent supplied the CCTV footage from the BIDC which it contended indicated that the Applicant fell asleep on the job. The footage demonstrates that the Applicant was seated on a red plastic chair, moved to a black sofa, dons his sunglasses, rests his head against the back of the chair and mostly remains in that position for approximately 24 minutes, until he is tapped on his shoulder by another staff member of the Respondent, identified as Mr Gurnett.

[120] During the Hearing and the Respondent's cross-examination of the Applicant, the Applicant gave evidence that his position on the red chair, before having moved to the sofa, was the optimal perfect position for him to be in, to undertake his duties, with a perfect line of site on the detainee he was engaged to monitor. The Applicant stated that his movement from this 'optimal' position to be seated on the couch was a mistake. He further stated that he probably did fall asleep without realizing it as it was the afternoon, he was tired and that he was not as vigilant as he should have been. The Applicant confirmed that moving to the sofa and being asleep was the worst position he could have been in and the worst thing he could do, in his line of work. He maintained, however, that he had not fallen asleep intentionally. He agreed that as a result of his failing to maintain vigilance, he put himself, his colleagues and the detainees he was responsible for, at risk.

[121] The Applicant confirmed that he had not told the Respondent about his other job working at the Star. Further the Applicant confirmed that he understood the Respondent's policies in regard to fatigue management even if he could not recall any specific 'toolbox' talks regarding it and stated that it would be common sense and best practice to raise any issues with a manager. The Applicant confirmed that he made the wrong call and choice in not radioing for someone to relieve him.

[122] The Applicant attended an independent medical examination conducted by Dr Sid O'Toole on 11 September 2023. Dr O'Toole provided in the report dated 10 October 2023 that the Applicant was 'able to safely perform the inherent requirements of his role'.

[123] In cross-examination, the Applicant was asked about his travel to Hungary. The Applicant asserted that he travelled to Hungary on the 10th of December. When asked about transactions on his bank statements that were at odds with this, the Applicant suggested that the telehealth appointments to a Perth doctor were not determinative of his location.

Findings

[124] In cross examination, I found the Applicant to be an unsatisfactory witness. He appeared to be looking for a way to explain away evidence that did not support his position. For example, when the proposition was put to him that purchases on his bank statement were made in Hungary, at a time he had otherwise claimed to be in Australia, he stalled briefly before suggesting that his wife was using his credit card. I do not accept that his wife used his credit card. The Applicant was in Hungary at the time of his termination, I accept the proposition put by the Respondent that the Applicant had no intention of returning to Australia for the show cause meeting with his employer and that his correspondence in which he told the Respondent that his solicitor was not available and that is why he decided to respond to the allegations in writing is not truthful.[49] The Applicant was aware of the gravity of the situation and it is my view that he had no intention of returning to attend that meeting.

[125] When confronted on the day of the incident, 23 November 2023, by the Respondent's Senior Manager Tony Tusa, in Mr Tusa's office, the Applicant denied sleeping on duty. The Applicant claims that this was an honest answer and then goes on to say that the CCTV later "appears to prove that I probably fell asleep sitting on the sofa".[50] The CCTV in my view goes further than that and it shows that the Applicant put on his glasses, sat in the most comfortable Sofa, lay back with his arms across his chest and his feet up and did not move for 24 minutes despite numerous people coming and going from the room. It is my view that there was intent to have a sleep and there was intent to hide it as much as possible. The PTSD explanation came later and was not a truthful explanation. There was no on the job evidence prior 23 November 2023 that the Applicant was unable to perform his role. Indeed, the Applicant took an additional security job with the Treasury Hotel. The Applicant acknowledged that he did not sit in the right chair to ensure he could perform his duties of looking after the vulnerable detainee and instead moved to the worst position he could have been in to undertake that function in cross examination.[51] He acknowledges the serious consequences that resulted from his decision. Further, he admits that he understood the fatigue management policy of the Respondent and that he made the "wrong call" by "not radioing" for help when he was tired.[52] These admissions of his conduct are not supported by the PTSD explanations. It is my view that they support a deliberate course of conduct by the Applicant on 23 November 2023.

[126] I reject the Applicant's position that he unknowingly fell asleep on 23 November 2023 because of his PTSD. If he was advised that he should cease work,[53] given the serious safety risks associated with his job, the Applicant had a duty to advise his employer of this. Instead, when the respondent questioned the Applicant's fitness to return to duty prior to 10 October 2023, the Applicant threatened his employer with legal action if he was not permitted to return to work as was put in the Respondent's evidence which I accept.

[127] I accept the evidence put by the Respondent, from the Applicant's GP and the Independent Medical Examiner, Dr O'Toole that the Applicant was fit for work when he returned to work. The medical evidence that suggested otherwise, did not exist until much later, indeed after the Applicant had been terminated.

[128] I further find that; at that stage the Applicant had obtained a second job at the Treasury Hotel as a security officer. In addition to working a second job, I accept the evidence of Mr Hall that the Applicant had accepted all of the shifts he was offered after 10 October 2023 and

that the Applicant did not raise any concerns with the Respondent about his mental health after his return in mid-October 2023.

[129] Having reviewed the CCTV footage and heard the evidence of the parties, I accept that the Applicant, on his own evidence, failed to sit in a position that would enable him to perform his role to stay alert, to have line of sight of and to fulfill his obligation to monitor, a vulnerable detainee. Instead, it is my view that the Applicant deliberately put on his sunglasses in order that the CCTV footage would not pick up that his eyes were closed, that he sat in a comfortable position on the sofa and went to sleep. There are a number of people that came in and out of that room during the time the Applicant was asleep, and the Applicant did not stir. Indeed, he was tapped on the shoulder twice by the Facility Operations Manager, Mr Gurnett, before the Applicant awoke.

[130] I accept the evidence of the parties that the detention centre is a place where circumstances can quickly escalate into situations with serious danger to staff and detainees, high-risk environment. The Applicant himself had experienced physical assault by detainees previously for which his injuries are ongoing.[54] In circumstances where the Applicant is employed as a detention services officer in this location and on the occasion in question, to monitor a vulnerable detainee, falling asleep, on the Applicant's own evidence is egregious. I do not accept that this was outside of the Applicant's control in fact I find the converse is the case as I have set out.

[131] Having regard to the matters I have referred to above, I find that there was a valid reason for the dismissal related to the Applicant's conduct that he failed to take adequate steps to ensure he did not fall asleep, which is even more egregious in circumstances where he was responsible for looking after a vulnerable detainee, in a high-risk setting. The Applicant was aware of and failed to comply with the Respondent's fatigue management policy on his own evidence and put himself, other employees and the vulnerable detainee who he was charged with protecting, at a serious risk to their health and safety. Further, I am satisfied that his actions were deliberate, that he moved from the correct chair for performing his role, one with a clear line of sight to the vulnerable detainee, to instead sit in a sofa chair that was more comfortable for sleeping and that he took steps to cover it up by putting on sunglasses indoors.

Was the Applicant notified of the valid reason?

[132] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[55]

[133] 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,[56] and in explicit[57] and plain and clear terms.[58]

[134] It was uncontested and I find that I find that the Applicant was notified of the reason for his dismissal prior to the decision to dismiss being made, and in explicit and plain and clear terms in his letter of termination dated 13 December 2023.[59]

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

[135] 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.[60]

[136] 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.[61] 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.[62]

Submissions

[137] The Applicant submitted that he did have an opportunity to respond to the reason for his termination and that he did so by way of written response to the Respondent. His response raised that his actions in falling asleep without knowing it was the result of his PTSD, that he had put his sunglasses on to lessen his headaches caused by the flashing effects of the TV.[63]

[138] The Respondent submitted that the Applicant did have an opportunity to respond to any valid reason related to the Applicant's capacity or conduct. The Respondent's Outline of Submissions stated the Applicant was 'provided with a high level of procedural fairness prior to the Dismissal in that he was given an adequate opportunity to respond to allegations of misconduct and the possibility of termination of his employment'.[64]

Evidence

[139] In submitting that the Applicant had been given an opportunity to respond to allegations of misconduct, the Respondent's Outline of Submissions cited four pieces of correspondence. These are a suspension letter from the Respondent to the Applicant dated 24 November 2023; a formal Disciplinary Meeting Letter issued on 28 November 2023; the invitation to attend at a disciplinary meeting on 29 November 2023; and the Applicant's response by written submission on 10 December 2023.

[140] Mr Bhindi, employed in the position of Regional People & Capability Manager East with the Respondent, provided a collection of emails annexed to his witness statement, entered into Evidence at Exhibit R2.

[141] Mr Bhindi provided a letter from the Respondent to the Applicant dated 28 November 2023, directing the Applicant to attend a disciplinary meeting with Mr Hall and Mr Bhindi on 29 November 2023.

[142] Mr Bhindi provided an email on 29 November 2023 at 8.47am from the Applicant to Mr Bhindi and Mr Hall of the Respondent, indicating he had a positive result for COVID-19 on a RAT test and indicating he would want a support person to attend the disciplinary meeting but that it would be difficult 'with such short notice'. The email also attached a medical certificate certifying the Applicant as unfit for work from 29 November 2023 to 3 December 2023;[65]

[143] Mr Bhindi provided an email on 29 November 2023 at 1.09pm from Mr Bhindi of the Respondent to the Applicant, notifying him that his disciplinary meeting had been rescheduled to 4 December 2023 and requesting he advise the name of his support person for the meeting.

[144] Mr Bhindi provided an email on 7 December 2023 at 8.15am from the Applicant to the Respondent, indicating he still had COVID-19 symptoms and had still tested positive for COVID-19 on a RAT test. The email attached a medical certificate certifying the Applicant as unfit for work from 7 December 2023 to 10 December 2023.[66]

[145] Mr Bhindi provided an email on 7 December 2023 at 12.52pm from Mr Hall of the Respondent to the Applicant asserting that it was possible to continue testing positive for COVID-19 for several weeks or months after a positive RAT test without being infectious. Noting the Applicant's medical certificate concluded on the Sunday, assuring the Applicant he was cleared under ABF policies to attend BIDC for a 'disciplinary hearing', and directing the Applicant to attend the disciplinary hearing at 11am on Monday 11 December 2023.[67]

[146] Mr Bhindi presented an email chain dated 8 December 2023[68] between Mr Bhindi and the Applicant. In the first email, Mr Bhindi confirms with the Applicant that his solicitor can attend the disciplinary hearing as a support person. A further email from the Applicant subsequently requesting the meeting be postponed because his support person is unavailable on Monday. A final email from Mr Bhindi replying to the Applicant, stating, *"Your support person can dial into the call on Monday and I will provide her the link. You have not provided her availability"*.

[147] Mr Bhindi provided an extract of correspondence from the Applicant to Mr Hall of the Respondent, that was sent on the 10th of December 2023, stating that his solicitor was unavailable, that he did not want to attend the hearing without legal representation, and that he did *'not want to delay the process further so decided to respond in writing'*. In that correspondence, the Applicant then proceeded to provide a written response to each of the allegations raised in the Respondent's letter of 28 November 2023.[69]

Findings

[148] I find that the Applicant was given multiple opportunities to respond to the concerns of the Respondent. In all the circumstances, I find that the Applicant was given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made.

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

[149] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[150] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."[70]

[151] It was uncontested that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal.

Was the Applicant warned about unsatisfactory performance before the dismissal?

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

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

[153] Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact.

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?

[154] Neither party submitted that the Respondent's enterprise lacked dedicated human resource management specialists or expertise which would be likely to impact on the procedures followed in effecting the dismissal and I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise.

What other matters are relevant?

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

[156] The Applicant submitted that the following other matters are relevant to the Commission's consideration of whether the dismissal was harsh, unjust or unreasonable:

- That this was the first time he fell asleep since his injuries had occurred;
- The Respondent could have given him a first and final warning to give him the opportunity to seek medical attention and have a second chance;
- The conduct was not wilful or deliberate in accordance with the Fair Work Regulations;[71] and
- The Respondent should have taken into account his length of service.[72]

[157] The Respondent contented that there were no mitigating factors that would convince the Commission's consideration of whether the dismissal was harsh, unjust or unreasonable:[73]

Findings

[158] I note that the degree of seriousness of the misconduct may be taken into account as a relevant matter under s.387(h) when considering whether "dismissal was a proportionate response to the conduct in question."[74]

[159] I also note that an employee's long and satisfactory work performance or history may be taken into consideration under s.387(h) of the Act and, depending on all the circumstances, may weigh in favour of a conclusion that the dismissal of the employee was harsh, unjust or unreasonable.[75]

[160] In respect to whether the conduct was wilful or deliberate, I believe that when the Applicant put on his sunglasses, he did so to avoid his closed eyes from being obvious and that this represents wilful and deliberate conduct. If I am wrong on that, then the remainder of the

definition of Serious Misconduct in the Fair Work Regulations is relevant and that is that the conduct of the Applicant falls within the relevant regulation as "conduct that causes serious and imminent risk to the health or safety of a person".[76]

[161] I find however that in all the circumstances, there were no mitigating factors that would negate the seriousness of the Applicant's conduct nor that would render the Respondent's decision to terminate the Applicant's employment as harsh, unjust or unreasonable.

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

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

[163] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[77]

[164] 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. I am satisfied that the Applicant fell asleep on the job, when charged with the protection of a vulnerable detainee in a high-risk setting. The Applicant breached the Respondent's fatigue management policies and acted with intent when he went to sleep and took action to conceal his conduct by putting on sunglasses indoors. The Applicant put his own safety at risk, as much as he put at risk the vulnerable detainee he was charged with taking care of. This created an untenable situation that was inconsistent with the continuation of the Applicant's employment as a Detention Services Officer.

Conclusion

[165] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act. The Applicant's application is therefore dismissed.

DEPUTY PRESIDENT

Appearances:

Mr Szentpeteri representing himself.
Mr P Brown of Baker & McKenzie for the Respondent.

Hearing details:

24 April 2024
Teams Video

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[1] Digital Court Book (DCB) p.116

[2] *Warrell v Fair Work Australia* [2013] FCA 291.

[3] Ibid.

[4] DCB p 52

[5] ibid

[6] DCB p 91

[7] DCB p.53

[8] DCB p.104

[9] Ibid.

[10] DCB, pp. 75-83

[11] DCB, pp. 84-93

[12] DCB, pp. 94-96

[13] DCB, pp. 97-103

[14] DCB, p.175

[15] DCB, p.134

[16] DCB, p.135

[17] Ibid

[18] *Gergely Szentpeteri v Serco Australia Pty Ltd*, [2024] FWC 504.

[19] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[20] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[21] Ibid.

[22] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[23] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[24] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[25] *Barclay v Nylex Corporation Pty Ltd* (2003) 126 IR 294.

[26] DCB, p. 53

[27] DCB, p. 134

[28] DCB, p. 76

[29] DCB, p. 77

[30] DCB, pp. 97-103.

[31] DCB, p. 94

[32] DCB, p. 122.

[33] DCB, p. 94.

[34] DCB, p. 122.

[35] DCB, p 94.

[36] DCB, p. 122.

[37] DCB, p. 95.

[38] DCB, p. 122.

[39] DCB, p. 95.

[40] DCB, p. 122.

[41] DCB, p. 95.

[42] DCB, pp. 122-123.

[43] DCB, p. 95.

[44] DCB, p. 123.

[45] DCB, p. 95.

[46] DCB, p. 123.

[47] DCB, pp. 123-125.

[48] DCB, p. 209

[49] DCB p. 59-61.

[50] DCB p. 55.

[51] Paragraph 120.

[52] Paragraph 121.

[53] DCB p. 52 and p. 91; see also paragraph [40] of this decision.

[54] DCB p.53, 62.

[55] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

[56] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[57] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[58] Ibid.

[59] DCB pp.41-46.

[60] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[61] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[62] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[63] Digital Court Book p. 61

[64] Digital Court Book, p. 134.

[65] Digital Court Book, p. 262, Witness Statement of Sumeet Bhindi, Annexure SB8

[66] DCB, pp. 268-269.

[67] DCB, p 271.

[68] DCB, pp. 274-276.

[69] DCB, pp. 33-25, 278-280.

[70] Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

[71] DCB p. 53; *Fair Work Regulations 2009* (Cth) r1.07.

[72] DCB p. 62.

[73] DCB p. 135.

[74] *Gelagotis v Esso Australia Pty Ltd t/a Esso* [2018] FWCFB 6092, [117].

[75] *Telstra Corporation v Streeter* [2008] AIRCFB 15, [27].

[76] *Fair Work Regulations 2009* (Cth) R1.07(2)(b)(i).

[77] *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 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].