DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Liam Hawken
v
Patrick Stevedores Holdings Pty Limited
(U2023/11593)

COMMISSIONER CIRKOVIC MELBOURNE, 19 JUNE 2024

Application for an unfair dismissal remedy – dismissal not unfair – application dismissed.

[1] Mr Liam Hawken (Applicant) was employed by Patrick Stevedores Holdings Pty Limited (Respondent) as a stevedore from 7 February 2022 to 6 November 2023.[1] Mr Hawken's employment was governed by the *Patrick Terminals Enterprise Agreement 2022*.[2]

[2] The termination of Mr Hawken's employment arose from the return of a positive confirmatory test for the presence of amphetamine and methamphetamine in an oral fluid sample provided on the night shift commencing 23 and ending 24 October 2023.[3] The Respondent alleges breaches of its Fitness for Work (Drugs and Alcohol) Standard Operating Procedure (D&A Procedure), East Swanson Dock Terminal: Life Saving Commitments (Life Saving Commitments), Patrick Code of Conduct (Code of Conduct), [4] and the *Occupational Health and Safety Act 2004* (Vic) (OHS Act).[5]

[3] At the time of termination, Mr Hawken's remuneration was $77,648 per annum.[6] Mr Hawken was provided two weeks' pay in lieu of notice on his dismissal.[7] Mr Hawken seeks the remedies of reinstatement and backpay.[8]

[4] On 22 November 2023, Mr Hawken made an application to the Fair Work Commission (Commission) for relief from unfair dismissal under s.394 of the *Fair Work Act 2009* (Cth) (the Act). The matter did not resolve at conciliation and proceeded before me to arbitration on 15 February 2024 and 8 March 2024.

[5] Mr Hawken was represented by Mr Kirk Bond, National Legal Officer, Maritime Union of Australia (MUA). The Respondent sought permission under s.596 of the Act to be legally represented by Mr Stephen Crilly, Counsel, Seyfarth Shaw. Having weighed the considerations in s.596 of the Act and the circumstances before me, I granted permission to the Respondent to be represented.

Initial matters to be considered.

[6] There is no dispute between the parties regarding the Commission's jurisdiction and I am satisfied on the evidence that:

(a) Mr Hawken's application was made within the period required in s.394(2) of the Act;

(b) Mr Hawken was a person protected from unfair dismissal;

(c) the Respondent was not a "*small business employer*" as defined in s.23 of the Act, meaning that the Small Business Fair Dismissal Code does not apply; and

(d) Mr Hawken's dismissal was not a case of genuine redundancy.

[7] Consequently, I am satisfied that the Commission has jurisdiction to determine the merits of the application.

Evidence.

[8] Mr Hawken relied on a witness statement and gave oral evidence at the hearing. Mr Hawken additionally relied on a witness statement from Ms Natalia D'Angelo, his partner.

[9] The Respondent tendered a witness statement from Mr Chris Brewster, Terminal Manager of the Respondent.

[10] Mr Hawken and Mr Brewster were subject to cross examination. I am satisfied that by and large the witnesses gave reliable evidence.

Background.

[11] Mr Hawken was employed as a stevedore by the Respondent from 7 February 2022 until 6 November 2023 at its East Swanson dock at the Port of Melbourne. Mr Hawken's duties included driving vehicles ("*straddles*")[9] used to move containers around the yard of the terminal and unlatching and placing metal bars on ship containers located on ships, ("*lashing*").[10] The Respondent operates in an environment with "*obviously hazardous conditions*".[11]

[12] On 23 October 2023, Mr Hawken was chosen for drug and alcohol testing on-site and recorded a negative result. Mr Brewster directed that Mr Hawken's negative sample be sent for confirmatory testing and on 25 October 2023, a positive result for amphetamine and methamphetamine was returned in a confirmatory test (25 October 2023 Confirmatory Test). On 30 October 2023, the Respondent conducted a show cause meeting and issued Mr Hawken a show cause letter. On 6 November 2023, Mr Hawken was terminated with effect from that date and issued with a termination letter which relevantly states, *inter alia*, as follows:

> "*In determining the appropriate disciplinary action to take, Patrick has carefully considered all of the information available to it, including your response, your stated commitment to changing your behaviour, and the letters of recommendation you provided, together with your employment history.*

Patrick has determined that these factors are outweighed by the repeated and serious nature of your misconduct. Your actions were a direct breach of the Patrick Drug and Alcohol Free Workplace Policy, the Fitness for Work (Drug and Alcohol) Procedure, and Patrick's "Safe Work" Life Saving Commitment, which requires that employees are drug and alcohol free at all times. Further, your actions have breached the Patrick Terminals Code of Conduct, which requires that you attend work in a fit state to safely perform your duties and continually strive to provide a safe and healthy working environment. All of this notwithstanding, it is self-evidently not acceptable to attend for work in a high-risk environment while your functioning is potentially impaired by consumption of drugs.

These matters are such as to seriously damage Patrick's confidence and trust in your ability to safely perform your role and comply with your employment obligations.

Outcome

Patrick has determined the appropriate action to be taken in this matter is to terminate your employment, effective immediately, and this letter serves as confirmation of this. Due to the serious nature of your misconduct, Patrick is not required to provide you with payment in lieu of your notice period. Despite not being required to do so, Patrick will provide you with payment of 2 weeks' in lieu of notice in recognition of the impact of termination on you. You will also receive any other statutory entitlements owing to you up until the termination date which will be paid directly into your bank account".[12]

[13] For convenience, I have set out below the largely uncontested relevant chronology:

<u>First breach of D&A Procedure</u>

- On 14 October 2022, Mr Hawken returned an on-site non-negative test for amphetamine and methamphetamine which was sent for confirmatory testing.[13]

- On 18 October 2022, the confirmatory testing report confirmed that Mr Hawken had returned a positive result for amphetamine and methamphetamine.[14]

- On 26 October 2022, a letter was issued to Mr Hawken by Mr Stuart Bloom, Operations Manager of the Respondent stating *inter alia* as follows:

  1) "*You have been issued with a formal warning and this letter serves as such. Any repetition of a positive drug and alcohol test, further breach of this procedure, or other unacceptable conduct may result in further disciplinary action up to and including the termination of your employment; and*

  2) *You will be required to undergo subsequent routine drug and alcohol tests over a 12-month period during your rostered shifts in order to monitor your ongoing compliance with the Fitness for Work (Drug and Alcohol) Procedure*."[15]

<u>Second breach of D&A Procedure</u>

- On 24 October 2022, Mr Hawken returned an on-site non-negative test for amphetamine and methamphetamine which was sent for confirmatory testing.[16]

- On 27 October 2022, the confirmatory testing report confirmed that Mr Hawken had returned a positive result for amphetamine and methamphetamine.[17]

- On 10 November 2022, a letter was issued to Mr Hawken by Mr Bloom stating *inter alia* that:

  1) "*Patrick has made the decision to issue you with a final warning, and this letter serves as such. Any repetition of a positive drug and alcohol test, further breach of this procedure, or any other unacceptable conduct may result in further disciplinary action up to and including the termination of your employment; and*

  2) You are required to attend counselling and provide evidence of attendance prior to returning to work. Failure to provide such evidence within two weeks shall constitute a further breach; and

  3) *You will be required to undergo subsequent routine drug and alcohol tests over a 12-month period during your rostered shifts in order to monitor your ongoing compliance with the Fitness for Work (Drug and Alcohol) Procedure*".[18]

Third breach of D&A Procedure and termination of employment.

- On 23 October 2023, at on or around 7.00am, Mr Hawken attended a friend's party and took a '*pill'* of unknown substance within 10-15 minutes of arrival.[19]

- On 23 October 2023 at 10.00pm, Mr Hawken attended work.[20] Upon arrival at work, Mr Brewster directed Mr Hawken to take a drug and alcohol test.[21] Mr Hawken's test returned an on-site negative result.[22] Mr Hawken subsequently continued working and drove straddles for the rest of the shift and the following two nightshifts.[23] Following the on-site negative test, Mr Brewster directed Mr Hawken's sample be sent for confirmatory testing**.**[24]

- On 25 October 2023, the confirmatory testing report confirmed that Mr Hawken had returned a positive result for amphetamine and methamphetamine.[25]

- On 25 October 2023, Mr Bloom contacted Mr Hawken and advised him that a meeting would be organised to discuss the return of a positive test for amphetamine and methamphetamine.[26]

- On 26 October 2023, Ms Grace Pryor, Human Resources Manager of the Respondent, left a voice message notifying Mr Hawken that a meeting had been arranged for 27 October 2023 at 10.00am.[27] Mr Hawken replied and requested the meeting take place the following week so he could arrange to have a support person present.[28] Ms Pryor agreed to this request and the meeting was re-scheduled for 30 October 2023.[29]

- On 30 October 2023, Mr Hawken attended a meeting with Mr Brewster and Ms Pryor with his support person, MUA Branch Official, Mr Dean Borg.[30] During the meeting, Mr Hawken was advised by Mr Brewster that the Respondent was considering terminating his employment due to the serious and repeated nature of his misconduct.[31] Mr Hawken was given a show cause letter by Mr Brewster.[32] Mr Hawken agreed to email a response to that correspondence that evening.[33]

- On 30 October 2023 at 5.39pm, Mr Hawken emailed a response to the show cause letter to Mr Brewster and Ms Pryor.[34]

- On 3 November 2023, Ms Pryor had a telephone conversation with Mr Hawken where she sought information and documents from him and confirmed a meeting was to take place on 6 November 2023.[35]

- On 3 November 2023, Mr Brewster received letters of support from Ms D'Angelo, and Ms Siobhan Hawken, Mr Hawken's sister.[36]

- On 6 November 2023, Mr Hawken and his support person Mr Borg attended a meeting with Mr Brewster and Ms Pryor.[37]

- During the meeting, Mr Brewster confirmed he had reviewed Mr Hawken's written response and letters of support and asked Mr Hawken if he wished to add any information.[38]

- Mr Hawken apologised and explained that he had organised a mental health plan with an employee support service called Hunterlink. Following a brief break from the meeting, the Respondent advised Mr Hawken that a decision had been made to terminate his employment effective immediately, handing him a termination letter. [39]

Relevant Procedure and Policies.

Fitness for Work (Drugs and Alcohol) Standard Operating Procedure (D&A Procedure)

[14] The relevant provisions of the D&A Procedure are set out below (**emphasis retained**):

> "***3. Definitions***
>
> *Allowable Limits*
>
> *Allowable Limit for Breath Alcohol Content (BAC) is Zero (0.00) for all employees.*
>
> *Allowable Limits for drugs other than Cannabis shall be in accordance with:*
>
> • *AS4308:2008 – Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine, or*
>
> • *AS4760:2006 – Procedures for specimen collection and the detection and quantitation of drugs in oral fluid.*

Note: The limit for confirmatory testing is as per the Australian Standard and any reading at or above this limit shall be considered as having exceeded the allowable limit

Confirmatory Testing

A procedure that uses calibrated specialised equipment in a laboratory to identify and quantify the presence of a specific drug or metabolite against the limits in the Australian Standards.

Confirmatory testing is conducted on all samples that are "Non Negative" and on 10% of the total number of samples to verify accuracy of testing processes and equipment.

Drugs

A substance capable of causing dependency, alteration of mood, impairment (of judgement, concentration or co-ordination). It includes:

- *Illicit drugs, or*
- *Authorised and unauthorised prescription medication, including "over the counter" substances or medication.*

Negative Result

A result at or below the pre-determined Allowable Limits following initial on-site screen or the Confirmatory Cut Off Concentrations following confirmatory testing.

Non Negative Result

A result from an on-site screening device (such as urine dip stick or oral swab) that indicates that further testing is warranted to confirm presence or otherwise of substances in the sample.

Positive Result

A result above the pre-determined allowable limits following confirmatory testing"[40]

…

4.5 Drug Testing

4.5.1 Indicative Test Negative

- *Employee returns to duties.*

…

4.5.3 Indicative Test Non-Negative with no disclosure of medication or drugs

- *The employee shall be stood down pending a confirmatory test.*
- *Transport home shall be offered and the offer shall be documented.*
- *If the confirmatory result is positive, then a breach will have occurred.*
- *If the confirmatory has integrity or other chain of custody issues, then a retest shall be arranged.*
- *If the confirmatory result is negative the employee shall return to work and be reimbursed for any lost shifts.*

Note: Any employee returning a positive result is not permitted to return to work until providing a negative result". [41]

…

"***4.6 Breach Procedure***

4.6.1 First Breach

A documented discussion shall occur with the relevant manager using Patrick – Discussion Record Template.

• A record of the discussion shall be retained in employees (sic) personal file.

• An offer of counselling shall be provided.

• A First Written Warning shall be issued using Form - Warning Letter (AOD Breach)

• Employee shall be stood down off pay but with access to leave.

• A Return to Work Plan is to be developed if required.

• Employee to be routinely tested for next 12 months.

4.6.2 Second Breach

A documented discussion shall occur with the relevant manager using Patrick – Discussion Record Template.

• A record of the discussion shall be retained in employees (sic) personal file.

• A Second Written Warning shall be issued using Form - Warning Letter (AOD Breach)

• Employee shall be stood down off pay but with access to leave.

• Employee required to attend counselling and provide evidence of attendance prior to returning to work, failure to provide such evidence within 2 weeks (unless mutually agreed) shall constitute a further breach.

• A Return to Work Plan is to be developed if required.

• Employee to be routinely tested for next 12 months.

4.6.3 Third Breach

A documented discussion shall occur with the relevant manager using Patrick – Discussion Record Template.

• A record of the discussion shall be retained in employee's personal file.

• A Third Written Warning shall be issued using Form - Warning Letter (AOD Breach).

• Employee shall be stood down off pay but with access to leave.
• A show-cause meeting shall be held between the employee and management"[42]

…

4.6.5 General

A breach has occurred when (but is not limited to):

• where an employee fails to follow the requirements of an agreed 'Return to Work Plan' following a returned "non-negative" result.

• Where an employee has/is refusing to cooperate with the authorised testing representative or submit to an alcohol test by providing a sample, or

• a positive Drug or Alcohol Test is returned.

The following shall be considered as examples of serious misconduct which may lead to loss of employment and will result in a show-cause meeting being held:

• avoidance, adulteration or falsification, any breath or urine sample including substitution of another person's sample, or arranges or is involved in any such substitution,

• aiding or abetting any person in respect of the above matters, or any attempt to do any of the above actions.

• A warning shall remain on file and current for a period of 12 months from the date of issue such that a second warning shall remain in force for 12 months after the date of issue regardless of the date of issue of the first warning (except that the second warning must have been issued no longer than 12 months after the first warning)".[43]

East Swanson Dock Terminal: Life Saving Commitments (Life Saving Commitments)

[15] The Respondent's Life Saving Commitments document is headed "*Patrick Life Saving Commitments*" and relevantly provides as follows (**emphasis retained**):

> "***Safe Work***
>
> *I will be drug and alcohol free at all times.*
>
> *I will intervene if I see others working unsafely.*
>
> *Since 2003, there have been 10 workplace fatalities in Australian Stevedoring, 4 of which have occurred at Patrick. We have also had a number of serious incidents and near misses on site that could have resulted in a fatality. The work we do is high risk.*
>
> *We need to continue to ensure everyone goes home safely every day by;*
>
> - *Ensuring the safety of yourself and others at all times.*
> - *Making conscious decisions to conduct work in accordance with Safe Operating Procedures, Safe Working Instructions and associated policies.*
> - *Always looking out for work colleagues to ensure they are working safely.*
> - *Stop and reporting incidents and near misses when they occur. - Bringing forward ideas for safety improvements.*
> - *Example Hazard 1: Employees operating machinery who may be impaired or under the influence of drugs and alcohol.*
> - *Example Control 1: All employees, contractors, and visitors must comply with Patricks' Drug and Alcohol Policy,*
> - *Example Hazard 2: Employees performing tasks without correct personal protective equipment.*
> - *Example Control 2: Fellow employee speaks to them and informs them of the correct attire*."[44]

Patrick Code of Conduct (Code of Conduct)

[16] The Code of Conduct relevantly states (**emphasis retained**):

> "***1. Promote a Safe and Healthy Workplace***
>
> *We're committed to providing a sale workplace with no injuries. To achieve this, we must:*

- *Comply with all our health and safety policies and assist our co-workers to do the same.*
- *Attend work fit for duty.*
- *Perform our work in a safe manner and in accordance with our procedures and standards so we return home safely, everyday.*
- *Report any safety hazards or unsafe conditions immediately and appropriately.*

2. Comply with the law.

We must comply with the laws and regulations in each state and territory. To comply we must:

- *Ensure we understand relevant legislation, company policies and procedures.*
- *We must comply with both the Company's policies and relevant legislation.*
- *Seek clarification when we have any doubts.*
- *Avoid undertaking improper tendering or price fixing. If approached, refuse on the spot and report the matter to your Divisional General Manager or Company Secretary.*
- *Attend all relevant training sessions*."[45]

Occupational Health and Safety Act 2004 (Vic) (OHS Act)

[17] Section 25 of the OHS Act relevantly states (**emphasis retained**):

"***Duties of employees***

(1) While at work, an employee must—

(a) take reasonable care for his or her own health and safety; and

(b) take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace; and

(c) co-operate with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under this Act or the regulations.

Penalty: 1800 penalty units.

(2) While at work, an employee must not intentionally or recklessly interfere with or misuse anything provided at the workplace in the interests of health, safety or welfare.

Penalty: 1800 penalty units.

(3) In determining for the purposes of subsection (1)(a) or (b) whether an employee failed to take reasonable care, regard must be had to what the employee knew about the relevant circumstances.

(4) An offence against subsection (1) or (2) is an indictable offence".

Was the dismissal harsh, unjust and/or unreasonable?

[18] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Mr Hawken's dismissal was harsh, unjust and/or unreasonable. I will address each of these statutory considerations in turn below.

Valid reason (s.387(a))

[19] The employer must have a valid reason for the dismissal of the employee although it need not be the reason given to the employee at the time of the dismissal.[46]The reason for the dismissal should be "*sound, defensible and well founded*" and should not be "*capricious, fanciful, spiteful or prejudiced*."[47]

[20] 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.[48] The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees).[49]

[21] In cases relating to alleged conduct, such as the present matter, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred. It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.[50]

[22] Where a dismissal relates to conduct of the employee, it is necessary to determine whether the matter was of sufficient gravity to constitute a sound, defensible and well-founded (and therefore valid) reason for dismissal.[51]

[23] In *Sydney Trains vs Hilder*,[52] a Full Bench of the Commission set out the principles applicable to the consideration required under s.387(a) as follows:

"(1) A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.

(2) When the reason for termination is based on the misconduct of the employee the Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.

(3) A reason would be valid because the conduct occurred and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).

(4) For the purposes of s 387(a) it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although

established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).

(5) Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).

(6) The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.

(7) The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).

(8) An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.

(9) Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable."[53]

[24] It is not in dispute that Mr Hawken had received training and was aware of the Respondent's D&A Procedure, [54] Life Saving Commitments,[55] and Code of Conduct[56] and that these policies are lawful and reasonable.[57]

[25] Pursuant to the D&A Procedure, the "*allowable limit*" for drugs other than cannabis is in accordance with Australian Standard: AS 4760:2006 – Procedures for specimen collection and the detection and quantitation of drugs in oral fluid (Australian Standard).[58]

[26] Clause 3 of the D&A Procedure is set out at paragraph [14] above. A "*Non-negative result*" is defined as "*a result from an on-site screening device (such as urine dip stick or oral swab) that indicates that further testing is warranted to confirm presence or otherwise of substances in the sample*".[59] A "*negative result"* is defined as "*a result at or below the pre-determined Allowable Limits following initial on-site screen or the Confirmatory Cut Off Concentrations following confirmatory testing*".[60] A "*positive result*" is defined as "*a result above the pre-determined allowable limit following confirmatory testing*".[61]

[27] Mr Hawken and the Respondent have adopted the terminology "*first, second, and third breach*" and "*first, second, and third warning*" when characterising Mr Hawken's conduct and the Respondent's disciplinary response as set out in the D&A Procedure.

[28] It is worth noting that both parties cite the relevant dates for Mr Hawken's first and second breach of the D&A Procedure as 14 October 2022 and 24 October 2022 respectively. For the purposes of my findings, I have adopted those dates notwithstanding that the definition of "*positive result*" in clause 3 of the D&A Procedure contemplates that a "*positive result"* is

returned *"following confirmatory testing"*.[62] Clause 4.6.5 provides that a "*breach"* has occurred when "*a positive drug or alcohol test is returned"*.[63] On that basis, in my view, Mr Hawken's first and second breach of the D&A Procedure occurred on 18 October 2022[64] and 27 October 2022[65] respectively upon the return of his positive confirmatory test results. Given my findings at paragraphs [47]-[49] the variance in the dates adopted by the parties and those advanced by me do not alter my overall findings in this matter.

[29] Adopting the dates proposed by the parties, Mr Hawken recorded a non-negative on-site test on 14 October 2022 (First Breach). He was issued with a warning in relation to the First Breach on 26 October 2022 (First Warning). On 24 October 2022, Mr Hawken recorded a non-negative on-site test (Second Breach) and was issued with a warning in relation to the Second Breach on 10 November 2022 (Second Warning). Relevantly, the Second Warning states unequivocally *"Patrick has made the decision to issue you with a final warning, and this letter serves as such. Any repetition of a positive drug and alcohol test, further breach of this procedure, or any other unacceptable conduct may result in further disciplinary action up to and including the termination of your employment".*[66]

[30] On 23 October 2023 at on or around 7.15am, Mr Hawken took a '*pill'* of unknown contents[67] and attended for work at 10.00pm that night.[68] Upon his arrival at work, Mr Hawken was directed by Mr Brewster to take a drug and alcohol test and returned a negative result.[69] On 23 October 2023, Mr Brewster directed Mr Hawken's on-site test be sent for confirmatory testing.[70] On 25 October 2023, the confirmatory test result was returned, and Mr Hawken's sample tested positive for amphetamine and methamphetamine.[71] On 30 October 2023, a show cause meeting was held at which Mr Hawken was issued with a show cause letter.[72]

Valid reasons relied on by the Respondent.

[31] The reasons for termination relied on by the Respondent can be gleaned from the termination letter dated 6 November 2023, the Respondent's written submissions in evidence, and the oral submissions advanced at hearing.

[32] Essentially, the Respondent advanced the following reasons for Mr Hawken's dismissal. First, that within 12 months of his having received a second and final warning, Mr Hawken returned a positive confirmatory test for the presence of amphetamine and methamphetamine in an oral fluid sample provided on the night shift commencing 23 and ending 24 October 2024.[73] The Respondent submits that Mr Hawken works in a "*safety-critical*" and "*hazardous*" environment,[74] and that he was in breach of the Respondent's D&A Procedure *"in a way that requires the commencement of the show cause process and permits his termination"*.[75]

[33] Second, that independent of the D&A Procedure, in taking a '*pill'* on the morning of 23 October 2023, which he did not know the content of and attending for and performing work the same evening, Mr Hawken created a "*risk that he was impaired when he came to work*",[76] and was in breach of "*numerous policies in which Mr Hawken has been extensively trained*",[77] including the Respondent's Life Saving Commitments[78] and Code of Conduct.[79] Further, the Respondent submits Mr Hawken was in breach of s.25(1) of the OHS Act[80] and that his "*failure to take reasonable care for his own health and safety, and for that of others who may be affected by his acts or omissions"*[81] is a further valid reason for dismissal.

[34] Mr Hawken disputes that there was a valid reason for his dismissal.[82] Mr Hawken submits that the Respondent "*was only entitled to initiate a show cause process if Liam had committed three breaches of the policy and been given three warnings within a twelve month period",* "*the evidence is clear that he did not breach the policy three times in the twelve month period*" and "*he didn't receive three warnings in the twelve month period*".[83]

[35] Mr Hawken submits that his First Breach occurred on 14 October 2022, his Second Breach occurred on 24 October 2022, and his third breach occurred on 25 October 2023 which was "*one year and eleven days after the first breach*".[84]

[36] Further, Mr Hawken submits that his First Warning was issued on 26 October 2022, his Second Warning was issued on 10 November 2022, and that there was "*nothing that I think could be reasonably construed as a warning letter"*[85] in relation to the third breach and *"the only letter that was given would have been on 30 October 2023, and that was in the form of a show cause letter"*.[86]

[37] Mr Hawken submits that pursuant to clause 4.6.5 of the Respondent's D&A Procedure, his First Warning issued on 26 October 2022 had lapsed as at 30 October 2023 when he was issued with a show cause letter and that as at 30 October 2023 his only active warning was the warning of 10 November 2022.[87] Consequently, Mr Hawken submits that the Respondent "*was not entitled to initiate the show cause process*"[88] pursuant to clause 4.6.3 of the D&A Procedure.[89]

[38] Mr Hawken also submits there was no valid reason for termination because Mr Brewster was not entitled to send Mr Hawken's 23 October 2023 negative on-site sample for confirmatory testing.[90] Mr Hawken states that the Australian Standard provides that "*when an oral swab test returns a negative result it is conclusive, confirmatory testing is not required*".[91] Further, Mr Hawken submits that the D&A Procedure provides that the Respondent is only entitled to conduct confirmatory testing on all samples that are "*non-negative*" and on "*10% of the total number of samples to verify accuracy of testing processes and equipment*".[92] Mr Hawken submits that Mr Brewster interjected himself into what is supposed to be a "*completely random process designed to verify the accuracy of testing processes*",[93] and "*directed the testing company to send Mr Hawken's negative sample to the lab in the hope that it would come back positive*".[94]As such, Mr Hawken submits that the 25 October 2023 Confirmatory Test should be "*disregarded"*.[95]

[39] Mr Hawken disputes the Respondent's submission that there is a valid reason for termination independent of the D&A Procedure. He submits that in making this submission the Respondent is attempting to "*divorce the company from the policy that it has created and state that under workplace health and safety laws and notions of recklessness, you can ignore the policy"*.[96]

[40] Further, Mr Hawken submits that the Respondent cannot maintain a zero-tolerance policy to drugs and alcohol on the one hand (as provided in the Life Saving Commitments) and permit an employee to attend work having tested positive for drugs on two occasions in a 12-month period and "*receive nothing more than formal written warnings*" [97] (as set out in the D&A Procedure).

Consideration

[41] As stated above, the Respondent submits that within 12 months of having received a second and final warning, Mr Hawken returned a positive confirmatory test for the presence of amphetamine and methamphetamine in an oral fluid sample provided on the night shift commencing 23 and ending 24 October 2023, [98] a breach of the Respondent's D&A Procedure *"that requires the commencement of the show cause process and permits his termination"*.[99]

[42] Mr Hawken was issued with a First Warning on 26 October 2022 for his First Breach recorded on 14 October 2022 and was issued with a Second Warning on 10 November 2022 for his Second Breach recorded on 24 October 2022.

[43] On 23 October 2023, Mr Hawken recorded a negative on-site drug test result. It is not in dispute that following the on-site test, Mr Brewster sought confirmatory testing of Mr Hawken's sample and that Mr Hawken's positive confirmatory test was returned on 25 October 2023. On 30 October 2023, a meeting initiating the show cause process was held, and Mr Hawken was issued with a show cause letter.

[44] The parties are in dispute as to the appropriate interpretation of Clause 4.6.5 of the D&A Procedure. Mr Hawken points to several failures of the Respondent to follow its D&A Procedure. As such, Mr Hawken submits the Respondent improperly initiated a show cause meeting at which a show cause letter was issued and consequently there could be no valid reason for Mr Hawken's termination. Alternatively, Mr Hawken submits that the Commission should have regard to the Respondent's failures to follow its own D&A Procedure when considering s.387 (h) of the Act.[100]

[45] Clause 4.6 of the D&A Procedure headed "*Breach Procedure*" sets out a process for dealing with a "*breach"*.[101] It does so under a series of dot points that appear below the headings "*First Breach"*, "*Second Breach*" and "*Third Breach*".[102] In each case of a "*breach"* of the D&A Procedure, a warning "*shall*" be issued.[103] Clause 4.6.5 headed "*General*" sets out when a "*breach"* has occurred and the duration a warning "*shall remain on file and current"*.[104] A "*breach"* has occurred when "*a positive drug or alcohol test is returned"*.[105]

[46] In the case of a third breach, Clause 4.6.3 provides that "*a Third Written Warning shall be issued using Form - Warning Letter (AOD Breach*)"[106] and in the final dot point that "*a show cause meeting shall be held between the employee and management"*.[107]

[47] There is contention as to when a warning properly lapses and is thus to be disregarded for the purposes of initiating a show cause meeting that "*shall*" occur following a third breach.

[48] I have reviewed the D&A Procedure. In my view, the warning given to Mr Hawken on 26 October 2022 had not lapsed as at the date of the confirmatory test on 25 October 2023 nor the date of the show cause letter of 30 October 2023. Clause 4.6.5 of the D&A Procedure sets out the process for dealing with a "*breach*" and the duration and currency of a warning issued following a "*breach*". Relevantly, it provides that "*a warning shall remain on file and current for a period of 12 months from the date of issue such that a second warning shall remain in force for 12 months after the date of issue regardless of the date of the issue of the first warning*

(except that the second warning must have been issued no longer than 12 months after the first warning) (my emphasis)".[108]

[49] Mr Brewster gave evidence as to his understanding of the operation of clause 4.6.5 of the D&A Procedure. In essence, he states that "*once they have a second warning, the 12 month period of their repeated testing and that warning is on file for that second breach for 12 months*".[109] I agree with Mr Brewster that Mr Hawken's Second Warning was issued 14 days after his First Warning and his Second Warning "*remains in force*"[110] for 12 months from 10 November 2022.

[50] It is not in dispute that the Respondent operates with "*obviously hazardous conditions*"[111] in an environment where containers loaded with cargo weighing up to 40 tonnes are brought to and from the terminal by ships, trucks, and straddles driven by its employees including Mr Hawken.[112]

[51] I note that the Second Warning issued by the Respondent to Mr Hawken on 10 November 2022, stated, *inter alia, "Patrick has made the decision to issue you with a final warning, and this letter serves as such. Any repetition of a positive drug and alcohol test, further breach of this procedure, or any other unacceptable conduct may result in further disciplinary action up to and including the termination of your employment"*.[113] It is evident that Mr Hawken was made aware that a further "*breach"* of the D&A Procedure may result in his employment being terminated.

[52] Having considered the material before me, I consider that the Respondent had a valid reason to dismiss Mr Hawken. I have found above that the Respondent operates in a hazardous environment and there is no dispute that the D&A Procedure was lawful and reasonable. There is also no dispute that the contents of the D&A Procedure were communicated to Mr Hawken, and he was aware of its contents.[114]

[53] I have found above that Mr Hawken attended work with levels of amphetamine and methamphetamine in his system above the pre-determined allowable limit on three occasions in the period of 14 October 2022 to 23 October 2023. I have found above at paragraphs [47]-[52] that Mr Hawken was in breach of the D&A Procedure on three occasions such as to justify the initiation of a show cause meeting and the termination of his employment.

[54] I have also considered the Respondent's Code of Conduct which provides that "*people, directors, and contractors at Patrick's must comply with our health and safety policies"*, and *"comply with both the Company's policies and relevant legislation"*.[115] I have found above that Mr Hawken's conduct breached the D&A Procedure. It follows that he did not comply with the Code of Conduct.

[55] Mr Hawken further raises a number of matters in support of a submission that the Respondent was in breach of its D&A Procedure and was therefore "*not entitled to initiate a show cause process"*.[116] First, he submits Mr Brewster was not entitled to send his on-site negative sample for confirmatory testing as the definition of "*confirmatory testing"* in clause 3 of the D&A Procedure provides that negative samples can only be sent for confirmatory testing to "*verify accuracy of testing processes and equipment"*.[117] Second, Mr Hawken submits that pursuant to clause 4.6.3 of the D&A Procedure, the Respondent was required to issue Mr

Hawken with a third written warning before initiating a show-cause process.[118] Mr Hawken submits that he was not issued a third written warning following the 25 October 2023 Confirmatory Test[119] in breach of the D&A Procedure and consequently the Respondent was "*not entitled to initiate a show cause process*".[120] Third, Mr Hawken points to a Fair Work Commission Recommendation (Recommendation) issued by Commissioner Riordan on 5 October 2023 in support of his submission that the Respondent did not comply with the D&A Procedure.[121]

[56] The three submissions referred to above at [55] are matters I shall consider further below in the context of s.387(h) as these matters do not concern Mr Hawken's conduct but rather the Respondent's procedural and substantive disciplinary response to that conduct.[122]

[57] I note the Respondent's submission that Mr Hawken's conduct is in breach of the Life Saving Commitments which relevantly provide that "*I will be drug and alcohol free at all times*".[123] Whilst a commitment to attend for work drug free is both commendable and reasonable on its own, in this case such a direction is on its face incompatible with Clause 4.6 of the D&A Procedure.

[58] In the course of oral submissions, Mr Hawken's representative submitted *"it's the most tolerant drug policy in the entire stevedoring industry"*[124] and that the Respondent cannot claim to have "*treated the policy as if it was zero tolerance"*[125] on the one hand and permit an employee to *"work for that company for 25 years and test positive 50 times for illicit drugs at any level"*[126] and receive "*nothing more serious than formal written warnings*".[127] The absurdity of this result is self-evident. Having created an incompatible regime for the administration of drug and alcohol infringements, in my view, Mr Hawken is entitled to the benefit of the more generous policy which in this case is clause 4.6 of the D&A Procedure. In those circumstances, it is unreasonable to require Mr Hawken to comply with the terms of the Life Saving Commitments. It follows that I do not accept the Respondent's submission that there has been a breach of the Life Saving Commitments.

[59] While it is not necessary to further consider the other breaches that the Respondent relies on to establish a valid reason for Mr Hawken's dismissal, I would have had difficulty accepting that all the listed breaches were made out to the requisite standard.

[60] I have found at paragraphs [52]-[53] that there was a valid reason for Mr Hawken's dismissal. This weighs in favour of a finding that the dismissal was not harsh, unjust and/or unreasonable.

Notification of the reason for dismissal (s.387(b)

[61] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account whether the person was notified of the reason.[128] Procedural fairness requires that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment.[129] The notification of the valid reason must be in explicit, plain and clear terms.[130]

[62] I have set out at paragraphs [52]-[53] my findings as to the reasons for Mr Hawken's termination. On the material before me, I am satisfied that Mr Hawken was provided with

sufficient information about the reasons for his termination. I additionally note that Mr Hawken does not seriously contest that he was notified of the reasons for termination.[131]

[63] I find that Mr Hawken was given notice of the reasons for his dismissal. This weighs in favour of a finding that the dismissal was not harsh, unjust and/or unreasonable.

Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person (s.387(c))

[64] Section 387(c) requires the Commission to take into account whether an employee was provided an opportunity to respond to any reason for their dismissal relating to their conduct or performance. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[132]

[65] The opportunity to respond does not require formality and this factor is to be applied in a commonsense way to ensure the employee is treated fairly.[133] 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.[134]

[66] In *Wadey v YMCA Canberra*[135] Moore J stated the following principle about the right of an employee to appropriately defend allegations made by the employer:

> "*[T]he opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend*."

[67] Mr Hawken submits the Respondent undertook a disciplinary process that had the appearance of affording him procedural fairness and an opportunity to respond to the reasons for dismissal, however had closed its mind to permitting him to continue his employment before allowing him to respond.[136] This is evidenced by the fact that after giving Mr Hawken an opportunity to meet with management face to face on 6 November 2023, the Respondent's managers adjourned the meeting for a matter of only a "*couple of minutes*" before producing a 2-page termination letter.[137]

[68] It is not in contest that the 30 October 2023 show cause letter stated "*before a final decision is made regarding this Patrick will provide you with an opportunity to consider the information outlined in this letter and provide a response addressing Patrick's concerns and providing any other relevant information for its consideration*"[138] and that Mr Hawken provided a written response to the Respondent's allegations on the evening of 30 October 2023[139] and letters of support from his partner and sister respectively on 3 November 2023.[140] It is additionally not in contest that a meeting was held on 6 November 2023 where Mr Hawken was asked to give a statement in addition to the material provided before the meeting. [141]

[69] The Respondent submits that it provided Mr Hawken with an opportunity to respond. In support of this submission, the Respondent points to the following factors:

- By the time of the meeting of 6 November 2023, Mr Brewster had considered the material already provided to the Respondent.[142]

- Very little (if any) novel information was provided in the meeting.[143]

- That being the case, Mr Brewster needed little time to further consider his position.[144]

[70] On the basis of the material before me, I am satisfied that Mr Hawken was provided with an opportunity to respond to the reasons for his dismissal. This weighs in favour of a finding that the dismissal was not harsh, unjust and/or unreasonable.

Any unreasonable refusal to allow the Applicant to have a support person present (s.387(d))

[71] Mr Hawken had a support person present at the time his possible termination was discussed.[145]

[72] I am satisfied that there was no refusal by the Respondent to allow Mr Hawken to have a support person present to assist at any discussion relating to his dismissal, and this is a neutral consideration in determining whether his dismissal was harsh, unjust, or unreasonable.

Warnings about unsatisfactory performance (s.387(e))

[73] In this instance the reasons for dismissal related to the conduct of Mr Hawken, rather than his performance, and so s.387(e) is not relevant.

Impact of size of the Respondent on procedures followed in effecting the dismissal and absence of dedicated human resource management specialists or expertise (s.387(f)&(g))

[74] I do not consider there to be any factors which might have impacted on the ability of the Respondent to follow a fair process in effecting Mr Hawken's dismissal. These are neutral factors in this case.

Other relevant matters (s.387(h))

[75] Section 387(h) provides the Commission with broad scope to consider any other matters it considers relevant. It is well established that a dismissal may be "*harsh, unjust or unreasonable*", notwithstanding the finding that there is a valid reason for the dismissal.[146] The gravity of an employee's conduct and the proportionality of dismissal to that conduct are important matters to be taken into account. The Commission should consider all the circumstances and weigh the gravity of the misconduct and other circumstances telling against a dismissal being unfair with any mitigating circumstances and other relevant matters that might support Mr Hawken's claim that the dismissal was harsh, unjust or unreasonable.[147]

Failure of the Respondent to comply with its own policies and D&A Procedure.

[76] Mr Hawken submits that the "*failure of the Respondent to follow its own policies under s.387(h)*"[148] renders the decision to terminate Mr Hawken's employment *"harsh and therefore an unfair dismissal"*.[149] I have set out Mr Hawken's submissions as to the Respondent's purported failures to follow its own policies at paragraphs [38]-[40] and [55] above and do not re-state them.

[77] I accept Mr Hawken's submission that clause 4.6.3 of the D&A Procedure provides that in the event of a "*Third Breach", "a Third Written Warning shall be issued using Form - Warning Letter (AOD Breach)"* before *"a show-cause meeting shall be held between the employee and management"*.[150] There is no evidence before me of a third written warning being issued to Mr Hawken before the show cause meeting on 30 October 2023.

[78] It is clear that each dot point of clause 4.6.3 of the D&A Procedure uses mandatory language in the word "*shall"* and that it applies in the event of a third breach. What is not necessarily apparent is whether each disciplinary step outlined in the dot points is mandatory or optional. If they are each mandatory steps leading to the final dot point that "*a show cause meeting shall be held between the employee and management*",[151] there is an obvious incompatibility in the process.

[79] By its very nature, a *"third written warning"* would require the Respondent to caution Mr Hawken to the real possibility that he risks being dismissed if there is a reoccurrence of his conduct, while a "*show cause meeting"* requires Mr Hawken to show cause as to why his employment should not be dismissed. These disciplinary steps cannot be applied in parallel. As such, I have formed the view that the sensible interpretation is that the matters set out in clause 4.6.3 are optional.

[80] I have also had regard to the evidence before me that Mr Brewster "*deviated from the norm*"[152] by directing Mr Hawken's sample of 23 October 2023 be sent for confirmatory testing.

[81] I observe that the terms of the Life Saving Values are on their face inconsistent with the D&A Procedure, and I agree with the Applicant that the Respondent cannot claim to have treated the policy "*as if it was zero tolerance"*[153] on the one hand and permit an employee to *"work for that company for 25 years and test positive 50 times for illicit drugs at any level"*[154] and receive "*nothing more serious than formal written warnings*".[155]

[82] That said, Mr Hawken was not terminated for one "*breach*" of the D&A Procedure. Rather, I have found that whilst on his second and final warning, Mr Hawken tested positive for amphetamine and methamphetamine on a third occasion.

Recommendation

[83] Mr Hawken seeks to rely on the Recommendation issued on 5 October 2023 by Commissioner Riordan regarding the Respondent's obligations under the D&A Procedure.

[84] The relevant parts of the Recommendation provide as follows:

"*Further, the parties were satisfied with the current oral fluid testing regime, as long as it maintained and delivered on its accuracy standards. I am satisfied that the current process of all "non-negative" swab tests and 10% of all tests being further tested in a laboratory ensures the ongoing accuracy of the oral fluid testing regime.*

In my opinion, any negative test which tests positive in the laboratory must be processed in accordance with the Procedure. To do otherwise would be contrary to the ambition and focus of the parties in relation to ensuring a safe workplace for all.

Therefore, I recommend the following change to the Procedure:

Confirmatory Testing	*A procedure that uses calibrated specialised equipment in a laboratory to identify and quantify the presence of a specific drug or metabolite against the limits in the Australian Standards.* *Confirmatory Testing is conducted on all samples that are "Non Negative" and on 10% of the total number of samples. The purpose of Confirmatory Testing is to verify accuracy of testing processes and equipment. Any Positive Result from Confirmatory Testing may result in the Breach Procedure in this document being applied.*

Patricks have agreed that they will conduct an education process for all employees in relation to this change. Further, Patricks have agreed that any warning that has been given to any employee over the last 12 months as a result of their negative swab test being reversed in the laboratory, will have that warning removed from their file. However, the arrangements which were put in place for any of these employees to return to work after their positive result will continue, including the requirement for additional testing".[156]

[85] The Recommendation was issued on 5 October 2023, and the undisputed evidence before me is that the Respondent did not notify its employees about the updated D&A Procedure and definition of confirmatory testing until 26 October 2023 at the earliest.[157]

[86] I observe that the warnings issued to Mr Hawken prior to 5 October 2023 were not the result of a negative on-site sample being reversed in a laboratory confirmatory test. As such, on its face the Recommendation would have little, if any, bearing on those warnings. As to the 25 October 2023 Confirmatory Test which I have found at paragraph [47]-[53] permitted the Respondent to initiate a show cause meeting, I do not consider the Recommendation to result in a reversal of Mr Hawken's third breach as "*the agreement was to remove warnings that have been given at certain points in time. That agreement must necessarily be contemporaneous with or pre date the date of the recommendation*".[158] Given that the Recommendation was issued on 5 October 2023, and Mr Hawken's third breach was on 25 October 2023, I consider the Recommendation largely immaterial to the matter before me. Further, I note the limited evidence before me as to the context surrounding the issuing of the Recommendation.

Mr Hawken's impairment levels.

[87] Mr Hawken submits that he was not impaired and was terminated "*solely*" by reason of his out of work conduct[159] and refers to the decision of Deputy President Easton in *Goodsell v Sydney Trains* where it was found that "*the absence of a risk of impairment supports the conclusion that his dismissal was harsh, unjust and unreasonable".*[160] Mr Hawken submits that the intoxicating effects of amphetamine and amphetamine "*last for no more than 4-6 hours*", and that as he "*consumed a pill some 11 hours before his shift, the effects of that pill would have worn off a minimum of 5 hours before the start of his shift".*[161]

[88] There is no evidence before me as to whether Mr Hawken was or was not impaired when he attended for work on 23 October 2023, or indeed the level of any alleged impairment. It was accepted by Mr Hawken in cross-examination that he did not know the contents of the "*pill",* nor how long it would last.[162] Further I note Mr Hawken's comments in his response to the 30 October 2023 show cause letter that his conduct *"jeopardised the safety of the workplace"*.[163]

[89] It is not in dispute that Mr Hawken took a "*pill*" of unknown contents the morning of 23 October 2023, 15 hours prior to attending for work, nor is there any dispute as to the accuracy of the results of the 25 October 2023 Confirmatory Test or the two prior breaches. There is no evidence before me as to whether Mr Hawken was discernibly impaired on 23 October 2023 when he attended work to perform his shift nor have the parties called any evidence as to the length of the intoxicating effects of amphetamine and methamphetamine. I make no findings as to whether Mr Hawken was impaired and do not consider the matter relevant in light of my findings at paragraphs [51]-[53]. In my view, the present circumstances can be distinguished from *Goodsell*.

Mr Hawken's employment history

[90] Mr Hawken submits that other than the positive drug tests, he had an unblemished work history and had no safety breaches.[164] The Respondent states that Mr Hawken was involved in several incidents which raise safety issues but accepts that he was not warned about this.[165]

[91] Mr Hawken was employed with the Respondent for 1 year and 9 months and did not receive any warnings besides those pertaining to the D&A Procedure.

[92] I have taken this submission into account in coming to my decision.

Mr Hawken's acceptance of responsibility and remorse

[93] Mr Hawken states that he fully cooperated with the Respondent's show cause process, showed genuine remorse and unconditionally accepted responsibility for his actions.[166] Mr Hawken submits that he has taken full responsibility for the positive drug test and has taken every possible step to ensure that he does not relapse.[167] He submits that he has been diagnosed with attention deficit hyperactivity disorder (ADHD) since the time that he tested positive,[168] is taking prescription medication to control his condition and impulses, and that he has the support of his partner and family.[169]

[94] I have taken this submission into account in coming to my decision.

Procedural fairness

[95] Mr Hawken submits that the Respondent's mind was "*closed in the disciplinary process to him continuing in his employment*".[170] I have dealt with this submission in my analysis of s.387(b)-(g) and note my findings at paragraphs [61]-[74] above.

The effect of the dismissal on Mr Hawken's mental health

[96] Mr Hawken submits that his dismissal had a particularly deleterious effect on his mental health.[171] The Respondent submits that there is no evidence that could adequately prove this proposition.[172]

[97] I have taken Mr Hawken's submission in account in coming to my decision.

Conclusion on mitigating circumstances

[98] The observations of the Full Bench in *BHP Coal Pty Ltd v Schmidt* in relation to the approach to ensuring a "*fair go all round*" in the context of a case involving safety issues are apt:

> "*The criteria for assessing fairness, although not exhaustive, are clearly intended by the legislature to guide the decision as to the overall finding of fairness of the dismissal and are essential to the notion of ensuring that there is "a fair go all round". This is particularly important in relation to safety issues because the employer has obligations to ensure the safety of its employees, and commitment and adherence to safety standards is an essential obligation of employees – especially in inherently dangerous workplaces. The notion of a fair go all round in relation to breaches of safety procedures needs to consider the employer's obligations and the need to enforce safety standards to ensure safe work practices are applied generally at the workplace*."[173]

[99] I have made findings at paragraphs [76]-[82] in regard to the Respondent's failure to comply with its own policies and D&A Procedure. Whether or not the Respondent has failed to comply with its own policies and procedures is indeed a relevant consideration when considering other relevant factors and will ultimately have some bearing on whether or not the dismissal is unfair.

[100] However, in my view, a failure of an employer to comply with its own policies and procedure has to be considered in the particular circumstances of each case and weighed against all of the other factors. In this case, the seriousness of Mr Hawken's conduct outweighs the Respondent's failure to comply with its own policies and D&A Procedure.

[101] I note Mr Hawken's submission that the Respondent's drug policy is "*the most tolerant drug policy in the entire stevedoring industry"*.[174] That said, I have found that Mr Hawken was in breach of the D&A Procedure and was issued with a second and final warning on 10 November 2022. I am satisfied that the Respondent operates in a safety critical environment and that mistakes within the Respondent's environment can have serious safety consequences.

[102] I am not persuaded the mitigating circumstances raised by Mr Hawken make his dismissal a disproportionate response.

Conclusion on harsh, unjust or unreasonable dismissal

[103] After considering each of the matters specified in s.387 of the Act, my evaluative assessment is that the Mr Hawken's dismissal was not harsh, unjust or unreasonable. The Respondent had a valid reason for the dismissal, and it afforded procedural fairness to Mr Hawken prior to making a decision to bring his employment to an end. I have found the Respondent operates in an environment with hazardous conditions. Mr Hawken attended work on 23 October 2023 knowing that he had taken a '*pill'* that morning of unknown contents and that he was on a second and final warning for testing positive to amphetamine and methamphetamine whilst at work. His conduct in that regard was in breach of the Respondent's D&A Procedure. Notwithstanding the Respondent deviating from its D&A Procedure in sending Mr Hawken's sample for confirmatory testing and taking into account the other relevant mitigating circumstances put forward by Mr Hawken, I consider that the Respondent's decision to terminate the Mr Hawken's employment after three breaches of the D&A Procedure was not harsh and was an action that a reasonable employer might impose in the circumstances. On balance, I am satisfied that the Respondent's dismissal of Mr Hawken was not unfair. The application is dismissed.

COMMISSIONER

Appearances:

Mr K Bond *for the Applicant*

Mr S Crilly, *with permission, for the Respondent*.

Hearing details:

2024.

Melbourne.

15 February and 8 March.

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[1] Digital Hearing Book (DHB) p5-6.
[2] DHB p85.
[3] DHB p93.
[4] DHB p51.
[5] DHB p95.
[6] DHB p85.
[7] DHB p51.
[8] DHB p7.
[9] DHB p111.
[10] DHB p111.
[11] DHB p54.
[12] DHB p18-19.
[13] DHB p34.
[14] DHB p361.
[15] DHB p34, p35.
[16] DHB p36.
[17] DHB p365.
[18] DHB p36.
[19] Transcript PN198-202, Transcript PN215.
[20] DHB p31, Transcript PN216.
[21]DHB p31, DHB p107.
[22] DHB p31, DHB p107.
[23] DHB p31, Transcript PN311-317.
[24] DHB p116
[25] DHB p116, p371.
[26] DHB p31.
[27] DHB p31.
[28] DHB p31.
[29] DHB p31.
[30] DHB p32.
[31] DHB p116.
[32] DHB p32.
[33] DHB p40.
[34] DHB p38.
[35] DHB p40-49, p117.
[36] DHB p117.
[37] DHB p32.
[38] DHB p32, DHB p118.
[39] DHB p119.
[40] DHB p65.
[41] DHB p72.
[42] DHB p74.
[43] DHB p75.
[44] DHB p319-322.

[45] DHB p160.

[46] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8.

[47] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373.

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

[49] Ibid.

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

[51] *Sydney Trains v Gary Hilder* [2020] FWCFB 1373.

[52] [2020] FWCFB 1373.

[53] [2020] FWCFB 1373 at [26].

[54] DHB p110.

[55] DHB p110, p316.

[56] DHB p110, p154.

[57] DHB p99, Transcript Day 2 PN18.

[58] DHB p20, p64, p109.

[59] DHB p65.

[60] DHB p65.

[61] DHB p65.

[62] DHB p65.

[63] DHB p75.

[64] DHB p361.

[65] DHB p365.

[66] DHB p36.

[67] Transcript PN215.

[68] Transcript PN216.

[69] DHB p31, DHB p107.

[70] DHB p116

[71] DHB p116, p371.

[72] DHB p32.

[73] DHB p93

[74] DHB p92.

[75] Transcript Day 2 PN174.

[76] Transcript Day 2 PN299.

[77] DHB p94.

[78] DHB p94.

[79] DHB p389.

[80] DHB p95.

[81] DHB p95.

[82] DHB p20.

[83] Transcript Day 2 PN53.

[84] Transcript Day 2 PN58

[85] Transcript Day 2 PN86.

[86] Transcript Day 2 PN86.

[87] Transcript Day 2 PN77-112.

[88] Transcript Day 2 PN53.

[89] Transcript Day 2 PN53-54, PN112.

[90] Transcript Day 2 PN134.

[91] DHB p20.

[92] DHB p52.

[93] Transcript Day 2 PN155.

[94] Transcript Day 2 PN155.

[95] DHB p20.

[96] Transcript Day 2 PN333.

[97] Transcript Day 2 PN14.

[98] DHB p93.

[99] Transcript Day 2 PN174.

[100] Transcript Day 2 PN20-23.

[101] DHB p74.

[102] DHB p74.

[103] DHB p74.

[104] DHB p75.

[105] DHB p75.

[106] DHB p74.

[107] DHB p74.

[108] DHB p75.

[109] Transcript PN444.

[110] Transcript PN413.

[111] DHB p54.

[112] DHB p92.

[113] DHB p36.

[114] DHB p55, p110.

[115] DHB p160.

[116] Transcript Day 2 PN53.

[117] DHB p53, Transcript Day 2 PN134.

[118] Transcript Day 2 PN35.

[119] Transcript Day 2 PN86.

[120] Transcript Day 2 PN53.

[121] DHB p52-54, Transcript Day 2 PN129-159.

[122] [2020] FWCFB 1373 at [30].

[123] DHB p320.

[124] Transcript Day 2 PN18.

[125] Transcript Day 2 PN326.

[126] Transcript Day 2 PN15.

[127] Transcript Day 2 PN15.

[128] *Fair Work Act 2009* (Cth) s. 387(b).

[129] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151; *Gooch v Proware Pty Ltd T/A TSM (The Service Manager)* [2012] FWA 10626.

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

[131] DHB p21.

[132] *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].

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

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

[135] [1996] IRCA 568; cited in *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544.

[136] DHB p21.

[137] DHB p21.

[138] DHB p373.

[139] DHB p38.

[140] DHB p40-49.

[141] DHB p32.

[142] DHB p21.

[143] DHB p21.

[144] DHB p21.

[145] DHB p21.

[146] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 at [41].

[147] Ibid.

[148] Transcript Day 2 PN23.

[149] Transcript Day 2 PN23.

[150] Transcript Day 2 PN53, DHB p74.

[151] DHB p74.

[152] Transcript Day 2 PN224.

[153] Transcript Day 2 PN326.

[154] Transcript Day 2 PN15.

[155] Transcript Day 2 PN15.

[156] [2023] FWC 2596.

[157] DHB p62.

[158] Transcript Day 2 PN276.

[159] DHB p22.

[160] [2023] FWC 3209 at [145].

[161] DHB p23.

[162] Transcript PN278-279.

[163] DHB p38, Transcript PN239.

[164] DHB p23.

[165] DHB p102.

[166] DHB p23.

[167] Transcript Day 2 PN160.

[168] Transcript Day 2 PN160.

[169] Transcript Day 2 PN161.

[170] DHB p23.

[171] DHB p23.

[172] DHB p100.

[173] [2016] FWCFB 1540 at [8].

[174] Transcript Day 2 PN18.