DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Roy Smout
v
BHP Coal Pty Ltd
(U2024/4252)

COMMISSIONER RIORDAN SYDNEY, 19 SEPTEMBER 2024

Application for an unfair dismissal remedy

[1] On 12 April 2024, Mr Roy Smout (**the Applicant**) filed an application with the Fair Work Commission (**the Commission**) seeking a remedy for an alleged unfair dismissal pursuant to section 394 of the *Fair Work Act 2009* (**the FW Act**). The Applicant was dismissed by BHP Coal Pty Ltd (**the Respondent**) on 28 March 2024.

Background

[2] In early March 2024, the Respondent was made aware that two female cleaners, Ms Heming and Ms Williams (the complainants), who were employed by ESS Support Services at the Blackwater Mine, had made a complaint about the Applicant, including allegations of sexual harassment.

[3] Mr Patrick Ritchie, Senior Associate of MinterEllison, and an embedded contractor with BHP as an Investigator for BHP's Ethics and Investigations team, was appointed to investigate the complaints made against the Applicant.

[4] Mr Ritchie interviewed the complainants on 20 March.

[5] The Applicant was stood down on 22 March 2024, pending the outcome of the investigation into the allegations made against him.

[6] The Applicant was interviewed by Mr Ritchie as part of the investigation process on 25 March 2024.

[7] Mr Ritchie delivered his Investigation Findings Memo (**the Report**) to the Respondent on 26 March 2024.

[8] The Applicant attended a Show Cause Meeting with the Respondent on 28 March 2024, the day before the Easter long weekend. It is uncontroversial that no HR staff of the Respondent would be on duty over the long weekend.

[9] The Applicant was issued a Termination Letter on 28 March 2024, which provided as follows:

> "28 March 2024
>
> Roy Smout
> Operator Processing
> Blackwater Mine
>
> Dear Roy,
>
> TERMINATION OF EMPLOYMENT
>
> I refer to the meeting held with you on 28 March 2024 attended by you and Greg Donohue (Operator, Employee Representative). You were provided the opportunity to bring a support person to this meeting and Greg acted in this capacity for you. During this meeting, there was a final discussion regarding the outcome of an investigation into the following serious allegations:
>
> 1. On 1 March 2024, in the male toilets near the CHPP at Blackwater Mine, that you made sexually suggestive comments to Impacted Person 1 and Impacted Person 2 without their invitation or consent, asked them if they had partners, if Impacted Person 1 could be trusted, if Impacted Person 1 trusted her partner who worked in Western Australia, suggested Impacted Person 1's partner was sleeping with other people, said 'What happens in WA stays in WA' and looked at Impacted Person 1's body up and down and down. It is alleged that you sexually harassed Impacted Person 1 and Impacted Person 2 in breach of the BHP Code of Conduct.
>
> 2. On 2 March 2024, near the CHPP control room at Blackwater Mine, that you made sexually suggestive comments to Impacted Person 1 and Impacted Person 2 without their invitation or consent, referred to them as "dumb cleaners" and "dumb bitches", said your wage was double their wage and suggested they talk to a male supervisor about getting a job and use their bodies to sexually provoke the supervisor to offer them a job. It is alleged that you sexually harassed Impacted Person 1 and Impacted Person 2 in breach of the BHP Code of Conduct.
>
> 3. On 3 March 2024, in the CHPP crib room at Blackwater Mine, that you made an offensive comment to Impacted Person 1 and Impacted Person 2 and said 'Are yous that fucking useless and need 3 extra cleaners'. It is alleged that you harassed Impacted Person 1 in breach of the BHP Code of Conduct.
>
> At the meeting we confirmed the process undertaken to investigate these allegations and discussed the findings with you. This investigation included a previous meeting held between yourself and Patrick Ritchie (Investigator) on 25 March 2024, the purpose of which were to raise these concerns with you and hear your response.

Following completion of the investigative process it has been determined that the allegations outlined above are substantiated.

The behavioural expectations of the Company are articulated in the Charter Values and the Code of Conduct (Code). The Charter Values and Code clearly state that employees are required to treat each other fairly, respectfully and with dignity. The Company does not tolerate inappropriate behaviour or any form of harassment or sexual harassment.

As an employee, you are accountable for ensuring that you conduct yourself in accordance with the Charter Values and Code at all times in the workplace. Your actions on 1, 2 and 3 March 2024 were totally unacceptable and constituted serious breaches of our Charter Values and the Code.

Your failure to take responsibility for your actions coupled with your lack of integrity raises serious concerns about the Company's ability to have trust and confidence in you moving forward.

During the meeting held today, we advised that we proposed to terminate your employment due to the above substantiated conduct and breaches of the Charter Values and Code. You were provided with an opportunity to show cause as to why this course of action would not be appropriate and were provided time to put forward any further information you believed we should take into consideration in making a decision about your ongoing employment. We have reviewed the information gathered during the investigation and your responses. You have not provided us sufficient reason to justify your continuing employment with the Company. Your employment with BHP will be terminated effective today 28 March 2024, with five weeks' pay in lieu of notice. In making our decision, we have considered your length of service, past performance and disciplinary history.

In effecting your termination, you will also be provided payment for any accrued and unused leave you may be entitled to. Details of your termination payments will be provided to you separately.

After your employment ends, you must not disclose to anyone any confidential information about the Company. You also remain bound by all other obligations in your contract of employment and associated documentation, which are expressed to continue after the termination of your employment.

Roy, we advise that we have extended your access to the Employee Assistance Program, for three months post your termination of employment until 28 June 2024. The EAP can provide confidential professional counselling to you and your immediate family. Our EAP provider is Gryphon Psychology. They can be contacted on [redacted].

Yours sincerely,

Adam Ryan
Superintendent Processing

Blackwater Mine

cc: Personnel File"

[10] The matter was Heard in Brisbane on 31 July 2024 and 1 August 2024. The Applicant was represented by Mr Aidan Nash of the Mining and Energy Union. The Respondent was granted leave pursuant to s.596 of the FW Act to be represented at the Hearing by Ms Peta Willoughby of Counsel, instructed by MinterEllison.

[11] The following persons gave evidence for the Applicant at the Hearing:

- Mr Roy Smout, the Applicant;
- Ms Lynn Modrow, a cleaner employed by ESS Support Services at the Blackwater Mine.

[12] The following persons gave evidence for the Respondent at the Hearing:

- Ms Gemmah Heming, a cleaner employed by ESS Support Services at the Blackwater Mine;
- Ms Gemma Williams, a cleaner employed by ESS Support Services at the Blackwater Mine;
- Ms Katherine Langdon, Employee Relations Specialist for BHP;
- Mr Russell Swann, Acting General Manager for Whitehaven Coal;
- Mr Adam Ryan, Coal Handling Processing Plant Superintendent for Whitehaven Coal.

[13] Further to a direction from me, Mr Patrick Ritchie was called to give evidence at the Hearing.

[14] At the request of both parties, the matter was further listed for Hearing by Video via Microsoft Teams on 21 August 2024, for provision of oral closing submissions.

Statutory Provisions

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

> **"396 Initial matters to be considered before merits**
> The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
> (a) whether the application was made within the period required in subsection 394(2);
> (b) whether the person was protected from unfair dismissal;
> (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

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

381 Object of this Part

(1) The object of this Part is:

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

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

(ii) the needs of employees; and

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

(i) are quick, flexible and informal; and

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

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

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

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

382 When a person is protected from unfair dismissal

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

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

(b) one or more of the following apply:

(i) a modern award covers the person;

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

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

384 Period of employment

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

(2) However:

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

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

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

(b) if:

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

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

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not

be recognised; the period of service with the old employer does not count towards the employee’s period of employment with the new employer.

385 What is an unfair dismissal

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

(a) the person has been dismissed; and

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

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

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

see section 388.

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person— whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.”

[16] Regulation 1.07 of the *Fair Work Regulations 2009* provides the meaning of ‘serious misconduct’ as follows:

“1.07 Meaning of *serious misconduct*

(1) For the purposes of the definition of *serious misconduct* in section 12 of the Act, serious misconduct has its ordinary meaning.

Examples of serious misconduct—employees

(2) For the purposes of subregulation (1), conduct that is serious misconduct includes the following conduct of an employee:

(a) wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment;

(b) conduct that causes serious and imminent risk to:

(i) the health or safety of a person; or

(ii) the reputation, viability or profitability of the employer’s business;

(c) engaging in theft, fraud, assault or sexual harassment in the course of the employee’s employment;

(d) being intoxicated at work;
(e) refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment."

(My emphasis)

Applicant's Submissions

[17] The Applicant submitted that his dismissal was harsh, unjust or unreasonable and that he seeks an order of the Commission for reinstatement to his position with the Respondent, including continuity of employment and compensation for lost wages.

[18] The Applicant submitted that he was employed by the Respondent at the Blackwater Mine (**the Mine**) from 2 December 1986 until his dismissal on 28 March 2024. The Applicant submitted that he worked as a process technician and a trainer assessor in the Coal Handling and Processing Plant (**CHPP**).

[19] The Applicant submitted that before March 2024, he had not had any disciplinary warnings or other performance or conduct issues in almost 38 years employment with the Respondent.

Circumstances leading to the 'complaints' against the Applicant

[20] The Applicant submitted that on 1 March 2023, he entered the 'dirty side' of the bathhouse, to get his helmet from his locker before commencing work after a physiotherapist appointment. The Applicant submitted that the 'dirty side' is an area outside the toilets, next to the crib room where workers take off their dirty boots and helmets after a shift and put them in their lockers before entering the clean areas.

[21] The Applicant submitted that while collecting his helmet, he saw two new cleaners, Ms Gemma Williams and Ms Gemmah Heming, who worked for ESS Services, providing cleaning services to the Mine. The Applicant's submitted that his wife worked as a cleaner at a School at Yeppoon, so he always tried to be friendly and welcoming to the cleaners on site.

[22] The Applicant submitted that he had a "*general get-to-know-you conversation*" with Ms Williams and Ms Heming. The Applicant submitted that he asked what they were doing out in Blackwater, a small town 216km west of Rockhampton in Central Queensland. They replied that they were out there to work as cleaners.

[23] The Applicant submitted that he was aware that often, people working as cleaners at the Mine, are there because they have partners who also work at the Mine or nearby, so he asked Ms Williams and Ms Heming whether they had partners or families. The Applicant submitted that Ms Heming replied that she had a partner who worked in Western Australia. The Applicant submitted that in response, he attempted to make a joke and said "*can you trust him? What happens in Western Australia stays in Western Australia*". The Applicant submitted that he intended this as a trite ice-breaking phrase and did not intend any particular connotations. The Applicant submitted that he did not ask any more questions or make any more comments about Ms Heming's relationship.

[24] The Applicant submitted that he also asked Ms Heming and Ms Williams how much they earned, comparing the wages at the Mine to his wife's wage cleaning in town. He asked if they thought it was worth the extra $10 an hour to be out in Blackwater in a dirty environment and Ms Heming and Ms Williams mentioned that they were hoping to get mining jobs. The Applicant submitted that he believed Ms Heming and Ms Willams may be candidates for traineeships that are generally available for people between 18-25 years old who live locally, therefore, he asked their ages and where they lived. The Applicant submitted that he then mentioned that Ms Williams may be a candidate for a traineeship based on her age and the fact she lived locally, but Ms Heming may not because she was 25 and did not live locally. The Applicant submitted that he also suggested that they talk to Workpac who often take on new 'greenskin' employees at the Mine and suggested that Ms Heming and Ms Williams also talk to the mining superintendents about the possibility of employment with the Respondent.

[25] The Applicant submitted that he saw Ms Heming and Ms Williams outside the CHPP control room the next day. He submitted that they had a very brief conversation in which he asked how they were and Ms Williams mentioned that her dad had been injured at Curragh Mine that day.

[26] The Applicant submitted that on 3 March 2024, he saw Ms Williams in the CHPP control room and asked how her father was to which she replied that he was okay. The Applicant submitted that he did not have any further interactions with Ms Williams or Ms Heming.

[27] The Applicant submitted that on 22 March 2024, he was stood down due to "*unspecified allegations of misconduct*". On 24 March, the Applicant was provided with a list of 3 allegations of harassment and sexual harassment of Ms Williams and Ms Heming. The Applicant submitted that the allegations included "*a series of false allegations of comments and behaviours that the Applicant did not engage in*".

Sale of the Mine and impact on the Investigation

[28] Relevant to this matter, the Applicant submitted that in October 2023 the Respondent announced the sale of the Mine to Whitehaven Coal Pty Ltd (**Whitehaven**) which was due to take effect on 3 April 2024. All employees had the option to transfer their employment from the Respondent to Whitehaven. The Applicant submitted that the senior leadership team of the Respondent was told that all disciplinary processes had to be completed by 2 April 2024 before the divestment took effect.

[29] The Applicant submitted that as part of the investigation into the allegations, he was interviewed by a representative of the Respondent's Ethics Point investigation team on 25 March 2024.

[30] The Applicant submitted that the Respondent's investigation determined that the allegations were substantiated, further to which the Respondent considered terminating his employment. The Applicant submitted, however, that the Respondent did not undertake its normal show cause process by providing written notice of the reasons for dismissal and an opportunity to respond in writing. The Applicant submitted that he was not informed of the

reasons for dismissal or provided with a genuine opportunity to respond to the reasons before a decision was made to terminate his employment.

[31] The Applicant submitted that a short 5–10-minute telephone meeting took place on 28 March 2024, in which he was informed that the allegations were substantiated. A 30-minute break took place before the meeting was reconvened and the Applicant was notified of his dismissal.

[32] The Applicant submitted that after his dismissal, he was informed by two other members of his crew, Mr Nathan Milhouse and Ms Katrina Dean, that they had made complaints to the Superintendent about cleaners in the CHPP the week before the allegations were made against the Applicant.

Legal Submissions – Criteria for Harshness

<u>Valid Reason</u>

[33] The Applicant submitted that when determining whether or not a valid reason exists, the Commission must be of the view that the reason put forward by Respondent is "*sound, defensible, or well founded. A reason that is capricious fanciful, spiteful or prejudiced could never be a valid reason*."[1] The Applicant submitted that 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.[2] The Applicant submitted that when making this determination, the Commission should not consider whether or not the employer viewed that the conduct formed a valid reason but should make their own determination.

[34] The Applicant submitted that the mere failure of an employee to comply with policies and procedures does not automatically mean that there is a valid reason for dismissal and the dismissal is not harsh, unjust or unreasonable. The Applicant submitted that the circumstances of each case must be taken into account.[3]

[35] The Applicant submitted that the Respondent's reasons for claiming there was a valid reason for termination, as summarised in the termination letter, appear to be that the Applicant engaged in misconduct in breach of company policy by harassing and sexually harassing Ms Williams and Ms Heming. Specifically:

> "*On 1 March 2024, in the male toilets near the CHPP at Blackwater Mine, that you made sexually suggestive comments to Impacted Person 1 and Impacted Person 2 without their invitation or consent, asked them if they had partners, if Impacted Person 1 could be trusted, if Impacted Person 1 trusted her partner who worked in Western Australia, suggested Impacted Person 1's partner was sleeping with other people, said 'What happens in WA stays in WA' and looked at Impacted Person 1's body up and down and down. It is alleged that you sexually harassed Impacted Person 1 and Impacted Person 2 in breach of the BHP Code of Conduct. (Allegation 1)*
>
> *On 2 March 2024, near the CHPP control room at Blackwater Mine, that you made sexually suggestive comments to Impacted Person 1 and Impacted Person 2 without*

their invitation or consent, referred to them as "dumb cleaners" and "dumb bitches", said your wage was double their wage and suggested they talk to a male supervisor about getting a job and use their bodies to sexually provoke the supervisor to offer them a job. It is alleged that you sexually harassed Impacted Person 1 and Impacted Person 2 in breach of the BHP Code of Conduct. (Allegation 2)

On 3 March 2024, in the CHPP crib room at Blackwater Mine, that you made an offensive comment to Impacted Person 1 and Impacted Person 2 and said 'Are yous that fucking useless and need 3 extra cleaners'. It is alleged that you harassed Impacted Person 1 in breach of the BHP Code of Conduct. (Allegation 3)"

[36] The Applicant submitted that in the letter of termination, the Respondent also suggested the Applicant lied during the investigation, failed to take responsibility for his actions and showed a lack of integrity.

[37] The Applicant submitted that the Respondent did not have a valid reason for the termination because:

"*a) The Applicant did not engage in most of the alleged conduct.*

b) The conduct that the applicant did engage in did not constitute harassment or sexual harassment.

c) The Applicant did not lie during the investigation and did not fail to take responsibility for his actions or show a lack of integrity."

The alleged conduct did not occur

[38] The Applicant submitted that he only had one substantial conversation with Ms Williams and Ms Heming which occurred on 1 March 2023. The Applicant submitted that his interactions with them on 2 March and 3 March were limited to asking how they were going and inquiring about Ms Williams' father who had been in an accident on 2 March 2023 at the Curragh Mine.

[39] The Applicant admitted that he asked Ms Heming if she could trust her partner and said, 'What happens in WA stays in WA'. However, the Applicant submitted that the rest of the allegations against him are unfounded, false and vexatious.

[40] In relation to Allegation 1, the Applicant submitted that:

"*a) The conversation did not occur in the male toilets, but in the 'dirty side' outside the toilets near the crib room. The Applicant did not enter the male toilets at the time of the encounter.*

b) The Applicant did not ask Ms Heming if she could be trusted, nor did he suggest that her boyfriend was sleeping with other people. He did not make any reference to sex or make any sexually suggestive comments.

c) The Applicant did not look Ms Heming's body up and down in a suggestive or sexual manner. Since an accident 27 years ago when a piece of metal lodged in his left eye, the Applicant has not had any vision out of that eye. He is therefore not in control of where that eye is looking and sometimes has to move his head to focus or see things well. The Respondent is well aware of the Applicant's lack of vision in his left eye."

[41] In relation to Allegation 2, the Applicant submitted that:

"*a) The Applicant did not refer to Ms Heming or Ms Williams as 'dumb cleaners' or 'dumb bitches'. The Applicant does not use such language.*

b) The Applicant's wife is a cleaner so it is improbable that he would refer to cleaning in such a derogatory way.

c) Neither Ms Heming not Ms Williams had done or said anything that would have given the Applicant cause to think that they were dumb. In fact, the Applicant encouraged them in their ambition to get mining jobs.

d) The Applicant did not discuss Ms Heming or Ms Williams getting mining jobs on 2 March 2024 however this was part of the discussion on 1 March 2024…

e) Although he did ask about Ms Heming's and Ms Williams' wage in comparison to his wife's wage as a cleaner, The Applicant did not mention his wage being double their wage.

f) The Applicant did make suggestions to Ms Williams and Ms Heming about getting jobs at the Mine, including that they look into traineeships, entry level jobs with Workpac, or talk to the Mining Superintendents about it. He did not suggest that they use their bodies to 'sexually provoke' the supervisor to offer them a job.

g) The Applicant used the term 'greenskins' to refer to Ms Williams and Ms Heming in the context of applying for jobs at Workpac. 'Greenskin' is a commonly used term in the industry to refer to new workers without prior experience. It is possible that Ms Williams or Ms Heming misinterpreted this as a reference to them showing skin in a sexual manner."

[42] In relation to Allegation 3, the Applicant submitted that:

"*a) The Applicant never used the phrase 'Are yous that fucking useless and need 3 extra cleaners' or any similar phrase on 3 March 2024 or at other time.*

b) The Applicant did not talk to Ms Heming on 3 March 2024 and only had a brief conversation with Ms Williams about her father which was in the CHPP control room and not the crib room.

c) There were no cleaners in the crib room when the Applicant had his crib break on 3 March 2024."

[43] The Applicant submitted that he does not know what caused Ms Heming and Ms Williams to make false allegations about him. The Applicant submitted that it may have been retaliation for complaints made by fellow employees against the cleaners the previous week, they may have confused the Applicant with somebody else, or there may have been a desire to be moved to a different crew.

[44] The Applicant submitted that the Respondent was under pressure to complete the investigation and disciplinary process by 2 April 2024 which involved a much shorter process than usual, described by the investigator, Mr Ritchie, as a "*very condensed timeline*". The Applicant submitted that this timeline was contingent on not having to interview any other witness apart from the Applicant, Ms Heming and Ms Williams.

[45] The Applicant submitted that in the face of conflicting statements between the Applicant and the accusers and potential collusion between Ms Heming and Ms Williams, the Respondent did not take adequate steps to try to independently verify the disputed facts. The Applicant submitted that:

> "*a) Mr Ritchie was told by Ms Heming and Ms Williams that another male employee came to get the Applicant during the conversation on 2 March 2023 which prompted the Applicant to refer to them as 'dumb bitches'. It would have been easy for the Respondent to identify who other employee was given that there were only approximately 5 male employees on the Applicant's crew. However, the investigator did not seek to track down and interview this employee.*
>
> *b) Lynn Modrow was rostered to work in a team with Ms Heming and Ms Williams for the whole swing of shifts and had been working alongside them between 28 February to 1 March 2024. She was present during the conversation between the Applicant and Ms Heming and Ms Williams on 1 March 2024, but she was not contacted by the investigator to ask if she saw or heard anything*."

Comment did not constitute harassment

[46] The Applicant admitted to making a remark to the effect of "*Can you trust him? What happens in WA stays in WA*". However, the Applicant submitted that this statement did not constitute sexual harassment or a breach of the code of conduct.

[47] The Applicant submitted that in his termination letter, the Respondent alleged that his actions constituted 'serious breaches' of the Charter Values and the Code of Conduct. However, the Applicant submitted that the letter did not state what specific provisions of the Code of Conduct were alleged to have been breached. The Applicant submitted that the Charter Values and the Code of Conduct do not impose separate obligations from each other. Rather, the Code of Conduct states that it 'demonstrates how to practically apply our Charter Values'.

[48] The Applicant submitted that in relation to harassment and sexual harassment, the Code of Conduct States:

> "*Harassment is an action or behaviour that would be reasonably viewed as humiliating, intimidating or offensive.*

Sexual harassment is an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature, which may make a person feel offended, humiliated intimidated. It may include unwelcome touching, suggestive comments or jokes, insults of a sexual nature, non-consensual acts of a sexual nature, or sending sexually explicit emails or messages. The impact of the action or behaviour on the recipient, not just the intent, is considered when determining whether the action or behaviour is harassment."

(Applicant's emphasis)

[49] The Applicant submitted that in this definition both the intention of the accused and the impact of the behaviour must be considered. The Applicant submitted that he had no intention of humiliating, intimidating or offending Ms Williams or Ms Heming. The Applicant submitted that he made the comment "*as an ice-breaker style joke as a form of banter [that] is common at the Workplace*".

[50] The Applicant submitted that sexual harassment in the workplace is also prohibited by section 527D of the FW Act and by the Sex Discrimination Act 1984 (**SDA**). The Applicant submitted that both Acts take their definition of sexual harassment from section 28A of the SDA which states:

"*(1) A person sexually harasses another person if:*

a) they make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

b) they engage in other unwelcome conduct of a sexual nature in relation to the person harassed

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated."

(Applicant's emphasis)

[51] The Applicant submitted that he did not make a sexual advance or unwelcome request for sexual favours. Therefore, to constitute sexual harassment under both the Code of Conduct and the legislative definition, the Applicant's conduct must constitute "*unwelcome conduct of a sexual nature*". The Applicant submitted that his comment cannot be categorised as conduct of a sexual nature. The Applicant submitted that the phrase "*What happens in WA, stays in WA*" is a variation of the commonly used phrase "*What happens in Vegas stays in Vegas*" which is derived from an advertising campaign for the city of Las Vegas, Nevada from 2003. The Applicant submitted that there is no inherent association with sex in that saying. The Applicant submitted that in modern day usage the phrase has become "*a benign platitude*". The Applicant submitted that his use of the phrase was not, as the Respondent claims, a suggestion that Ms Heming's partner was sleeping with other people.

[52] The Applicant submitted that even if his comment was to be categorised as conduct of a sexual nature, the Code of Conduct and s28A definition impose a reasonable person test on whether a person would have anticipated the possibility that the person harassed would be offended, humiliated, or intimidated. The Applicant submitted that this is an objective test and must take into account the circumstances, including the context in which the comments were made. As to context, the Applicant submitted the following should be taken into account:

> "*a) The comments were made at a Coal Mine in Central Queensland where such banter is common.*
>
> *b) Ms Heming seemed to be happily chatting to the Applicant.*
>
> *c) The phrase is a common phrase that is used in a variety of situations.*
>
> *d) The Applicant did not explicitly mention sex or Ms Heming's partner sleeping with anyone and did not make any follow up comments about Ms Heming's partner.*
>
> *e) The Applicant did not make any other comments that could be construed as sexually suggestive during that conversation or at any other time.*
>
> *f) The Applicant went on to talk about his wife and her work as a cleaner after making the comment*."

[53] The Applicant submitted that in this context, a reasonable person would not have anticipated the possibility that the person would be offended, humiliated or intimidated by the comment.

[54] The Applicant submitted that, based on the above, even if Ms Heming and Ms Williams found the Applicant's comment distasteful, it cannot be categorised as harassment or sexual harassment.

<u>*Whether the person was notified of that reason and given an opportunity to respond*</u>

[55] The Applicant submitted that, as a large and complex organisation, the Respondent has established a multistage process when an employee has been accused of misconduct which can be summarised as follows:

> "*a) First, an investigation is undertaken by the Respondent's ethics point team to determine whether any, or all, of the allegations against the employee can be substantiated.*
>
> *b) The report summarising the investigation is then provided to the employee's line leaders to consider whether there has been a breach of the code of conduct or other procedures or policy and, if so, what the appropriate disciplinary outcome should be.*
>
> *c) If an employee is found to be guilty of misconduct that is not considered to be serious, a warning may be issued.*

> *d) However, if the line leaders of the employee consider that the conduct is serious enough to result in termination, then a written show cause letter is sent to the employee* ***and the employee is given 7 days to respond to the allegations in the letter and give reasons why their employment should not be terminated before a final decision is made.***"

(My emphasis)

[56] However, the Applicant submitted that on this occasion, the Respondent was under a strict deadline to complete any disciplinary process before 2 April when the Applicant's employment would transfer to Whitehaven. The Applicant submitted that, as a result, it cut corners in the process.

[57] The Applicant submitted that on 19 March 2024, the Respondent's employee relations specialist, Ms Kim Chan, warned the Applicant's Superintendent, Mr Adam Ryan, and the Production Coal Manager, Mr Wen Khong:

> "*even if all goes to plan and we receive the report by 26 March please note that it would still need to be considered by the you [Mr Khong] and Adam (the line leaders), and ER. If disciplinary action (not termination) is warranted (e.g. written warning, final written warning), we could possibly achieve this by 2 April 2024.* ***However, if a show cause process is warranted it may be a very tight timeframe to complete before 2 April 2024***."[4]

(My emphasis)

[58] The Applicant submitted that this email appears to be saying that the Respondent would not have time to conduct a show cause process before 2 April 2024. The Applicant submitted that the response from Mr Khong and Mr Ryan to manage this timeframe appears to have essentially been to cut out the show cause process, denying the Applicant the opportunity to be notified of the reasons for his termination or provide a considered response before a decision was made.

[59] The Applicant submitted that he was notified of the allegations that had been made against him on 24 March 2024 and participated in an interview with the Respondent's investigator on 25 March 2024. The Applicant submitted that when he participated in that interview, he had not been informed that he had breached the Code of Conduct or that his employment may be terminated. The Applicant submitted that he was under the impression that there had been some misunderstanding which would be clarified after he provided his version of events. Further, the Applicant submitted that he was only asked questions that were narrowly related to whether the alleged events took place, and not in relation to whether he should be dismissed in the circumstances.

[60] The Applicant submitted that neither Mr Ryan nor Mr Khong were present in this interview.

[61] The Applicant submitted that after receiving the investigation report, the Respondent apparently formed a view that he had breached its Code of Conduct. The Applicant submitted

that the Respondent also formed a view that the Applicant had lied during the investigation, failed to take responsibility for his actions and displayed a lack of integrity.

[62] The Applicant submitted that the appropriate course of action, as suggested by Ms Chan in her email of 19 March 2023, would have been for the Respondent to set out these 'charges' against the Applicant in a written show cause letter and allow him an opportunity to respond in writing. Instead, the Applicant submitted that the Respondent undertook a process of going through the motions of providing the Applicant with an opportunity to respond before terminating his employment even though a decision had clearly already been made.

[63] The Applicant submitted that on 28 May 2024, Mr Ryan organised a telephone meeting with the Applicant which lasted only 5-10 minutes. During that meeting, the Applicant was informed that the allegations against him had been substantiated and his employment would be terminated unless he could provide them with a reason why it shouldn't be. The Applicant submitted that he was shocked and distraught on hearing this news. **The Applicant submitted that he was put on the spot and not provided with sufficient opportunity to gather his thoughts and respond meaningfully to the reasons for dismissal.**

(My emphasis)

[64] The Applicant submitted that Mr Ryan reconvened the meeting just 30 minutes later and issued the Applicant with a letter of dismissal.

[65] The Applicant submitted that this 'cursory' meeting and almost immediate termination of his employment is evidence that the Respondent had already made a decision to terminate him before it notified him of the reasons for his dismissal and gave him an opportunity to respond. The Applicant submitted, therefore, the Commission should find that this meeting was a cursory attempt to give the appearance of a show cause opportunity without providing the Applicant with a genuine opportunity to respond to the reasons for termination.

Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal

[66] The Applicant submitted that he was not denied the opportunity to have a support person during the dismissal process.

If the dismissal related to unsatisfactory performance by the person - whether that person had been warned about that unsatisfactory performance before the dismissal

[67] The Applicant submitted that the dismissal did not relate to unsatisfactory performance.

The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal

[68] The Applicant submitted that the Respondent is a large and well-resourced employer with a dedicated employment relations team. Its size did not impact on the procedure followed in effecting the dismissal.

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

[69] The Applicant submitted that the Respondent employs dedicated human resource management specialists.

Any other matters

[70] The Applicant submitted that if the Commission decides that there was a valid reason for the termination, the termination was still unfair as the decision was harsh, unjust and unreasonable. The Applicant submitted that in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must consider and weigh each of the matters set out in paragraphs (a)-(h) of section 387. The Applicant cited the decision in *B, C and D v Australia Post (Australia Post)*,[5] in which the Full Bench Stated:

> "*Nevertheless, it remains a bedrock principle in unfair dismissal jurisprudence of the Commission that a dismissal may be "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" for the dismissal*".[6]

[71] The Applicant submitted that in the event the Commission determines that there was a valid reason for termination, there are a range of other matters to be taken into account, including:

> "*a) The Applicant is a long serving and loyal employee with almost 38 years of service. This can be contrasted with the abridged investigation and disciplinary process afforded to the Applicant.*
>
> *b) The Applicant has not had any previous misconduct, performance issues or other disciplinary action taken against him during his employment.*
>
> *c) In addition to ending his employment with the Respondent, the Applicant's dismissal has also prevented the Applicant from continuing to work at the Blackwater mine for Whitehaven where he had already been offered continuity of employment.*
>
> *d) The dismissal has had a harsh impact on the Applicant. The mining industry in Central Queensland is relatively insular and the Respondent is the major employer in the area. The dismissal of the applicant on the grounds of sexual harassment has damaged the Applicant's reputation and made it very difficult for the applicant to find other work. Combined with the Applicant's age of 59 years old, his lack of sight in one eye, and the fact that he has not worked for any employers other than the Respondent since being an apprentice, the dismissal is likely to spell the end of the Applicant's career and working life.*
>
> *e) The unfounded claims of sexual harassment and the circumstances of his dismissal after 38 years of employment have had a negative effect on the Applicant's mental health. It has led to depression, anxiety, and an inability to sleep properly.*

f) The Applicant is otherwise a dedicated, hard-working and valued employee of the Respondent. He has a good safety record and trained and mentored other employees. As a longstanding, valued employee the termination of the applicant's employment is disproportionate to any misconduct that he may have engaged in.

g) There were other disciplinary options open to the Respondent that were not considered. The Applicant was permitted to remain in the workplace for almost 3 weeks between the ethics point complaint being made on or about 3 March 2024 and the date that he was stood down on 22 March 2024. He worked without incident, and Ms Williams and Ms Heming were moved to a different crew. There is no reason that this arrangement could not have continued following a warning to the Applicant about his conduct."

Remedy

[72] The Applicant submitted that the Commission should find that his dismissal was harsh, unjust and unreasonable, and therefore make the following orders pursuant to s391 and s392 of the FW Act:

"*a) Reinstatement to a position with terms and conditions no less favourable than those on which the Applicant was employed immediately before his dismissal. The Applicant's former position at the Blackwater Mine has now transferred to Whitehaven Coal. However, the Respondent has equivalent positions at its Peak Downs, Saraji and Goonyella Riverside Mines.*

b) That the applicant be compensated for any lost wages and maintain his continuity of service."

[73] The Applicant submitted that if the Commission makes a finding that the reason for termination was not a 'valid reason', it stands to reason that there could not have been a destruction of the relationship of trust and confidence between the parties and there would still be sufficient trust to make the relationship viable and productive. Any difficulty, embarrassment or inconvenience on behalf of the respondent regarding their previously erroneous view about the applicant's actions, should not be such that these problems could not be overcome. This is especially so given that the decision makers in relation to the Applicant's dismissal no longer work for the Respondent as their employment has transferred to Whitehaven.

[74] Further, the Applicant submitted that even if there was a valid reason to be found, his history of employment at the mine shows him to be a competent, safe and loyal employee for almost 38 years. The Applicant submitted that he has had no safety or performance issues or misconduct in that time and he is fit to perform his role as a coal mine operator.

[75] The Applicant submitted that Ms Heming and Ms Williams continue working at the Blackwater mine which is no longer operated by the Respondent. The Applicant submitted that if he were reinstated to one of the Respondent's other mines, he would not be working near Ms Heming or Ms Williams and there would be no risk of future interpersonal issues.

[76] The Applicant submitted that if the Commission considers that reinstatement is inappropriate, then pursuant to s.390(3)(b) of the FW Act, in lieu of reinstatement, an order for compensation may be considered by the Commission. In respect of the amount of compensation, the Applicant submitted as follows:

> "*c) the Applicant's age of 59 years at the date of his dismissal;*
>
> *d) the length of the Applicant's service of almost 38 years with the Respondent;*
>
> *e) The absence of any previous conduct or performance issues;*
>
> *f) the Applicant's desire to continue working for the Respondent until retirement;*
>
> *the likelihood that the Applicant would have continued in employment with the Respondent for at least another 7 years was very high*."
>
> (Paragraph numbering as it appears in the Applicant's Submissions)

[77] The Applicant submitted that, having regard to s.392(2)(a) to (g) of the FW Act:

> "*(a) making an order for the Respondent to pay the Applicant an amount of compensation would not have any effect on the viability of the Respondent's enterprise;*
>
> *(b) the Applicant had a length of service of almost 38 years with the Respondent;*
>
> *(c) the Applicant, would have received at least another 7 years remuneration with the Respondent. His salary at the time of termination was $164,982 plus a guaranteed $15,000 per annum bonus paid weekly and a trainer assessor allowance of $100 per week ($5,200 per annum);*
>
> *(d) the Applicant has been unable to look for other work due to the impacts of the dismissal on his mental health. He has suffered from depression, anxiety and has had trouble sleeping. The applicant has taken steps to mitigate his loss and enable his return to work by seeking medical treatment from Dr Madoc Schlencker and his psychiatrist Dr Pranod Menon;*
>
> *(e) The Applicant received 5 weeks' pay in lieu of notice on or about 28 March 2024. He has not earned any other income since his dismissal;*
>
> *(f) The Applicant is unlikely to earn any other income between the making of an order for compensation and the actual compensation;*
>
> *the appropriate compensation for the Applicant would be an amount that exceeds the statutory cap in s392(5) of the Act*."

[78] The Applicant submitted that, applying the statutory cap, he should receive the equivalent of 26 weeks' pay in compensation at the Applicant's full rate of pay before

termination. The Applicant submitted that the amount that would otherwise be ordered to be paid to the Applicant should not be reduced by any amount pursuant to s.392(3) of the FW Act.

Respondent's Submissions

[79] The Respondent submitted that the Applicant's dismissal was not 'harsh, unjust or unreasonable' pursuant to s. 385(b) of the FW Act, and therefore that the Application must be dismissed.

<u>*Valid Reason*</u>

[80] The Respondent submitted that a 'note' to s. 387 of the FW Act provides (in short summary) that sexual harassment in connection with a person's employment can amount to a valid reason for dismissal. The Respondent submitted that note is also consistent with regulation 1.07 of the *Fair Work Regulations 2009* (Cth), which provides that serious misconduct includes sexual harassment.

[81] The Respondent submitted that its evidence confirms that:

> "*(a) a complaint was made by two complainants on or about 4 March 2024 and entered into EthicsPoint, the Respondent's complaint management system;*
>
> *(b) the complaint was referred for investigation, and Mr Patrick Ritchie was subsequently engaged to perform the investigation;*
>
> *(c) as a result of the complaint, the two impacted persons were relocated to a different work area in order to avoid further contact with the Applicant;*
>
> *(d) due to the seriousness with which the Respondent viewed the alleged conduct, consideration was given by Mr Ryan to suspension of the Applicant, however he was instructed to wait until the allegations had been assessed and therefore this did not occur until 22 March 2024;*
>
> *(e) the matter was investigated, and the Applicant participated in an interview with the investigator for that purpose on 25 March 2024; and*
>
> *(f) each of the three allegations was substantiated*."

[82] The Respondent submitted that, consistent with s.387 of the FW Act, substantiated allegations of sexual harassment are well accepted to constitute a valid reason for dismissal.

[83] The Respondent submitted that, while the Applicant maintains that he did not engage in sexual harassment, it is relevant to note that a fair and independent investigation substantiated both the facts as alleged and that those facts amount to sexual harassment in respect of the first and second allegations and harassment in relation to the third allegation, and, in the Respondent's submission, the Respondent is entitled to rely upon the findings of that investigation. Accordingly, the Respondent submitted that it had a valid reason for the termination of the Applicant's employment.

[84] The Respondent noted the observations of the Full Bench of Fair Work Australia (as it was then known) in *Parmalat Products Pty Ltd v Wililo* (*Parmalat*):[7]

> "*The finding of a valid reason is a very important consideration in establishing the fairness of a termination. Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open*."[8]

Allegation 1

[85] The Respondent submitted that when the evidence is examined, on the Applicant's own version of events he:

> "*(a) asked the two complainants whether they had partners, an unnecessarily personal question;*
>
> *(b) said, in response to the answer that one complainant had a partner working in rigging in WA: "can you trust him? What happens in WA stays in WA";*
>
> *(c) meant that phrase as a play on the words "what happens in Vegas, stays in Vegas"*."

[86] Further, the Respondent submitted that the complainant alleged, and Mr Ritchie accepted, that the Applicant said:

> "*(a) "can you be trusted out here?"; and*
>
> *(b) with reference to the complainant's partner, "he is probably doing things that you don't like"*."

[87] The Respondent submitted that the Commission "*may take judicial notice of the fact that the phrase "what happens in Vegas, stays in Vegas" is a well-known trope implying that what happens whilst you are in Las Vegas does not have any consequences*." The Respondent submitted that remark, combined with the words "can you trust him?" carries a clear implication that the complainant's partner may be engaging in sexual conduct of which she would not approve. The Respondent submitted that is certainly how the complainant interpreted the remarks, and that interpretation was also corroborated by the second complainant.

[88] The Respondent submitted it is not to the point that the Applicant now says that he did not intend the remark to have sexual connotations. In that regard, the Respondent cited the remarks of McCallum JA in *Vitality Works Australia Pty Ltd v Yelda (No 2)* (*Yelda*):[9]

> "*Innuendo, insinuation, implication, overtone, undertone, horseplay, a hint, a wink or a nod; these are all devices capable of being deployed to sexualise conduct in ways that may be unwelcome. ... In the nature of things, sexual implication is perhaps the most powerful of all. The suggestion that conduct cannot amount to sexual harassment unless it is sexually explicit overlooks the infinite subtlety of human interaction and the*

historical forces that have shaped the subordinate place of women in the workplace for centuries. The scope of the term "conduct of a sexual nature"…is properly construed with an understanding of those matters.'"[10]

[89] The Respondent submitted further that, whether it is capable of being regarded as offensive, humiliating or intimidating is an objective test.[11] The Respondent submitted that the Commission has found that the fact that the target of sexual harassment may respond stoically does not mean that the conduct somehow ceases to be harassment.[12]

[90] The Respondent submitted that, relevantly:

"*(a) the two complainants both agree on the version of events, and the version provided to the investigator in interview was consistent with the notes that they made on 3 March 2024;*

(b) the investigator preferred their version of events over that of the Applicant; and

(c) the Respondent is entitled to rely upon the finding of the investigator."

[91] Further, the Respondent submitted that it is inherently unlikely that two individuals, virtually unknown to the Applicant, would concoct such a story within a short period of meeting him. The Respondent submitted that inherent unlikelihood must count against the Applicant's assertion that the conduct did not occur.

Allegation 2

[92] The Respondent submitted that, as to Allegation 2, the Applicant denies that the incident occurred at all. However, the Respondent submitted that on his own version of events, he did:

"*(a) ask the complainants how old they are and how much they earn;*

(b) told them they may be able to get a traineeship, or at least Ms Williams may be able to; and

(c) told them to speak to 'Marty' and 'Tracy' about it."

[93] The Respondent submitted that while the Applicant denies that this conversation occurred on 2 March 2024, when it occurred is not to the point. The Respondent submitted that the facts, as reported by the Applicant, do align with those reported by the two complainants, aside from the date.

[94] The Respondent submitted that while the Applicant denies that he told the complainants to use their bodies, or that he refers to them as "*young bitches*", the Respondent noted again that:

"*(a) the two complainants both agree on the version of events, and the version provided to the investigator in interview was consistent with the notes that they made on 4 March 2024;*

(b) the investigator preferred their version of events over that of the Applicant; and

(c) the Respondent is entitled to rely upon the finding of the investigator."

[95] The Respondent submitted again that sexual harassment is an objective test. The Respondent submitted that the statement that the complainants could "*show their bodies off*" to "*provoke*" a male supervisor into giving them a job is capable of amounting to "*unwelcome conduct of a sexual nature in relation to the person harassed*".[13]

Allegation 3

[96] The Respondent submitted that, as to allegation 3, the Applicant denies that the incident occurred at all. However, the Respondent again noted that:

"*(a) the two complainants both agree on the version of events, and the version provided to the investigator in interview was consistent with the notes that they made on 3 March 2024;*

(b) the investigator preferred their version of events over that of the Applicant; and

(c) the Respondent is entitled to rely upon the finding of the investigator."

<u>Notification of the reason and opportunity to respond</u>

[97] The Respondent submitted that 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.[14] The Respondent submitted that 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.[15]

[98] The Respondent submitted that its evidence is that on 28 March 2024, the Applicant met with Mr Adam Ryan. In that meeting, Mr Ryan:

"*(a) communicated the findings of the investigation;*

(b) advised the Applicant that, as a result of the findings, the Respondent was considering terminating the Applicant's employment;

(c) invited the Applicant to respond; and

(d) listened to the Applicant's remarks."

[99] The Respondent submitted that this occurred prior to the decision to terminate employment being made, in satisfaction of the requirement of the FW Act.[16]

[100] The Respondent submitted that the Applicant took the opportunity to communicate his position in respect of the termination of employment by:

> "*(a) continuing to maintain that the conduct was not sexual in nature, or did not happen; and*
>
> *(b) referring to his long employment at the Blackwater mine*."

[101] The Respondent submitted that Mr Ryan considered those matters but regarded them as inadequate to provide a justification for his behaviour or why his employment should not be terminated. The Respondent submitted, accordingly, Mr Ryan determined that the outcome of termination of employment remained appropriate and effected the termination in a subsequent meeting with the Applicant. The Respondent submitted that this was communicated to the Applicant in writing on the same day.

[102] The Respondent submitted that the Applicant was afforded an adequate opportunity to respond to the reason for the decision before that decision was finally made and communicated.

[103] The Respondent submitted that the Applicant was treated fairly in this process.

<u>*Support person*</u>

[104] The Respondent submitted that the Applicant had a union support person, Mr Greg Donohue, present at his meeting with Mr Ritchie, and again at both of the meetings with Mr Ryan on 28 March 2024.

<u>*Other relevant matters*</u>

[105] The Respondent submitted that the Commission should take into account both the serious nature of sexual harassment misconduct and the Applicant's lack of insight or accountability for his engaging in such conduct. In this regard, the Respondent submitted that the observations of the Full Bench in *Parmalat* are apposite. The Respondent submitted that the Applicant's misconduct was serious and it is incumbent upon employers to take action to stamp out such conduct. The Respondent submitted that the conduct goes to the heart of the trust and confidence that the Respondent could have in the Applicant to behave in accordance with the expected norms within the workplace.

[106] The Respondent submitted that its action is also consistent with compliance with its positive duty to prevent or eliminate workplace sexual harassment, sex discrimination and sex-based harassment under the SDA.

[107] The Respondent submitted that, while length of service is of course a factor which goes to the harshness of a dismissal, in this case, the seriousness of the misconduct and the fair process provided to the Applicant outweighs these considerations and is a factor weighing against the Applicant. The Respondent submitted that the Applicant's length of service means that the Applicant should have been well aware of the requirements of the Respondent's Code

of Conduct (in which he was most recently trained on 29 September 2022) and the potential consequences of sexual harassment within the workplace.

[108] The Respondent submitted that even if the Applicant had not completed recent training in the Code of Conduct, the Commission has accepted that an employee should not have to be told to treat their co-workers with civility.

<u>*Remedy*</u>

Reinstatement

[109] The Respondent submitted that it follows from the above submissions that the Applicant was not unfairly dismissed, and no remedies should be awarded. However, the Respondent submitted that if it is found that the dismissal was unfair, the following submissions should be taken into account in respect of remedy.

[110] The Respondent submitted that s.390 of the FW Act provides that compensation must not be ordered unless the Commission is satisfied that reinstatement is inappropriate and the Commission considers compensation is appropriate in all the circumstances of the case.

[111] The Respondent submitted that it would be inappropriate for the Commission to order reinstatement because:

> "*(a) the Blackwater Mine is no longer operated by the Respondent, and accordingly there is no appropriate role for the Applicant to be reinstated to; and*
>
> *(b) in any event, it is uncontroversial that "trust and confidence is a necessary ingredient in any employment relationship*."

[112] The Respondent submitted that it is relevant to consider that between the serious nature of the Applicant's misconduct and his complete failure to acknowledge the seriousness of that conduct this has resulted in an irretrievable breakdown in the necessary relationship of trust and confidence.

[113] Further, the Respondent submitted that in light of the serious nature of the misconduct engaged in and the fair process followed in the investigation and subsequent decision to terminate employment, compensation would be inappropriate.

[114] The Respondent submitted that, alternatively, even if compensation were ordered, s.390(3) of the FW Act provides:

> "*If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct*."

[115] Accordingly, the Respondent submitted that in light of the serious nature of the Applicant's conduct leading to the dismissal, if compensation were ordered, it must be substantially reduced in accordance with s.390(3).

Conclusion and orders sought

[116] The Respondent submitted that for all of the above reasons, the Commission should determine that the dismissal of the Applicant was not unfair and dismiss his application.

Applicant's Submissions in Reply

Valid Reason

[117] The Applicant submitted that the Respondent has asserted that it considered that the conduct of the Applicant was so serious that the Applicant should be suspended from duty. The Applicant submitted that the allegations were made against him on or about 4 March 2024, yet he was permitted to continue working for two and a half weeks until 22 March 2024 when he was stood down. The Applicant submitted that the Respondent has claimed this was due to the need to assess the allegations, yet the Respondent has not provided any evidence of any action it took to investigate the allegations until at least 19 March 2024.

[118] The Applicant submitted that the Respondent clearly did not consider, at the time the allegations were made, that the alleged actions of the Applicant were so serious that he presented an ongoing risk that required immediate action to remove him from the workplace.

[119] The Applicant maintained that he did not make any of the alleged comments other than the "*what happens in WA, stays in WA*" comment and that the allegations made by Ms Williams and Ms Heming involve a fabrication or embellishment of events.

[120] The Applicant submitted that where there are differences in the evidence of the Applicant and the Respondent, the evidence of the Applicant should be preferred. The Applicant submitted that his account of his interactions with Ms Heming and Ms Williams has been consistent throughout the investigation. However, the Applicant submitted that there have been inconsistencies in the evidence provided by Ms Heming and Ms Williams.

[121] The Applicant submitted that the Respondent has pointed to the fact that the two complainants both agree on the version of events that they have presented. However, the Applicant submitted that such a consistency in the stories could equally be evidence of collusion between the complainants. The Applicant submitted that Ms Williams has admitted that her and Ms Heming discussed the allegations before making their complaints.

[122] The Applicant submitted that the Respondent also submits that it is entitled to rely on the findings of what it claims was a 'fair and independent investigation'. However, the Applicant submitted that the investigation was neither independent nor fair because:

> "*a. The investigation was conducted internally by an employee of the respondent.*
>
> *b. The investigator discussed and sought comments on his 'draft' findings with members of the Respondent's human resources department before finalising the investigation report.*

c. After 2 weeks of inaction by the respondent, the investigation was rushed on a 'very condensed timeline'.

d. Presented with two very different versions of events, the Respondent did not take reasonable steps to independently verify the allegations made by Ms Williams and Ms Heming:

i. The Respondent was made aware of an alleged witness in relation to Allegation 2 by Ms Heming but did not make any substantial attempt to identify or contact the alleged witness to verify this account despite the Applicant stating that the alleged incident did not happen. Ms Williams also identified the same witness, but the investigator later noted that Ms Williams 'did not identify any relevant witnesses'.

ii. Ms Heming alleged that the Allegation 2 incident commenced in the control room. The Respondent would have known that the control room is always occupied but did not try to find out who was rostered to work in the control room and contact them as a potential witness."

Notification of the reason and opportunity to respond

[123] The Applicant submitted that the Respondent has argued that it provided the Applicant with a full opportunity to respond to the reasons for his termination because it communicated the findings of the investigation, advised him that it was considering terminating his employment, invited him to respond, and listened to his remarks.

[124] However, the Applicant submitted that it is open to the Commission to find that this process was confected to give the illusion of procedural fairness without conducting the process in a time and manner that provided a genuine opportunity to for the Applicant to respond to the allegations.

[125] The Applicant submitted the evidence shows that:

"*a. The entire process described by the Respondent at paragraph [28] of its submissions lasted only 5-10 minutes.*

b. The Applicant was in shock on hearing, for the first time, that his employment may be terminated after 38 years of service. He was not in a mental state to provide a considered response during the meeting.

c. If the Applicant was given more time to consider his response, he would have sought legal and industrial assistance from his union and requested the ability to submit a written response. As the meeting occurred at 2:30pm on the Thursday before the Easter long weekend, the Applicant would not have been able to receive this advice until the following week.

d. The Respondent was under a strict deadline to finalise the disciplinary process on 28 March 2024 because its employment relations team was not working over the long

weekend and its divestment to Whitehaven Coal was occurring on Tuesday 2 April. It therefore had no capacity to allow the Applicant to seek further advice, or to investigate any further matters that may have been raised by the Applicant.

e. The Respondent cannot rely on the looming divestment date as a justification for the abridged process, given that the Respondent took no action for the first two and a half weeks after receiving the allegations about the Applicant."

[126] The Applicant submitted that the Respondent claims that the above process occurred prior to a decision to terminate being made. The Applicant submitted that the evidence shows that a decision had in fact already been made before this process occurred because:

"*a. Adam Ryan, who was conducting the process for the Respondent had already sought and received permission to terminate the Applicant on the basis of the allegations before the meeting occurred.*

b. Mr Ryan had been provided with a script to follow during the meeting. Although the script stated that any new information should be considered, it had already pre-empted the Applicant's response and it did not provide any genuine time to consider any matter that required following up. The script required that the meeting be reconvened in 30 minutes and the section about how to terminate an employee had already been highlighted.

c. The Respondent had no capacity to prolong the consideration process beyond 28 March 2024 if the Applicant raised any issue that required further action."

<u>Other relevant matters</u>

[127] The Applicant submitted that the Respondent has referred to the Applicant's lack of insight and accountability as relevant matters to be taken into account by the Commission. The Applicant submitted that this argument should not be accepted. The Applicant submitted that he has been fully accountable in relation to the one instance of alleged conduct that occurred. In relation to the other allegations, the Applicant submitted that he merely pointed out that the conduct did not occur. The Applicant submitted that he has never stated that he considered that the conduct in Allegations 2 and 3 was acceptable, he has specifically acknowledged this conduct would have been inappropriate if it did occur.

[128] The Applicant submitted that while he maintains that the allegations should never have been substantiated given that the conduct did not occur, even if the Commission accepts that the Respondent was entitled to adopt the findings of Mr Ritchie, termination of employment was not the only, or most appropriate option available to the Respondent.

[129] The Applicant submitted that he had worked for the Respondent for 38 years. He worked "*in a crew that was 50% women*" and he had never had any previous complaints made about him, nor had he ever been warned to change his behaviour. The Applicant submitted that the Respondent had no reason to believe that the Applicant could not have learned to improve his behaviour and conduct if he was given a formal warning.

[130] The Applicant submitted the fact that he was permitted to continue working in the CHPP and did so without further issue for another 2 and a half weeks, shows that there had not been a breakdown of trust and confidence, and that the Applicant could safely continue his employment without further incident.

Reinstatement

[131] The Applicant submitted that the Respondent has claimed that it would be inappropriate to reinstate the Applicant because Blackwater Mine is no longer operated by the Respondent, and accordingly there is no role to which the Applicant could be reinstated. However, the Applicant submitted that the Respondent conducted its operations across 4 mines in the Bowen Basin – Goonyella Riverside, Peak Downs, Saraji and Blackwater. Employees at all 4 of these mines were covered by the same BMA Enterprise Agreement 2022. The Applicant submitted that the Goonyella Riverside, Peak Downs and Saraji Mines all have CHPPs where the Applicant could be reinstated to an equivalent position given that the Blackwater Mine is no longer operated by the Respondent.

Consideration

[132] I have taken into account all of the submissions that have been provided by the parties and I have attached the appropriate weight to the evidence of the witnesses.

[133] It is not in dispute, and I find, that the Applicant is protected from unfair dismissal, submitted his application within the statutory timeframe, was not made genuinely redundant and did not work for a Small Business.

[134] When considering whether a termination of an employee was harsh, unjust or unreasonable, the oft-quoted joint judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines* (*Byrne*)[17] is of significance:

> "*It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted*."

[135] In analysing *Byrne*, a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan* (*AMH*)[18] held:

> "*The above extract is authority for the proposition that a termination of employment may be:*
>
> - *unjust, because the employee was not guilty of the misconduct on which the employer acted;*

- *unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or*
- *harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct*".

[136] Further, a Full Bench of the AIRC in *King v Freshmore (Vic) Pty Ltd*[19] said:

> "*[24] 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*".

.

[137] I now turn to the criteria for considering harshness as provided in s.387 of the FW Act.

Section 387(a) - Valid Reason

[138] The meaning of the phrase "valid reason" has been universally drawn from the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*:[20]

> "*In broad terms, the right is limited to cases where the employer is able to satisfy the Court of a valid reason or valid reasons for terminating the employment connected with the employee's capacity or performance or based on the operational requirements of the employer. …*
>
> *In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly…*".

[139] In *Rode v Burwood Mitsubishi*,[21] a Full Bench of the Australian Industrial Relations Commission held:

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

[140] In *Qantas Airways Ltd v Cornwall* (*Cornwall*)[22] the Full Court of the Federal Court of Australia said:

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

(My emphasis)

[141] The legal meaning of "sexually harass" is found in section 28A of the *Sex Discrimination Act 1984*. This section provides as follows:

"(1) For the purposes of this Act, a person sexually harasses another person (the person harassed) if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
(c) any disability of the person harassed;
(d) any other relevant circumstance.

(2) In this section:

"conduct of a sexual nature" includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing."

(My emphasis)

[142] In *Hughes trading as Beesley and Hughes Lawyers v Hill*,[23] the Full Court of the Federal Court of Australia observed that there are essentially three elements of unlawful sexual harassment for the purposes of section 28A. These are summarised below:

1. **The first task is to decide whether there has been** any sexual advance, request for sexual favours, or other **conduct of a sexual nature** (as defined in section 28A(2) of

the Sex Discrimination Act 1984). This is a question of fact for the Court to decide for itself.

2. **If there has been relevant conduct of a sexual nature, the Court must then decide if the conduct was unwelcome to the person allegedly harassed. This is a question of subjective fact, which turns only on the attitude of the person to the conduct at the time; their actual state of mind.** Conduct will not be sexual harassment if it was not actually unwelcome in this sense. Ordinarily this will be proved by the recipient of the conduct giving evidence that the conduct was unwelcome, although this evidence may be available by a variety of means and in some cases the unwelcome quality of the conduct may be painfully obvious.

3. Once it is established that there was unwelcome conduct of a sexual nature towards another, an objective limit is applied to the scope of section 28A. This objective standard does not relate to the first two issues (whether conduct of a sexual nature occurred, or whether it was unwelcome). **The 'circumstances', which are defined broadly but not exhaustively in s.28A(1A), must be such that a reasonable person would have anticipated the possibility that the person allegedly harassed would be offended, humiliated or intimidated by the conduct.** The reasonable person is assumed to have some knowledge of the personal qualities of the person harassed, and the extent of their knowledge is a function of the circumstances in s.28A(1A) that must be taken into account.[24]

(My emphasis)

[143] In *Swift v Highland Pine Products Pty Ltd* (*Swift*),[25] Commissioner McKinnon relevantly stated:

"*[68]* ***Sexual harassment is conduct of the kind that will ordinarily justify dismissal. Not only is it unlawful under section 28B of the Sex Discrimination Act 1984 and inconsistent with the duties of employers and employees under workplace health and safety legislation, it is destructive of the necessary confidence between an employer and an employee.*** *In many cases, it is also likely to be inconsistent with an express direction from the employer to treat other employees with respect and to not engage in sexual harassment, for example in a contract of employment or workplace policy. Further, employers have a positive duty to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sexual harassment by their employees. This duty applied to Highland Pines at the time of Mr Swift's dismissal.*

…

[70] ***The intention of a person who engages in sexual harassment is irrelevant to the question of whether their conduct was unwelcome, or objectively offensive, humiliating or intimidating.*** *Just as irrelevant is the response that one's conduct was not unwelcome to others, or has been an accepted feature of the workplace in the past. Even if those propositions can be established, they do not go to the question of whether certain conduct of a sexual nature was unwelcome to the persons to whom it was directed. Those are matters of subjective fact, personal to the individuals in question. One cannot know how a person will respond to conduct of a sexual nature, and there is no common or ordinary response to conduct that for many is an intensely private and*

personal matter. Nor can one assume that when a person responds to conduct of a sexual nature, they are consenting to their participation. Equally possible is what happened in this case, where the response of the employees concerned was to find ways to avoid or limit their involvement in a way that did not put them at further risk."

(My emphasis)

Allegation 1

[144] The evidence of Ms Modrow is that the Applicant is a friendly, polite and respectful person and that he said to Ms Heming "*Can you trust him? What happens in WA stays in WA*." Ms Modrow was not required for cross-examination. As a result, Ms Modrow's evidence is unchallenged.

[145] Regarding the unchallenged evidence of Ms Modrow, I note that in the Full Bench decision of *INPEX Australia Pty Ltd v The Australian Workers' Union*,[26] it was stated that:-

"*[29] The Commission is not a court. It is not bound by the rules of evidence.6 It is required to perform its functions and exercise its powers in a manner that is quick, informal and avoids unnecessary technicalities.7 But when the Commission makes a finding of fact, it must proceed by reference to rationally probative material. 8 That material may include, inter alia, evidence or, in an appropriate case, submissions.* ***For example, it may be appropriate for a finding of fact to be made on the basis of an unchallenged submission made by one party, particularly when the other party is legally represented***."

(My emphasis)

[146] Further, a Full Court of the Federal Court of Australia stated in *Ashby v Slipper*[27] that:-

"*The second aspect, critical to this appeal, relates to the weight or cogency of the evidence: that is, as a general proposition,* ***evidence, which is not inherently incredible and which is unchallenged, ought to be accepted:*** *Precision Plastics Pty Limited v Demir [1975] HCA 27; (1975) 132 CLR 362 at 370-371 (per Gibbs J, Stephen J agreeing, Murphy J generally agreeing).* ***The evidence may of course be rejected if it is contradicted by facts otherwise established by the evidence or the particular circumstances point to its rejection***."

(My emphasis)

[147] The Respondent had the opportunity to cross-examine Ms Modrow on her evidence but declined. As a result, I am satisfied and find that the comments "*can you trust him?*" and "*what happens in WA, stays in WA*" were the only comments made by the Applicant to Ms Heming about infidelity. I have taken this into account.

[148] Ms Heming stated that she was offended by these comments on the basis that they were sexual in nature and inferred that her partner would have sex with somebody else while he was away from home. Whilst I accept that the comment made by the Applicant is a play on words

where the state of WA has replaced 'Vegas', I do not accept that these comments were intended to relate to the gambling activities which are prolifically undertaken in Las Vegas.

[149] I do not accept the Applicant's non-explanation of the meaning of the phrase "*what happens in WA, stays in WA*". The phrase has a meaning. It is widely understood in the community. It basically means that you allegedly get a "*leave pass*" or an "*exemption*" to play up in whatever capacity you decide whilst staying in Vegas. It is a joke. I don't believe anyone would take offence to that comment. In this circumstance, however, the Applicant also asked whether Ms Heming could trust her partner. I am satisfied and find that the issue of "*trust*" stated by the Applicant related to sexual infidelity. I accept that he may have simply been trying to be funny, but it was a totally inappropriate comment to make to a young woman whom he had only met a few minutes earlier. Ms Heming was offended. I can understand why. I have taken this into account.

[150] I do not regard the Applicant as being some kind of sexual predator who made these comments for his own personal gratification or to encourage any level of sexual activity between himself and Ms Heming. The comment was silly and offensive, which brought into question the strength and standards of the relationship between Ms Heming and her partner. The Applicant had no right to make such a comment and whilst I accept that he did not intend for it to be offensive, I am satisfied that Ms Heming was offended by the comment. As a result, I am satisfied that the definition of sexual harassment as identified above in the Respondent's Code of Conduct, the FW Act and the Sex Discrimination Act has been satisfied.

Allegation 2

[151] The first component of Allegation 2 is that the Applicant suggested that the complainants "*show off*" their bodies to a male superintendent in an attempt to gain employment. In her complaint lodged on 3 March 2024, Ms Heming claimed:-

> "*Roy proceeded with the conversation saying "You could also talk to the male supervisor, yous would probably have more a chance getting a job with him than with her as you are young females and yous can show your body more and provoke him" myself and Gemma immediately felt uncomfortable and said we better get back to cleaning…*"

[152] Ms Williams wrote in her note book the following entry for 2 March 2024:-

> "*Saturday 2nd march*
> **was talking about a job opportunity (roy) goes show you're* (sic) *body off and provoke him and he will give you the job as they hire females…*"

[153] In her complaint lodged on 3 March 2024, Ms Williams wrote:-

> "*Saturday 2nd of March. Pm*
>
> *(roy) approached Gemmah and I and was talking about job opportunities and to try and get into the dump trucks he pointed down the corridor and said to speak to the lady their* (sic) *he mentioned that Gemmah and I are better to talk to the man saying we would have better luck with him as we are females*

(roy) goes when you's do show you're (sic) body more and provoke him…"

[154] I note the slight differences in the recollection of the complainants. Whilst I acknowledge that the complainants talked about their conversations that they had with the Applicant and the filing of their complaints, they are sufficiently different to show that they have not been copied.

[155] Further, Mr Ritchie's interview notes are also relevant on the issue. In relation to Ms Heming he recorded:-

"*…We said well this is not a forever job. It's a foot in the door to something else. He pointed don* (sic) *the hall way you should go see this chick she will give you a job on the dump trucks. He said oh no, maybe you're better off to se* (sic) *this guy, you are young females and you could use your body to provoke him*

Your response?

- *I was quite shocked. I looked at Gemma. I didn't have anything to say. Big shock.*

How did it make you feel?

- *Very uncomfortable, disgusted that he would think we might try doing that.*

Was it a sexualised comment?

- *Yes definitely. As he was saying it to us, we were standing there and he looked us up and down, raised his eye brows, you know your* (sic) *young females, you can use your body to provoke him.*

It made you feel disgusted?

- *Yes. Makes me feel I can't go to a male supervisor and ask for a job without them thinking that. It put that thought in my mind. A male supervisor would only consider us because we were female and we would give them something.*

Sexual favours?

- *Yep. Roy was saying we could give sexual favours to a supervisor to get a job.*
- *Gemma went into the control room and started sweeping. Roy walked into room I was in. someone came into the hall asking for him.*"

[156] In relation to Ms Williams, Mr Ritchie's notes state:-

"… Roy approached us… He said… If you want a job in operating you should talk to the supervisor. There is a lady down there the hallway and you could, but you are probably better off talking to the male supervisor, and pointed down the corridor. Gemma said

why? Roy said he is easy going and you could show your bodies off to him and provoke him.

…

What did he mean when he said you could show your bodies off to him and provoke him?

He was saying bring more attention to your bodies and provoke him to get a job.

Provoke him mean?

Lead him on, flirt with him to get a job in operating.

How did that make you feel?

Not good, I wanted to go home, very uncomfortable, it was rude."

[157] Whilst the Applicant has denied making these comments, I am satisfied and find, based on the evidence of the complainants, that this part of the conversation occurred. Whether it transpired on the 1st or 2nd of March is not relevant. The only relevant factor is that the Applicant suggested to these two young females that they should act provocatively towards a male superintendent in order to get a job with BHP. The complainants felt a variety of justifiable emotions as a result of this comment, namely, disgusted, uncomfortable and objectified. To suggest to any female that they will get a job if they "show some skin" is demeaning and outrageous. This conduct was totally unacceptable and a breach of the Respondent's Code of Conduct, the FW Act and the Sex Discrimination Act. I have taken this into account.

[158] In relation to the other components of Allegation 2, I was surprised that Mr Ritchie did not attempt to ascertain the identity of the witness to the alleged conversation. On 2 March 2024, the Applicant is alleged to have said "*sorry, I am coming, I was talking to these young girls…I won't say what I was thinking though…talking to these young bitches*". Ms Heming and Ms Williams both put into their complaints that a colleague of the Applicant heard those comments. Ms Heming testified that this employee rolled his eyes upon hearing the Applicant's comment. The Applicant has denied this interaction. It beggars belief that any investigator who was aware of a witness to this alleged interaction would not attempt to identify and interview this employee. Mr Ritchie should have required the production of photos of all nine employees who worked in the CHPP on that day to be shown to the two complainants in an attempt to identify the witness (who allegedly had brown hair). This witness could have corroborated or refuted the claims made by Ms Williams and Ms Heming. I have taken this into account.

Allegation 3

[159] In relation to Allegation 3, it was acknowledged that swearing is commonplace within the Respondent's place of work. If the swear word is removed from the alleged comment, then it takes away a significant level of criticism of the cleaners. I do not accept that the comment of "*fucking useless*" was aimed directly at Ms Heming, nor could it be construed to be directed at Ms Heming. The use of the word "*yous*" refers to a collective of individuals. This comment

needs to be read in the context of the comments made by the Applicant over the previous two days in relation to the work ethic of the contract cleaners. As a result, I am satisfied and find that Ms Heming was not harassed on Sunday, 3 March 2024.

Conclusion

[160] Based on the obiter in *Yelda* and *Swift,* and my findings in relation to Allegation 1 and Allegation 2, I am satisfied and find that the Applicant's conduct was of a sexual nature which was unwelcome by both Heming and Ms Williams. As a result, I find that the Applicant has sexually harassed the complainants and that the Respondent had a valid reason to terminate the Applicant.

Section 387(b) - Notified of the Reason

[161] The Applicant was notified of the reasons for his dismissal during a meeting on 28 March 2024. I have taken this into account.

Section 387(c) - Opportunity to Respond

[162] The Applicant was afforded an opportunity to respond and availed himself of this opportunity. However, this opportunity to respond was basically instantaneous. The concept of an 'opportunity to respond' is to provide procedural fairness to an employee, to allow an employee to consider the Show Cause letter, to seek legal/industrial advice in relation to its content, and to reflect on the allegations and respond with reasons why the proposed outcome is illogical, unnecessary or unfair. The Applicant was denied this opportunity. The fact that the Applicant's union delegate was present in the meeting does not abrogate the Respondent's obligation to provide the Applicant with a 'real' opportunity to respond. A delegate, even a Lodge President, is not a full-time union official.

[163] As Wilcox CJ held in *Gibson v Bosmac Pty Ltd* (*Gibson*):[28]

> "*Ordinarily, before being dismissed for reasons related to conduct or performance, an employee must be made aware of the particular matters that are putting his or her job at risk and given an adequate opportunity of defence. However, I also pointed out that the section does not require any particular formality. It is intended to be applied in a practical, commonsense way so as to ensure that the affected employee is treated fairly. 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 of the section*."
>
> (My emphasis)

[164] It is my understanding that the phrase 'full opportunity' has not been determined by any Court or Full Bench. Following the principles of interpretation, in giving words their plain and ordinary meaning, I am prepared to adopt the Shorter Oxford English Dictionary definition of 'full' which, amongst other definitions, means "*abundant, copious, satisfactory, complete*".

[165] Adopting the commonsense definition to this scenario, it would mean that the Applicant should have been given the normal timeframe to respond to a show cause notice, which is 7 days, according to the unchallenged submission from the Applicant.

[166] I find that the Applicant has not been given a full opportunity to respond. I have taken this into account.

Section 387(d) - Any refusal of a support person

[167] The Respondent did not refuse the Applicant having a support person present for any of the meetings or discussions leading up to the Applicant's dismissal. I have taken this into account.

Section 387(e) - Unsatisfactory performance

[168] I am satisfied that the Applicant did not receive any formal written warnings in relation to any issue of his performance over his 38-year career with the Respondent. I have taken this into account.

Section 387(f) - Size of Employer

[169] The Respondent is a large employer. I have taken this into account.

Section 387(g) - Dedicated HR specialists

[170] The Respondent does employ HR specialists. I have taken this into account.

Section 387(h) - Any other matter

[171] The investigation was conducted by Mr Patrick Ritchie. Mr Ritchie is a Senior Associate of Minter Ellison, the preferred law firm of the Respondent. Mr Ritchie advised that he is an embedded contractor with BHP and has conducted more than 100 investigations throughout his career. Mr Ritchie is a lawyer of considerable global and investigative experience. Mr Ritchie testified that he considers himself to be an external and independent investigator.

[172] I am of the view that Mr Ritchie is neither external nor was his report independent. I am convinced that a proportion of Mr Ritchie's Report is flawed. I have reached this conclusion for the following reasons:-

i) A BHP employee was identified by both Ms Heming and Ms Williams as being a witness to the alleged comment from the Applicant in relation to "young bitches". The Applicant denied this interaction. An independent witness would have been able to corroborate either the complainants' or the Applicant's version. On the basis that neither of the complainants knew the name of this witness, Mr Ritchie did not make any attempt to identify this employee. If a work log is not kept in the control room, then BHP could have used their attendance records. Security photos of all employees who were working at the CHPP could have then been shown to the complainants to see if they could identify the witness. The evidence identified that the Applicant

worked on a crew with only 9 employees, 3 of which were female. Ms Heming testified that the witness was male, had brown hair, and had rolled his eyes at the Applicant's comment. Therefore, Ms Heming had obviously had a good look at his face. Further, if Mr Ritchie did not believe the Applicant's version, as he stated, the witness to the comment was then a material witness and had to be interviewed. It was certainly not appropriate or accurate for Mr Ritchie to advise Ms Chee that no witnesses had been identified. A witness had been identified, their identity was simply unknown. I am satisfied that identification of the witness by either complainant was likely and probable.

ii) The Applicant's interview was conducted via a video conferencing system. Whilst videoconferencing is a convenient and cost-effective means of communication, it has its flaws. It is not possible to see if there is anybody else in the room out of screenshot. It can also be difficult to evaluate the body language of the interviewee. Further, there can be difficulty in delivering an appropriate message, especially when it is a serious issue such as sexual harassment. It is obvious that the Applicant did not understand the seriousness of the issues that he faced based on his reaction to his notice of termination.

iii) Surprisingly, Mr Ritchie only conducted his interviews with the complainants by telephone. This process was totally inappropriate. Body language is an important component of every interview. Even though it can be difficult to evaluate body language over a video link, it is impossible over a telephone. Mr Ritchie denied himself the opportunity of this essential component. Further, Mr Ritchie would have absolutely no idea if the other complainant was also in the room during the interview or if the complainant being interviewed was simply reading off the filed complaint when answering questions.

iv) The investigative rigour that would be expected in an external and independent process was simply non-existent. There were no probing questions. In fact, in response to a question from me, Mr Ritchie agreed that he asked leading questions when trying to corroborate the evidence of the complainants, when he should have asked open questions.[29] It would appear that Mr Ritchie simply believed the complainants because they gave virtually the same answers and provided similar written complaints. Mr Ritchie even failed to pick up the inconsistencies in the evidence provided by the complainants.

v) Further, in her interview, Ms Williams stated she was using a Tennant Cleaning Machine on 3 March 2024 when the Applicant made a comment about the number of cleaners on shift that day. Mr Ritchie did not enquire as to the noise of the machine or whether she was certain that she had heard the alleged comment. Under cross-examination, Ms Williams admitted that she had not heard the Applicant's comment. Mr Ritchie should have been able to extract this information from Ms Williams during his investigation.

vi) Unbelievably, Mr Ritchie kept in contact with senior employees of BHP throughout the investigation process via email and telephone. Mr Ritchie even provided BHP with a draft copy of his report for review and amendment prior to releasing the final

report. How such a practice could be deemed appropriate in an independent investigation is beyond my comprehension.

vii) Finally, the investigation was rushed. Mr Ritchie testified that investigations normally take around 20 days. This investigation took 7 days. Mr Ritchie denies that his timetable was dictated by BHP due to the transfer of the business to Whitehaven Coal on 2 April 2024. I do not accept this evidence. Mr Ritchie did not interview the Applicant until 25 March, yet was able to produce his report, along with the review and amendments from BHP, by close of business on 26 March 2024. I've never known an investigator to work so expeditiously. It is difficult to accept that he took the time necessary to weigh up the comments of the Applicant, go back and check his notes and undertake the appropriate deliberations. It is not in dispute that he made no enquiries or conducted any interviews with:-

- any other cleaner on shift, including Ms Modrow, on 1 March 2024;
- the unidentified witness to Allegation 2; or
- the other cleaners undertaking the cleaning of the crib room on 3 March 2024.

I have taken this into account.

[173] If the premise of an investigation is simply to be a cursory process, to satisfy a provision in a company policy or the FW Act, then the asking of leading questions is appropriate. Alternatively, if the investigation is a thorough investigative process to ascertain the facts of a situation, then leading questions are inappropriate. In matters relating to the lives and the future livelihood of employees, I hold the view that an independent investigator must bring an open mind to an investigation and apply the appropriate rigor to test the accusations by asking probing questions. Unfortunately, Mr Ritchie did not meet this standard, as evidenced by the recanting of Ms Williams's evidence in relation to Allegation 3. I accept that my views do not concur with those contained in *Drake v Melba Support Services Australia Limited*.[30]

[174] I accept the submission from the Union that due to the Applicant's age he will struggle to find alternative employment. I also acknowledge that the Applicant has been an exemplary employee over 38 years with a few verbal reprimands in relation to comments that he made at toolbox meetings over this period. I have taken these matters into account.

[175] Placing witnesses in a witness box and asking them probing questions in a court room whilst under oath or affirmation provides a variety of human responses. From my experience, nearly all witnesses are nervous and apprehensive but fundamentally honest. Some become emotional. On occasions, this will lead to a witness modifying their recollection or commentary under cross-examination. Rather than be overly critical or belittle witnesses for changing their evidence, what is important is that the truth of a situation/scenario be eventually discovered. I am satisfied that the truth has been uncovered in this matter and make no adverse finding in relation to the evidence of either the Applicant or Ms Williams.

Conclusion

[176] I am satisfied and find that the investigation of Mr Ritchie is partially flawed. I do not accept that part of Allegation 1, part of Allegation 2 or all of Allegation 3 have been substantiated.

[177] Notwithstanding the finding above, I am satisfied and find that the Applicant did say to Ms Heming "*Do you trust him*" and "*What happens in WA stays in WA*".

[178] Further, I am satisfied and find that the Applicant did say to Ms Heming and Ms Williams, words to the effect of, that they should "*show off their bodies*" in an attempt to get a permanent job with BHP.

[179] The Applicant has clearly not adjusted to the modern workplace. Whilst these comments may have been seen as a joke a few decades ago, that is not the case now. The law has changed, the workplace has become more sophisticated and diverse. The notion of "*the standards of men, and not those of angels*"[31] is no longer appropriate in a modern workplace, including a coal mine.

[180] Whilst I accept that the Applicant did not mean any malice from his comments, the complainants found them to be inappropriate and offensive. As a result, I am satisfied that the Applicant has breached the Respondent's Code of Conduct, the FW Act and the Sex Discrimination Act by sexually harassing both Ms Heming and Ms Williams.

[181] However, every employee has a statutory right to a "*fair go*". This includes the opportunity to respond, or as held in *Gibson*, the "*full opportunity to respond*". I do not believe that the Applicant was given that 'full opportunity'. He wasn't given the opportunity to ponder his response. Nor was he given the opportunity to seek legal advice or advice from his full-time union official. He wasn't given the time to research the allegations or to ask his shift colleagues of their recollection of any of the events. This rushed process was all because of the pending ownership transfer of the mine and because no one from the Respondent's HR team wanted to work over the Easter long weekend. Union Officials and HR employees are sometimes required to work outside of normal hours. That is just part of the job when members/employees work in industries that operate 24/7. For the Applicant's termination to be rushed simply because of a public holiday is disappointing. As a result, I am satisfied that the Applicant has not received his "*fair go*".

[182] Despite having a valid reason to terminate the Applicant, the lack of procedural fairness afforded to the Applicant renders his termination unfair.

Remedy

[183] Having found that the Applicant's termination was unfair, I now turn to the issue of an appropriate remedy.

[184] The relevant provisions of the FW Act in relation to a remedy for an unfair dismissal are:

"**390 When the FWC may order remedy for unfair dismissal**

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and
(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies."

"**391 Remedy—reinstatement etc.**

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and
(b) that position, or an equivalent position, is a position with an associated entity of the employer;
the order under subsection (1) may be an order to the associated entity to:
(c) appoint the person to the position in which the person was employed immediately before the dismissal; or
(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

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

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

Order to restore lost pay

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

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

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and
(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement."

"392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and
(b) the length of the person's service with the employer; and
(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and
(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:
(i) received by the person; or
(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

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

[185] The Applicant seeks reinstatement to another Mine of the Respondent. However, I am satisfied and find that reinstatement is not appropriate in this circumstance. The Applicant has breached the Respondent's Code of Conduct, the FW Act and the Sex Discrimination Act as a result of his conduct. I agree with the Respondent that the trust and confidence required in an employment relationship cannot be restored in these circumstances. I, therefore, find that compensation is the appropriate remedy.

[186] I have taken into account the provisions of s.392(2) of the FW Act and the Sprigg formula as enunciated in a decision of the Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket*.[32]

[187] I am satisfied, though, that a thorough process, including giving the Applicant a full opportunity to respond to the allegations, would have still resulted in the Applicant being found to have sexually harassed Ms Heming and Ms Williams and he would have ultimately been dismissed.

[188] I find that the Respondent's show cause process should have taken a further week as per the normal practice of the Respondent.

[189] I order that the Respondent pay the Applicant 1 weeks' pay.

[190] I so Order.

COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<PR777802>

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

[2] *Gelagotis v Esso Australia Pty Ltd* [2018] FWCFB 6092 at [117]; *Edwards v Giudice* [1999] FCA 1836 at [7].

[3] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 at [67].

[4] Witness Statement of Mr Roy Smout, at Annexure RS-5.

[5] *B, C and D v Australian Postal Corporation t/a Australia Post (Australia Post)* [2013] FWCFB 6191.

[6] Ibid at [41].

[7] [2011] FWAFB 1166.

[8] Ibid at [24].

[9] *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147.

[10] Ibid at [125].

[11] Ibid at [37].

[12] *Heesom v Vegco Pty Ltd t/a One Harvest* [2019] FWC 1664 at [31].

[13] *Sex Discrimination Act 1984* (Cth), s. 28A(1)(b).

[14] *Royal Melbourne Institute of Technology v Asher* [2010] FWAFB 1200 (Watson VP, Acton SDP, Williams C, 3 March 2010) at para. 26, [(2010) 194 IR 1]; citing *Gibson v Bosmac Pty Ltd* [1995] IRCA 222 (5 May 1995), [(1995) 60 IR 1, at p. 7 (Wilcox CJ)].

[15] Ibid., 14–15.

[16] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport,* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at paras 70–73, [(2000) 98 IR 137].

[17] (1995) 185 CLR 410.

---

[18] (1998) 84 IR 1.

[19] [2000] AIRC 1019.

[20] (1995) 62 IR 371.

[21] PR4471.

[22] (1998) 84 FCR 483.

[23] [2020] FCAFC 126.

[24] As summarised in [2023] FWC 1997.

[25] [2023] FWC 1997.

[26] [2021] FWCFB 1038.

[27] [2014] FCAFC 15.

[28] [1995] IRCA 222.

[29] Transcript at PN1584 – 1587.

[30] [2023] FWC 677 at [40].

[31] *Jupiter General Insurance Co. Ltd. V Ardeshir Bomanji Shroff*, All England Law Reports Annotated, Vol 3 67 at 74.

[32] (1998) 88 IR 21.