DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Mr Mark Frost
v
Ambulance Victoria
(C2024/1086)

COMMISSIONER CONNOLLY MELBOURNE, 23 AUGUST 2024

Alleged dispute about any matters arising under the enterprise agreement

[1] On 22 February 2024, an application was lodged by Mr Mark Frost (the Applicant) under s.739 of the *Fair Work Act 2009* (the Act) for the Fair Work Commission (the Commission) to deal with a dispute under the dispute resolution procedure contained in clause 11 of the *Ambulance Victoria Enterprise Agreement 2020* (the Agreement). The Respondent in this matter is Ambulance Victoria, the Applicant's employer who is covered by the Agreement.

What this Dispute is About

[2] This is a dispute about the application of the Agreement to the employment of Mr Frost. It concerns the decision of Ambulance Victoria (AV) to impose disciplinary action against him. This decision was based on substantiated findings of serious misconduct made against him arising from investigations that commenced in August 2021 in accordance with clause 74 of the Agreement, titled 'DISCIPLINARY PROCESS'. The proposed disciplinary action included a transfer of work location to Dandenong, which is the subject of this dispute.

[3] It is not disputed that Mr Frost engaged in some of the conduct that is alleged and that AV is within its rights under the Agreement to impose disciplinary action against him. The disciplinary action proposed includes, (a) a first and final warning and (b) restorative practices - including education and development, and a transfer of his work location from Bright to Dandenong. Mr Frost accepts a first and final warning and education and development. He does not accept being transferred.

[4] Mr Frost lives in Bright. He moved to Bright from Queensland to commence work as an Advanced Life Support Paramedic with AV in 2009. He has built a life, friendship and community there. He wishes to remain living in Bright. Being transferred to Dandenong or another work location not within reasonable vicinity of Bright means this would no longer be possible.[1]

[5] On 7 March 2024 and 20 March 2024, conciliation conferences were conducted via video to resolve this dispute. However, they were not successful.

[6] As conciliation failed to identify any suitable alternative work locations, Mr Frost disputes that AV can impose a transfer in the present circumstances. Further, he argues that if the Commission finds AV has a right to transfer him, a transfer to Dandenong is not reasonable as it will require him to relocate or travel an excessive 350km to work.

[7] The Commission's jurisdiction to arbitrate the dispute arises out of clause 11 of the Agreement, which relevantly provides:[2]

> **"11. RESOLUTION OF DISPUTES AND GRIEVANCES**
>
> 11.1 …a dispute between the Employer and employees, or an individual grievance, about a matter arising under this Agreement or the NES must be dealt with in accordance with this clause…
>
> …
>
> 11.5 **Arbitration**
>
> (a) If the dispute or grievance cannot be resolved by conciliation then either party may refer the dispute or grievance to the FWC for arbitration and the FWC is authorised to proceed to deal with the dispute or grievance by arbitration.
>
> (b) A dispute or grievance under clauses 73 and 74 may only be dealt with in accordance with this clause 11.5 when any of the following disciplinary outcomes have been imposed (such a dispute or grievance may include whether clause 75 has been complied with by the Employer in coming to a decision):
>
> (i) Formal counselling steps in 73.3(a)-(c);
>
> (ii) Warning;
>
> (iii) Final warning;
>
> (iv) First and final warning;
>
> (v) Restorative practices where issues in conjunction with any action listed in clause 11.5(b)(i)-(iv).
>
> (c) If a dispute or grievance is referred to the FWC for arbitration the FWC will have the power to arbitrate the dispute and exercise any of its powers pursuant to or incidental to sections 589, 590 and 595 of the Act, and make any order it considers appropriate. In relation to a dispute or grievance under clause 11.5(b)(i)-(v), in order to make a finding that the disciplinary outcome issued by the Employer should not apply, the FWC will:
>
> (i) review the Employer's observance of the requirements of clause 75; and / or

(ii) determine whether the Employer has acted unreasonably or unjustly in the circumstances in imposing the disciplinary outcome in clause 11.5(b); and

(iii) decide whether it should exercise its discretion or not to substitute its view for the outcome imposed by the Employer."

[8] It is common ground that the requirements of Clause 11 are satisfied. Further, the parties have agreed that the questions to be determined by the Commission are as follows:[3]

1. *Was Mr Frost's conduct, in all the circumstances, serious misconduct related to conduct that meets the definition of workplace bullying and harassment pursuant to the Fair Work Act or the Equal Opportunity Act?*

2. *In imposing a transfer on Mr Frost as a disciplinary outcome, has Ambulance Victoria acted unreasonably or unjustly?*

3. *Does an employee who is transferred under clause 74.6(f)(iv) of the Agreement have access to the dispute resolution procedure pursuant to clause 37.2?*

4. *If the answer to Question 3 is "Yes", is the transfer of Mr Frost to Dandenong unreasonable having regard to his personal and family circumstances and the requirement for excessive travel to attend work?*

Procedural Matters

[9] With the questions to be determined by the Commission agreed, on 8 April 2024, my Chambers issued directions for the filing of material and the matter was set down for a Hearing on Wednesday, 29 May 2024. Submissions, in outline and reply, were filed on behalf of Mr Frost by his representatives, the Victorian Ambulance Union Incorporated (VAU), including two witness statements by the Applicant. For Ambulance Victoria, an outline of submissions was also filed along with witness statements from Ms Narelle Capp, Ms Rebecca Avard, Mr Stephen Doyle, and Ms Hermina Gibson. At the conclusion of the Hearing, supplementary submissions were also filed by both parties with respect to the powers of the Commission under clause 11.5.

[10] At the hearing, the Applicant appeared with his representatives, Mr Joshua Gardner and Ms Maxine Lange from VAU. Ms Rebecca Davern (of Counsel) was granted permission to represent Ambulance Victoria, with the assistance of Ms Elizabeth Cole. Mr Frost, Ms Capp, Ms Avard, Ms Gibson and Mr Doyle gave evidence at the Hearing.

Relevant Terms of the Agreement

[11] I have set out above the provisions of Clause 11.5 of the Agreement which the parties accept are enlivened for the Commission to arbitrate this dispute. The other relevant provisions of the Agreement are contained in Clause 74 – the disciplinary process clause; Clause 75 – the procedural fairness clause and clause 37 – the resource allocation clause.

The Central Issues

[12] The central issue in this dispute is the decision of AV to propose a transfer of Mr Frost to Dandenong. The power for AV to make this decision comes from the provisions of clause 74.6(f)(iv) of the Agreement, which provides:

> "(f) Restorative Practices (may include but not limited to):
>
> …
>
> (iv) Transfer in the case of serious misconduct related to conduct that meets the definition of workplace bullying or harassment pursuant to the Act and *Equal Opportunity Act 2010* (Vic);"

[13] It is common ground between the parties that the power to transfer an employee in a disciplinary process is limited to instances of serious misconduct that meets the definition of workplace bullying and or harassment. The parties are not in agreement about whether Mr Frost's conduct meets this definition.

[14] Mr Frost's position is that his conduct is not serious misconduct that meets the definition of bullying or harassment. On this basis, he submits he has been treated unreasonably because AV has sought to impose a transfer when the pre-conditions of such a disciplinary outcome (bullying or harassment) have not been met.

[15] In the alternative, he submits he has the right to initiate a dispute pursuant to clause 37.2 of the Agreement on the grounds that the proposed transfer to Dandenong is unreasonable because of his personal and family circumstances.

[16] Accordingly, the questions to be determined as set out in paragraph [8] above can be found in the four issues below:

> ***Issue 1:*** *Whether the conduct of Mr Frost amounts to bullying or harassment pursuant to the Act and Equal Opportunity Act 2010 (Vic). If I do not find this is the case, it follows that Ambulance Victoria has not acted reasonably in imposing a transfer because it has no power to do so.*
>
> ***Issue 2:*** *If Mr Frost's conduct was bullying or harassment, then whether the transfer is unreasonable or unjust.*
>
> ***Issue 3:*** *If Mr Frosts conduct was bullying or harassment, is he able to initiate a dispute under clause 37.2.*
>
> ***Issue 4:*** *If Mr Frost can initiate a dispute under clause 37.2, is a transfer to Dandenong reasonable?*

[17] Before turning to consider each of these in turn, it is important to set out some relevant background to the circumstances of this dispute.

Relevant Background

[18] Mr Frost is an Advanced Life Support Paramedic and Bright Team Manager. He commenced employment with AV in approximately March 2009. Prior to working as a paramedic, he served in the Australian Defence Force (ADF). He relocated from Queensland to Victoria to take up a position with AV in Bright where he has worked continuously since.

[19] Bright is an "On-call" branch where paramedics serve over an 8-day-on, 6-day-off 8:00am – 6:00pm roster where they are on-call overnight during their 'on' period. To facilitate this, paramedics who are employed at an on-call location must live within a ten-minute drive from the Branch. Mr Frost's residence is within walking distance.

[20] Bright is also an "ACO" Branch which is staffed by a single AV paramedic who, when required, are accompanied on dispatch by a casual Ambulance Community Officer (ACO). ACO's are non-paramedic casual employees drawn from the local community who are trained in emergency response and register their availability for set periods of time to attend as required.

Allegations of Misconduct

[21] On 24 August 2021, Mr Frost was informed that AV had become aware of allegations of potential misconduct against him and that he was being placed on temporary leave from duty on full pay. A week later, he was advised AV had made the decision to suspend him from the workplace, effective immediately, whilst the allegations were investigated further. On 1 September 2021, Mr Frost was provided a letter setting out the details of six allegations against him and advised they were to be investigated by the Honourable Brian Lacy AO as an external investigator in accordance with clauses 74 and 75 of the Agreement.

[22] Mr Frost has consistently denied that he engaged in the conduct as alleged and acted in breach of his contract of employment. Between 25 October and 23 December 2021, he provided two written responses to the allegations and participated in an interview with Mr Lacy.

Misconduct Found

[23] On 22 July 2022, AV notified Mr Frost that it had concluded the investigation and determined findings that:[4]

- Allegations 1 and 2 were substantiated, in part;
- Allegation 3 was unsubstantiated; and
- Allegations 4, 5 and 6 were substantiated.

Proposed Disciplinary Action

[24] Based in these findings, AV's correspondence asked Mr Frost to show cause as to why AV should not impose disciplinary action on him. The show cause letter informed Mr Frost

that AV considered the conduct he had been found to have engaged in warranted disciplinary action in accordance with clause 74.6 of the Agreement, which included:

(a) A first and final warning;

(b) Restorative practices including:

i. Education and development;

(c) A transfer of work location to AV's Dandenong Branch.

[25] AV did not provide Mr Frost with a copy of Mr Lacy's investigation report or detail what evidence was considered, why his responses were not accepted or on what basis the allegations against him were substantiated. A complete copy of Mr Lacy's report was included in the material filed by the Respondent in submissions. The Mr Lacy's report sets out the investigation process, procedures followed, evidence gathered and conclusions. The relevant key findings in the report are found in pages 18 and 19, where Mr Lacy considers allegation 6 as follows:[5]

"…

I have determined allegation 3 is not substantiated.

As to Allegation 4, I have concluded that Frost is generally "rude", has "always been like that" and "does not respect women very much" and the fact that he treats everybody in the same way he treats Gibson does not excuse his conduct or behaviour, but rather is an indication of a person who is simply socially inept. I determined that Frost frequently ignores Gibson's greetings, does not engage in conversation with her or acknowledge her work or exchange pleasantries with her. In my opinion such behaviour is unreasonable and creates a risk to health and safety.

In respect of Allegation 5, I am satisfied that in the period 2019 to 2021, Frost has failed to treat Gibson with courtesy, civility, respect and dignity, belittled her contributions and failed to create a safe, encouraging, supportive and respectful environment that is free of discrimination, harassment and bullying. I find this is bullying behaviour as defined.

I reject Frost's denial. Having regard to the evidence and my findings in respect of Allegations 4 and 5, I am satisfied that Frost has engaged in bullying and/or harassment of Gibson…"

[26] In proceedings, the Applicant noted that the first time Mr Frost and his representatives had to review and consider the Mr Lacy's report was in the final preparation for these proceedings. They noted Mr Lacy was a respected investigator and formal judicial officer. On this basis, Mr Frost's representatives indicated they did not object to Mr Lacy' report, its conclusions and findings, including that Mr Frost's conduct amounted to bullying.[6]

[27] Despite this position, the Applicant maintained the findings of Mr Lacy into Mr Frost's conduct did not amount to serious misconduct and did not enliven the Respondent's right of transfer as a course of disciplinary action.

[28] Mr Frost responded to AV's show cause letter on 12 August 2022. In his response, he rejected the findings against him and did not accept that his conduct met the definition of serious misconduct under the Agreement or bullying or harassment under relevant legislation.

[29] However, he did not object to the proposed disciplinary action being a first and final warning; education and training and a transfer of work location. He did object to being transferred to AV's Dandenong branch and sought a further discussion about the proposed transfer to identify a more reasonable location. The basis for Mr Frost's objections were that a transfer to Dandenong was not reasonable considering his personal circumstances.

[30] On 7 December 2022, AV advised Mr Frost it had considered his show cause response but had determined it would be imposing the disciplinary action, including the transfer to Dandenong. Mr Frost raised this dispute in response on 13 February 2024 and filed his F10 Application with the Commission on 22 February 2024.

[31] Since 21 August 2021, Mr Frost has been suspended from work on full pay. On 3 March 2024, his suspension from duties ended and he commenced a program to regain his authority to practice certification at AV's Whittlesea Branch, commencing on 8 April 2024.

[32] In determining this dispute, the parties in proceedings acknowledged it was not the place of the Commission to undertake a new investigation into Mr Frost's conduct.[7] I have set out at paragraph [7] above the provision of Clause 11.5 of the Agreement that outlines the obligations of the Commission in relation to dispute applications relating to disciplinary procedures. It follows from these provisions that a review of the respective positions and context of the investigation will be necessary. However, the Commission's role is not to undertake a new investigation into the conduct of Mr Frost. Clause 11.5(c) requires the Commission to review the employer's observance with the requirements of clause 75 and/or determine: [8]

(1) whether the employer has acted unreasonably or unjustly; and

(2) decide whether it should exercise its discretion or not to substitute its view for the outcome imposed by the Employer.

[33] I have limited my considerations to those matters relevant to determining the questions agreed by the parties.

Clause 11.5(c)(i): Review the employer's observance of Clause 75

[34] As indicated, to determine this dispute I must consider the employer's observance of the terms of Clause 75 and whether AV has acted unreasonably or unjustly in the circumstances in imposing the disciplinary outcome on Mr Frost as required by 11.5(c)(i) and 11.5(c)(ii) above.

[35] There is no dispute as to the purpose of this clause, it's operation and plain meaning in the agreement. It is taken by both parties to set out the procedural fairness requirements on AV

when dealing with unsatisfactory performance and/or misconduct pursuant to clauses 73 and 74 of the Agreement. It provides that any preliminary or formal investigation into alleged misconduct will be undertaken consistent with the principles of procedural fairness and natural justice.

[36] Further, it specifies what steps the employer will take and what opportunities the employee will have in these processes to ensure this is the case. Additionally, in the event AV appoints an investigator to investigate alleged misconduct pursuant to clause 74.4, clause 75 sets out what an investigator must do. The investigator must collect relevant materials; speak with the employee; speak with any relevant witnesses; provide the employee with particulars to allow the employee to properly respond; and investigate any explanation made by the employee as far as possible.

[37] In this case, AV has appointed an external investigator, Mr Brian Lacy AO, to undertake the investigation into the alleged conduct of Mr Frost in accordance with clause 74.4. There has been no suggestion that AV or Mr Lacy has not followed the procedural steps required under clause 75.

[38] AV submits that it has complied with all the requirements of clause 74 and 75 of the Agreement and there is no basis for the Applicant's contention that the proposed disciplinary action is unreasonable or unjust. Their position is that Mr Frost has accepted findings of misconduct against him in accepting the proposed final warning, education and training as "just".

[39] Further, Mr Frost has not previously complained of not being provided specific details of the allegations put to him, that he was not able to properly respond, or was being denied procedural fairness. The Respondent submits there are three broad principles of procedural fairness as follows:[9]

a) the requirement that a decision-maker give to a person whose interests may be adversely affect by a decision an opportunity to present his or her case and respond to any specific, relevant and credible material adverse to his or her case;

b) that the decision-maker is not interested in the matter to be decided, nor that there be an appearance that the decision-maker brings to the matter a prejudiced mind; and

c) that a decision be based upon logically probative evidence.

[40] AV's position is that the procedural fairness requirements of clause 75 have been met and that there is no basis for the Commission to find the Employer has acted unreasonably or unjustly. They maintain that the present circumstances are that a respected and experience investigator has found that the allegations against Mr Frost amount to misconduct. That Mr Frost has accepted this to be the case in accepting the disciplinary action proposed against him, but for the transfer to Dandenong.

[41] Mr Frost disputes this. His position is that he consistently maintained that the conduct alleged against him does not amount to serious misconduct, bullying or harassment as defined

by the Agreement and the Act. He made this position clear in his responses to Mr Lacy's investigation. Further, he made it clear in his response to the show cause letter from AV that he stood by his responses to Mr Lacy and that it was *"…difficult for him to respond to the findings given that the show cause letter did not describe what exactly was substantiated, and why.* [10]

[42] Mr Frost's position is that there is nothing in this response that indicates he accepts the findings against him or that they were reasonably made. Furthermore, his position is that there is nothing in the show cause letter that was provided to him that sets out why the Respondent's findings against him and proposed disciplinary action was reasonable. He submits the letter merely states whether the allegations were either substantiated, unsubstantiated, or substantiated in part.

[43] As to why Mr Frost did not dispute the final warning, training and education proposed, he submits he had already been suspended for some 11 months, suffered considerable stress and anxiety and wanted to return to work. Neither a final warning or retraining prevented this outcome so, at the time, he decided he was prepared to *"wear"* these outcomes and focus on disputing the transfer to a work location some 350km from where he lived.[11]

[44] It is the Applicant's position that the requirements of procedural fairness extend well beyond the 3 broad principles set out above by the Respondent. Among other things, they submit, the principles of procedural fairness mean that a decision maker will inform the affected person of *"the nature and content of adverse material that is credible, relevant and significant obtained from sources other than the affected person'* and that a person *"who is the subject of a disciplinary investigation be provided with the allegations against the applicant and the substance of the material the decision-maker proposes to rely upon in support of the allegations*."[12]

[45] Contending that he was not provided with specific detail of the substantiated findings against him, and the reasons why, Mr Frost submits he has been denied procedural fairness and that AV has not complied with its obligations under clause 75.

[46] In addition, Mr Frost also submits that in making its disciplinary decision AV has also relied on irrelevant information and failed to properly consider alternative transfer locations, the impact on Mr Frost and OH&S implications of his return to Bright.

The Evidence of Ms Capp

[47] Mr Frost submits that in July 2022 Ms Capp became aware Mr Anthony Carlyon, as decision maker, was considering proposing to return Mr Frost to Bright, and intervened to stop this from occurring. As the responsible manager for the region, Ms Capp states *"I was very concerned about the impact on staff if Mr Frost was to return to the region and that Mr Carlyon may not have been provided all the required information concerning Mr Frost's behaviour or the potential ongoing risks for staff… "*[13]

[48] Ms Capp's sworn evidence is that acting on this concern she subsequently met with Mr Carlyon and took steps to ensure all the relevant information in relation to Mr Frost was provided to the Professional Conduct Unit ('PCU') prior to the final disciplinary decision being

made. This included records of concerns of many members of the Hume 3 Ambulance Service Area (ASA) staff who were adversely impacted by Mr Frost's behaviour and expressed concerns about this and any prospect of him returning to Bright to herself and Mr Heaslip, a regional manager at the time. Ms Capp's evidence is also that as area manager she was consulted by the PCU about a suitable work location for Mr Frost and that she expressed her views in this process, including that Mr Frost *"should work at a 24-hour branch that did not work with ACO's."*[14]

Decisions of Mr Carlyon and Mr Doyle

[49] Mr Frost was advised in December 2023 by Mr Doyle that the final decision of AV was to impose the proposed disciplinary outcome, including a transfer to Dandenong. Mr Doyle's sworn evidence is that prior to informing Mr Frost of this outcome he had taken all steps to satisfy himself that in proposing the disciplinary action, Mr Carlyon as Chief Operations Officer, had considered all relevant matters including Mr Frost's responses.[15]

[50] Mr Frost argues that because Ms Capp acted on her concern that Mr Frost may have been returned to Bright, Mr Carlyon changed his proposed disciplinary decision to include a transfer of work location following Ms Capp's intervention.

[51] Mr Frost submits that he has not seen any of Ms Capp's materials, the information she provided to the PCU or a record of what she discussed with Mr Carlyon. He argues he was not provided any opportunity to consider this material or respond to them in breach of the requirements of clause 75 and the principles of procedural fairness.

[52] Furthermore, he submits the findings of substantiated conduct against him only concerned Ms Gibson, and that any other matter or concern was not relevant and could not be considered as part of the disciplinary process. He argues that Mr Carlyon was provided material he did not have an opportunity to respond to and material that was not relevant to the findings of misconduct against him. Therefore, that the decision to transfer him was unreasonable, unjust and not made in compliance with the requirements of clause 75.

Transfer not properly considered

[53] It is also Mr Frost's position that AV has not properly considered, or disregarded, his suggestions of alternative work locations within the Hume Region that would have removed him from contact with Ms Gibson because of irrelevant information. He argues that because AV has not provided any evidence of these considerations or called any witnesses from the PCU to attest to what material was provided to Mr Carlyon, the Commission should draw an inference that these omissions would be negative to the Respondent's case. Finally, that in deciding not to return Mr Frost to work within the Hume region, AV has relied on a consideration of the OH&S risk of Mr Frost's behaviour reoccurring without a contemporaneous risk assessment considering his absence from the workplace of over 2 years.

Did AV provide Mr Frost with procedural fairness?

[54] I have considered all of Mr Frost's submissions regarding the employer's commitments to procedural fairness and its obligations under clause 75 of the Agreement. What is critical in

the present circumstances is the investigation and report of Mr Lacy. The findings of this report are that the conduct of Mr Frost was misconduct within the meaning of serious misconduct as defined.

[55] There is no contest that in making its disciplinary decisions, AV has relied on this report. Similarly, there is no contest Mr Frost, or his representatives, were not provided with a complete copy of this report and the reasoning contained therein until final material was filed for this proceeding.

[56] Mr Lacy's report should have been provided. I am satisfied that it was not, and this is an omission on behalf of the Respondent that should have been avoided. As the Applicant submits, the principles of procedural fairness are well established and extend, beyond the mere perfunctory, to providing an aggrieved person the opportunity to have the details, reason and allegations put to them prior to final decisions being made so they can properly respond. [16]

[57] In not providing Mr Frost with the details of Mr Lacy's report and the reasoning behind his conclusions, I am satisfied AV has not done everything within its power to ensure Mr Frost was provided with procedural fairness.

[58] While I am satisfied on the evidence that this is the case, it does not necessarily follow that the Respondent has failed to comply with its obligations under the Agreement or acted unreasonably or unjustly.

[59] The obligations under clause 75.1 of Agreement are that the *"management of… misconduct…."* and any "*…investigation conducted by the Employer into alleged misconduct will be undertaken consistent with the principles of procedural fairness and natural justice."*

[60] I have considered these words consistent with the established principles of agreement interpretation as set out in *Berri*[17] and I am satisfied that they are meant to require the application of the principles of procedural fairness and natural justice to the investigation process.

Was Clause 75 complied with?

[61] In the present case, Mr Lacy has conducted the investigation on behalf of the Respondent into Mr Frost's conduct. Mr Lacy has conducted this investigation as an experienced and respected investigator. He has done so in compliance with the provisions of clause 75 and provided Mr Frost with every opportunity to respond to the allegations put to him and thoroughly considered his responses. The Applicant does not suggest otherwise and in proceedings, after being provided the opportunity to finally review the Mr Lacy's report, did not dispute its findings.

[62] Furthermore, there is no obligation under the Agreement that a copy of any investigation report prepared pursuant to clause 75.3 be provided to the person being investigated. While this may be ideal, particularly for the person under investigation, it is not a requirement imposed on the Respondent by the Agreement. Nor do I find is it a requirement that the Respondent provide the Applicant specific details and reasoning of the basis of its disciplinary decision.

[63] What is required is that the management of any misconduct pursuant to clause 74 is done so consistent with the principles of procedural fairness and natural justice. Clause 74 further specifies as follows:

> *"74.3 The employee will be provided with a reasonable timeframe to respond to any allegations. Where a meeting is convened the employee will be offered the opportunity to have a representative present.*
>
> *74.4 Where an investigation is conducted by the Employer, the investigator will make findings in relation to each allegation of misconduct. Where allegations are substantiated, the Employer will provide an employee with reasonable time to respond to the findings or material and any proposed disciplinary outcome/action."*

[64] There has been no suggestion that Mr Frost has not been provided with a reasonable timeframe to respond to allegations against him or be represented at a meeting. I am satisfied this is the case.

[65] There is also no suggestion that there is any procedural deficiency or unfairness in the report and findings of Mr Lacy or that Mr Frost has not been provided a reasonable time to respond to these findings and the proposed disciplinary action. Mr Frost disputes the basis for AV imposing disciplinary action against him and the material relied on in finalising this decision. However, there is no suggestion Mr Frost has not been provided with reasonable time to respond to the findings and proposed disciplinary action. I am satisfied this is also the case.

[66] Accordingly, for the above reasons, my review of AV's observance of its commitments under clause 75 of the Agreement leads me to conclude AV has fulfilled its obligations under this clause in the present circumstances.

[67] On this basis, including the findings accepted within the Mr Lacy's report,[18] I am satisfied it was reasonably open to the Respondent to conclude disciplinary action was necessary to address the findings of Mr Frost's misconduct before them.

Clause 11.5(c)(ii): Has AV acted unreasonably or unjustly in the circumstances in imposing the disciplinary outcome in clause 11.5(b)?

[68] In addition to reviewing the Employer's observance with clause 75, clause 11.5(c)(ii) of the Agreement requires the Commission to determine whether the Employer has acted unreasonably or unjustly in the circumstances in imposing the disciplinary outcome in clause 11.5(b).

[69] Mr Frost argues AV has acted unreasonably or unjustly because:

(a) he did not engage in conduct that meets the definition of serious misconduct, bullying or harassment as required by clause 74.6;

(b) irrelevant information was taken into account;

(c) Mr Frost's responses were not considered by the decision-maker; and

(d) the decision to transfer him some 350km from his home, family and support network was unreasonable.[19]

[70] His principal argument in support of this position is that the conduct Mr Lacy's report found to have occurred does not constitute serious misconduct, harassment or bullying. Mr Frost submits if he did not engage in serious misconduct, harassment or bullying it cannot be open to the Commission to conclude AV has either complied with the terms of the Agreement or that AV has acted reasonably or justly in imposing a disciplinary outcome on him that includes a transfer to Dandenong.

[71] The question of whether Mr Frost's conduct constitutes serious misconduct, bullying or harassment coincides with the first question agreed by the parties for the Commission to determine. I consider this question below at paragraphs [97] - [124] and provide my reasoned conclusion not to accept Mr Frost's position there.

[72] The additional arguments advanced by Mr Frost are firstly, that only after the intervention of Ms Capp did AV make the decision to transfer Mr Frost. That Mr Frost was not provided an opportunity to respond to this information, contrary to the principles of procedural fairness. Furthermore, none of these concerns related to the facts of the misconduct that had been alleged and ought not to have been considered.

[73] Secondly, that Mr Frost's show cause response, and in particular his appeal not to be transferred to Dandenong but to another branch closer to his home, was not properly considered by the Respondent. Thirdly, that the transfer to Dandenong was unreasonable, being some 350km from Mr Frost's home, family and support network.

[74] I have set out the rationale applied by the Applicant in advancing these positions above.

[75] Critically to these submissions is the evidence of Ms Capp and ultimately Mr Doyle who assessed the initial recommendation of Mr Carlyon and, being satisfied all relevant material had been considered, communicated the final decision to impose the disciplinary outcome on Mr Frost. Both Ms Capp and Mr Doyle gave evidence in proceedings.

[76] I accept Ms Capp's evidence and note it was largely unchallenged in cross examination. I accept that in reaching out to Mr Carlyon and providing information to the PCU as she considered necessary and was requested to Ms Capp acted within the scope of her responsibilities as manager for the Respondent. I find no evidence Ms Capp directed, or in any other way, improperly influenced the decision-making or disciplinary process. For Mr Frost's submission to stand, this would have to have to be the case. It is not.

[77] Furthermore, I note the provisions of 74.5(b) make explicit reference to the recommendations of a manager being considered in the disciplinary decision-making process. There is no question Ms Capp is a manager of the Respondent and her recommendations may be considered in accordance with terms of the Agreement.

[78] In making this finding, I am also satisfied that the employees whom Ms Capp was responsible for had legitimate concerns as to Mr Frost's conduct. In particular, the

unchallenged evidence of Ms Gibson is compelling as to her experience of working with Mr Frost and the legitimacy of her concerns.[20]

[79] The Applicant submits prior to Ms Capp's intervention Mr Carlyon had reached a conclusion not to terminate or transfer the Applicant from Bright, and that he only changed this decision to propose disciplinary action that included transfer based on the intervention of Ms Capp.

[80] This speculation is not supported by the evidence. Mr Carlyon has not provided a witness statement or evidence in these proceedings. The Applicant's position is that the Commission should draw an inference from this that his evidence would be negative to the Respondent's case. I do not accept this submission for the reasons set out below.

[81] The person who had the final opportunity to review and consider all the circumstances of Mr Frost's case and the proposed disciplinary action of transfer was Mr Doyle.

[82] Mr Doyle provided a witness statement and gave sworn evidence in proceedings. I accept his evidence. I am satisfied that prior to the communication of the final disciplinary decision to Mr Frost he took appropriate steps to consider the decision and satisfy himself of the proposed outcome. This included discussing the matter with Mr Carlyon, satisfying himself that all relevant information in the circumstances of the case was considered. He agreed with the proposed outcome and communicated it to Mr Frost as the responsible officer of AV.[21]

[83] I find no evidence that Mr Doyle or Mr Carlyon has considered irrelevant information or improperly discharged their responsibilities. On the contrary, and I am satisfied, they have taken all regard to the seriousness of the decision before them and ensured all relevant material has been considered. Ultimately, resolving to make and communicate the final decision to impose the transfer to Dandenong because it was the only location available at the time where Mr Frost could work at a comparable level.

Transfer to Dandenong

[84] The third and final basis Mr Frost submits AV has acted unreasonably and unjustly is by imposing a transfer of work location on him from Bright to Dandenong. The Applicant submits this proposal is unreasonable and unjust in the circumstance because it will not be possible for him to continue living in Bright and working from Dandenong without significant impact.

[85] The evidence of Mr Frost of the impact of a transfer to Dandenong is not disputed. I accept that it is not unreasonable, considering his personal circumstances, that he opposes and seeks to dispute this outcome.

[86] The Respondent argues it is not open to the Commission to consider whether the transfer location of Dandenong is "unreasonable" because clause 11.5(b) limits the jurisdiction of the Commission to considering whether the employer has acted unreasonably or unjustly in determining a transfer of work location from the list of available disciplinary outcomes in clause 74.6.[22]

[87] The Applicant rejects this position and maintains as this dispute has been validly made in relation to clauses 73-75, that there is nothing in clause 11.5 that would preclude the location of the transfer being a relevant consideration for the Commission. Further, that clause 11.5(c) requires the Commission to consider the proposed relocation to Dandenong to discharge its obligations under that clause.

[88] The Respondent refers to the principles of enterprise agreement interpretation to advance its position.[23] I have considered these submissions. However, I do not accept the Respondent's proposition that the plain and ordinary meaning of transfer, in this context, is just that. I consider the plain and ordinary meaning of the word transfer to be mean as defined by the Oxford English Dictionary; *"the act of transferring, or fact of being transferred… from one place to another*".

[89] On this basis, I accept Mr Frost's submissions that I am required to consider the location of the proposed transfer in considering whether AV has acted reasonably or unjustly. I am also satisfied that, as identified by Mr Frost, my obligations under clause 11.5(c) also require such a consideration.

[90] However, it does not necessarily follow that I agree with the Applicant's submissions that the transfer to Dandenong was in and of itself unreasonable and unjust. In the present circumstances, I do not reach this conclusion for the reasons below.

[91] AV's position is that its considerations in determining a transfer were the removal of Mr Frost from the complainants against him, in particular Ms Gibson, minimising the risk of Mr Frost engaging in the same or similar conduct again and imposing an appropriate disciplinary sanction to allow Mr Frost to return to his substantive duties. At the time, the only available location that met this criteria outside of the Hume Region was Dandenong.

[92] Mr Doyle's evidence is that in determining Dandenong as the transfer location he has considered all relevant factors including the circumstances and responses of Mr Frost. Dandenong was proposed because it was the only available option at the time. [24] I accept this evidence and I am not satisfied that in making this determination AV has acted unreasonably or unjustly.

Clause 11.5(c)(iii): Should the Commission exercise its discretion or not to substitute its view for the outcome imposed by the Employer?

[93] I have been satisfied that in the present circumstances, AV has properly observed its obligations under clause 75. Further, that it has not acted unreasonably or unjustly in imposing the disciplinary action proposed on Mr Frost, including a transfer to Dandenong.

[94] On this basis, I not satisfied that the Commission should exercise its discretion and impose its view in substitute for that imposed by the Employer.

[95] In reaching this conclusion, I have considered the submissions of Mr Frost of the impact of a transfer to Dandenong on him and his personal circumstances. However, I note that at the time of the disciplinary decision being imposed, Dandenong was the only option available.

Recommendation

[96] The Respondent submits this is no longer the case and have provided a list of further alternative transfer locations.[25] Bearing in mind Mr Frost's submissions, I consider it appropriate the parties consider working together to identify other alternative locations for Mr Frost to work from to allow him to return to full duties as soon as practically possible once his authority to practice has been completed.

Consideration

Issue 1: Was Mr Frost's conduct, in all the circumstances, serious misconduct related to conduct that meets the definition of workplace bullying and harassment pursuant to the Fair Work Act or the Equal Opportunity Act?

[97] Both parties accepted that clause 74.6(f)(iv) of the Agreement only enables AV to impose a disciplinary transfer on an employee in the case of serious misconduct related to conduct that meets the definition of workplace bullying or harassment pursuant to the Act.

[98] It is Mr Frost's position that to activate the "employer's" right to transfer the misconduct must be 'serious misconduct' and must also meet the definition of workplace bullying under the Act.

[99] Mr Frost submits that the conduct substantiated against him is not serious misconduct and does not meet the definition of workplace bullying in the Fair Work Act.

[100] The basis of his argument is as follows. Firstly, the only conduct relevant to the determination of whether he has engaged in serious misconduct is the conduct found to be substantiated in Mr Lacy's report. I accept this argument.

[101] Secondly, that allegations 1 and 2 in Mr Lacy's report against Mr Frost were found to be substantiated in part and did not amount to a finding of 'serious misconduct', bullying or harassment and cannot be relied on to justify his transfer. That allegation 3 was unsubstantiated and that the only relevant finding in Mr Lacy's report was the finding that Mr Frost engaged in conduct that was bullying towards Ms Gibson in allegation 6 which concerned the conduct alleged in allegations 4 and 5.

[102] Thirdly, the conduct Mr Lacy found to be substantiated and to be 'bullying' towards Ms Gibson was not "serious misconduct" because it was not:

(a) found to be wilful or deliberate;

(b) inconsistent with the continuation of the employment relationship; or

(c) presenting a serious and imminent risk to the health and safety of a person or the reputation, viability or profitability of the employers business.

[103] Supporting this submission, Mr Frost points to the definition of bullying and harassment under the Act as behaviour that is repeated, unreasonable conduct towards the same individual or group of individuals that created a risk to health and safety.

[104] In proceedings, Mr Frost's representatives made it clear that the findings of Mr Lacy that Mr Frost had engaged in bullying towards Mr Gibson was not disputed.

[105] What Mr Frost does not accept is that this bullying meets the required definition of serious misconduct. His argument is that to be considered serious misconduct the behaviour must meet the definition set out in paragraph [102] above.

[106] Mr Frost submits that Mr Lacy did not find Mr Frost's treatment of Ms Gibson was wilful or deliberate, rather that he was socially inept and may have treated everyone badly. That Mr Lacy did not conclude Mr Frost engaged in conduct that was inconsistent with the continuation of the employment relationship. Finally, that Mr Lacy did not find there was an imminent risk arising from his behaviour, pointing to Ms Gibson's own evidence that she accepted working with Mr Frost may be a reality if she wanted to continue working from Bright.[26]

[107] Based on these contentions, Mr Frost argues the evidence is that his conduct did not meet the required test of being serious misconduct, bullying or harassment. Therefore, AV has no right to transfer his employment to Dandenong.

[108] The Respondent rejects this. It is their position that Mr Frost has been found to have engaged in both serious misconduct and bullying in the present circumstances.

[109] AV identifies firstly that Mr Frost has been found by Mr Lacy to have engaged in wilful and deliberate conduct that amounted to bullying of Ms Gibson, which meets the very definition of what is meant by clause 74.6(f)(iv) of the Agreement.

[110] Secondly, that in accepting the other disciplinary action taken against him (the first and final warning and education) Mr Frost has accepted the finding of his misconduct and cannot now refuse to engage with the consequences of this acceptance.

[111] Further, the Respondent relies on the evidence of Mr Gibson, who gave credible and reliable evidence in proceedings, of her interactions with Mr Frost and the basis of her complaints of bullying.

[112] I am satisfied that Ms Gibson's evidence is an accurate version of events and her complaints, and I accept her evidence.

[113] As Mr Lacy's findings of bullying are not disputed by the Applicant, I am not required to make my own determination on whether bullying has occurred.

[114] What I am required to determine is did this bullying amount to serious misconduct. The Applicant says it does not. In addition to the reasons in support of this above, the Applicant referred me to the definition of serious misconduct in the *Fair Work Regulations* at 1.07.[27] Mr Frost's position is that the regulations support his submissions.

[115] The Respondent rejects this assertion. It is their position that the regulations do not exhaustively define serious misconduct, and further, that to be serious misconduct it is not necessary the conduct be wilful. Further supporting this position, the Respondent referred to the decision of Vice President Asbury (Commissioner as she was then) in *Mourilyan v James Hardie Australia Pty Ltd* where the Vice President considered the regulation 1.07 as follows:

> "[90] Misconduct is wrongful conduct. To be properly described as "serious", misconduct must be: "significantly worse than negligence and serious in its culpable quality as misconduct, as distinct from the results". Serious misconduct is judged on an objective basis, and it is therefore not necessary that the employee should intend to do wrong. If the employee knows of a specific relevant risk there may be misconduct depending on its seriousness. If the employee does not know of a specific relevant risk, then the negative element of misconduct requires a disregard or recklessness of possible risk. Wilful misconduct carries the additional connotation of intention, or a deliberately reckless course of misconduct, with knowledge that it is wrong.
>
> [91] Regulation 1.07 does not require that misconduct be wilful before it is serious misconduct but provides that serious misconduct includes wilful or deliberate behaviour."[28]

[116] On this basis, the Respondent submits any suggestion by the Applicant that Mr Frost's behaviour of bullying towards Ms Gibson did not also constitute serious misconduct must be rejected.

[117] I have considered these submissions, and the contemporaneous evidence of Ms Gibson in proceedings.

[118] For the Applicant's argument to prevail, my finding must be that Mr Frost's behaviour independently found by Mr Lacy and accepted by Mr Frost to be bullying does not constitute serious misconduct.

[119] I do not make this finding. In reaching this conclusion, I accept the Respondent's position that 'serious misconduct' is judged on an objective basis and concur with the findings of the Vice President identified above that it need not be wilful.

[120] Further, I do not accept the distinctions Mr Frost's representatives seek to draw that Mr Lacy did not find Mr Frost's behaviour presented serious imminent risks or was inconsistent to the continuation of the employment relationship.

[121] I do not consider it necessary for AV to make these distinctions. What is relevant in this matter is that AV had received an independently prepared report that included a substantiated finding Mr Frost had engaged in conduct that amounted to bullying, amongst other things.

[122] On this basis alone, I am satisfied the Respondent was entitled to considered Mr Frost had engaged in serious misconduct and move to consider the appropriate disciplinary sanction for this conduct, including transfer.

[123] To suggest that bullying, objectively viewed, does not amount to serious misconduct is implausible in my view.

[124] Moreover, it is inconsistent with the contemporary provisions of the Act and explicit provisions therein that distinguish bullying from other forms of workplace conduct the Parliament has identified in line with contemporary community standards.

Issue 2: In imposing a transfer on Mr Frost as a disciplinary outcome, has Ambulance Victoria acted unreasonably or unjustly?

[125] I have considered the question of whether Mr Frost's conduct was bullying or harassment above. As I am satisfied the conduct amounts to bullying as defined in the present circumstances, consideration of whether the transfer was unreasonable or unjust is not a consideration required by this question. In my review of the employer's observance of its obligations under clause 75 of the Agreement beginning at paragraph [69] above, however, I have considered whether the transfer is unreasonable or unjust. I have not been satisfied this is the case.

Issue 3: Does an employee who is transferred under clause 74.6(f)(iv) of the Agreement have access to the dispute resolution procedure pursuant to clause 37.2?

[126] The Applicant's position is that in the event the Commission finds it was open to AV to transfer Mr Frost, then he is entitled to bring a dispute for the Commission to consider the reasonableness of any disciplinary transfer decision under the terms of clause 37.2.

[127] Mr Frost's contention is that consistent with the principles of agreement interpretation there is nothing in the terms of this clause that limit its application to transfers of a particular nature. Rather, that the clause provides a right to an aggrieved employee to access the dispute procedure clause for transfers of any nature. On this basis, it is his position that the plain and ordinary meaning of the words are such that the unreasonableness of Mr Frost's transfer can be considered by the Commission.

[128] The Respondent rejects this submission. Their position is that the principles of agreement interpretation require that in addition to the principle that words be given their ordinary meaning, the principles also require that words be read as a whole and in context and not in a vacuum divorced from industrial realities.

[129] I note, as identified by the Respondent that clause 37.2 needs to be read in the context of the clause that it forms part of. The entire term of clause 37 is as follows:

> **"37. Resource Allocation**
>
> 37.1 Resources will be allocated to meet service demand. Employees will be required to perform all work they are competent to perform and accept the requirement for flexibility in relation to work arrangements and mobility between work locations to meet the Employer's operational and service delivery requirements.

> 37.2 Where an individual employee has a grievance about a transfer in work location is unreasonable having regard to the employee's personal and family circumstances and the requirement for excessive travel to attend work, that employee has access to the procedure in clause 11.

[130] Considering the meaning of the words in clause 37.2 in this context, I consider these words to apply in cases of the transfer of employees arising from resource allocation decisions as explicitly identified in the title of the clause and in 37.1.

[131] The plain and ordinary meaning of these words are that the grievance referred to in 37.2 is a grievance arising from a resource allocation decision in 37.1. Not from a grievance about a transfer arising from a disciplinary decision pursuant to clause 74. Had the drafters intended this to be the case, they would have provided for it.

[132] Therefore, I conclude that clause 37.2 does not provide an employee transferred in the context of a disciplinary procedure access to the provisions of this clause.

Issue 4: If the answer to Question 3 is "Yes", is the transfer of Mr Frost to Dandenong unreasonable having regard to his personal and family circumstances and the requirement for excessive travel to attend work?

[133] As I have not found the provisions of clause 37.2 provide Mr Frost access to the provisions of clause 11 in the Agreement, additional determination of this issue to that set out above is not necessary.

Conclusion

[134] My consideration of the issues in this matter has not led me to conclude in favour of Mr Frost in the questions agreed by the parties for the Commission to determination, outlined in paragraph [8] above.

[135] Accordingly, for the reasons set out above, his application is dismissed.

COMMISSIONER

Appearances:

Mr J. Gardener *on behalf of the Applicant.*
Ms R. Davern *on behalf of the Respondent.*

Hearing details:

2024.
Melbourne.
29 May.

Final written submissions:

5 June 2024

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[1] Witness Statement of Mark Frost, Court Book pages 19 – 29.

[2] AE509354, Court Book pages 52 – 53.

[3] Directions, Court Book page 839.

[4] Court Book pages 559-561.

[5] Witness Statement of Narelle Capp – NC-42, Court Book pages 584 – 585.

[6] See Transcript of Hearing on 29 May 2024 at [PN882]-[PN885].

[7] Ibid at [PN215]-[PN247].

[8] AE509354, Court Book page 53.

[9] Respondent's Outline of Submissions at [22], Court Book page 286.

[10] Applicant's Submissions in Reply at [24], Court Book page 260.

[11] Ibid at [28], Court Book pages 260-261.

[12] Ibid at [55]-[56] citing *Coutts v Close* [2014] FCA 19 at [114], Court Book page 264.

[13] Applicant's Submissions in Reply at [34], Court Book page 260. Witness Statement of Narelle Capp at [37]-[38], Court Book pages 294-295.

[14] Applicant's Submissions in Reply at [39], Court Book page 262.

[15] See Transcript of Hearing on 29 May 2024 at [PN740]-[PN763].

[16] Applicant's Submissions in Reply at [55]-[56], Court Book page 264.

[17] See *AMWU v **Berri** Pty Ltd* [2017] FWCFB 3005 at [114], *Workpac Pty Ltd v **Skene*** [2018] FCAFC 131 at [197].

[18] See Transcript of Hearing on 29 May 2024 at [PN882]-[PN885].

[19] Applicant's Submissions in Reply at [19], Court Book page 259.

[20] See Transcript of Hearing on 29 May 2024 at [PN977]-[PN978].

[21] Ibid at [PN731]-[PN804].

[22] Respondent's Outline of Submissions at [29], Court Book page 289.

[23] Ibid at [25]-[30] DCB p 287-289

[24] See Transcript of Hearing on 29 May 2024 at [PN740]-[PN763].

[25] Witness Statement of Stephen Doyle at [20]-[21], Court Book pages 758-761.

[26] Applicant's Submissions in Reply at [12]-[18], Court Book pages 257-259.

[27] *Fair Work Regulations* 1.07 – *Meaning of serious misconduct*.

[28] [2010] FWA 9672.