

[2024] FWC 2351

The attached document replaces the document previously issued with the above code on 2 September 2024.

Additional paragraphs added at [110] to [140].

Associate to Commissioner Durham

Dated 3 September 2024





# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Michael Gauci**

v

**DP World Brisbane Pty Limited**

(U2024/3765)

COMMISSIONER DURHAM

BRISBANE, 2 SEPTEMBER 2024

*Application for an unfair dismissal remedy – applicant failed drug test – applicant did not disclose prescribed medicinal cannabis – breach of policy – valid reason – dismissal not unfair – application dismissed*

[1] On 5 February 2024, Mr Michael Gauci, a Stevedore at DP World’s Brisbane terminal was selected to undertake a random drug test. He returned a non-negative result.

[2] Further laboratory testing confirmed the presence of 11-nor-d-9-THC-9-carboxylic acid, which is more commonly known as THC, in Mr Gauci’s urine at a level 10 times higher than the high range threshold prescribed by DP World’s Alcohol and Other Drugs Policy (**AOD Policy**).

[3] Following a disciplinary process, Mr Gauci was dismissed without notice due to serious breaches of DP World’s AOD Policy and his employment contract.

[4] Mr Gauci, who at the time, had been prescribed and was consuming medicinal cannabis, believes that his dismissal was unfair. He maintains that when he presented for work on 5 February 2024, he was not impaired and was able to competently perform his duties without compromising the health and safety of himself or others.

[5] He argues that the existence of traces of the metabolite THC in his system, in circumstances where he had a prescription, and was not impaired was not a valid reason for his dismissal.

[6] Mr Gauci seeks reinstatement to his former position, continuity of employment and lost pay. In the alternative, he seeks compensation of six (6) months of his income.

[7] For the reasons outlined below I find that there was a valid reason for Mr Gauci’s dismissal and further, that the dismissal was not harsh, unjust, or unreasonable. It was therefore not unfair.

## **Procedural Background**

[8] Following an unsuccessful conciliation conference on 27 May 2024, the matter proceeded to hearing on 16 and 17 July 2024. At the hearing, Mr Gauci was represented by Mr Samuel O’Sullivan of the Construction Forestry and Maritime Union (MUA) and DP World was represented by Mr James McLean of Counsel.

[9] Both parties filed written submissions and witness statements. Mr Gauci gave evidence in support of his application as did Mr Aaron Johnston, MUA Official. Dr Michael Robertson, Pharmacologist and Forensic Toxicologist, provided an expert report and was called to give evidence for Mr Gauci.

[10] Mr Benjamin Hanley, General Manager, gave evidence on behalf of DP World. Dr Michelle Williams, Chief Toxicologist for Brassetts Group provided an expert report and was called to give evidence on behalf of DP World.

## **BACKGROUND**

### **Mr Gauci’s role and his employment with DP World**

[11] At the time of his dismissal, Mr Gauci was employed by DP World as a Stevedore (grade 3) at DP World’s Brisbane Terminal. He had been employed with DP World for over 19 years.

[12] Whilst Mr Gauci contends that he had an impeccable work history, I have noted and given appropriate weight to DP World’s submissions, and the evidence of both parties relating to an official warning that was issued to Mr Gauci in 2017 for a breach of an unrelated policy.<sup>1</sup>

[13] It is not in dispute that Mr Gauci’s role is one that can be described as safety critical and that prior to his test he had been driving a shuttle carrier — work which would reasonably be characterised as driving or operating heavy machinery.

### **Mr Gauci’s medical condition and use of medicinal cannabis**

[14] In recent years, Mr Gauci’s relationship with his wife had become strained, leading to a significant deterioration in his mental health. In February 2023 Mr Gauci was prescribed medicinal cannabis as a treatment for his condition. Mr Gauci was prescribed:<sup>2</sup>

- **Phytoca CBD oil 150 30ml (THC Oil)**

Dosage: Initial dose: 0.25mL BD SL (daily); increase each dose by 0.1ml every two days if required until symptoms are controlled, or side effects occur; Maximum daily dose: 3.0mL

- **Spectrum Therapeutics Canopy JH 22 THC flower 15g (22% THC Flower)**

Dosage: Initial dose: 0.1g via vape PRN; increase by 0.1g every two days if required until symptoms are controlled, or side effects occur; Maximum daily dose: 1.0g

- **Spectrum Therapeutics Canopy TC 28 THC flower 15g (28% THC Flower)**

Dosage: Initial dose: 0.1g via vape PRN; increase by 0.1g every two days if required until symptoms are controlled, or side effects occur; Maximum daily dose: 1.0g.

[15] It is not in dispute that Mr Gauci did not disclose this prescription or his use of medicinal cannabis to DP World.<sup>3</sup>

[16] In June 2023 Mr Gauci separated from his wife.<sup>4</sup> Mr Gauci provided evidence, which I accept, about the further impact this had on his mental health, and the various associated periods of leave taken during 2023.<sup>5</sup>

[17] Mr Gauci acknowledges that during this period his use of medicinal cannabis increased however he maintains that he always ensured that he did not consume medicinal cannabis within 24 hours of commencing a shift.<sup>6</sup> I note at this point that the position of the parties differs as to whether 24 hours is sufficient time to ensure that no impairment remains, nor to ensure that a positive result would not be recorded, as required by the AOD Policy.

[18] In early January 2024, Mr Gauci's mental health deteriorated further, and he began seeing a psychologist, Dr Siang who gave him a provisional diagnosis of depression and anxiety and provided him with a medical certificate saying that he was unfit for work from 4 January 2024 up to 29 January 2024.<sup>7</sup>

[19] During this period of leave, Mr Gauci says that he was barely sleeping.<sup>8</sup> Trying to "get himself better" Mr Gauci increased his usage of medicinal cannabis.<sup>9</sup>

[20] On the evening of 3 February 2024, Mr Gauci was struggling to sleep. At approximately 7:00am the next morning (4 February 2024 – the day before he was due to start work), he consumed a "small amount" of medicinal cannabis to help him get back to sleep.

[21] During cross examination, when pressed on exactly how much medicinal cannabis he had consumed, Mr Gauci explained that he did not weigh the amount and measured by eye. Further, Mr Gauci was unsure whether he had consumed the 22% THC Flower or 28% THC Flower, but thought it may have been the latter and that it was most likely that he had consumed approximately 1 gram. It is noted that this was the maximum prescribed daily dose.

### **The events of 5 February**

[22] Mr Gauci states that he woke on the morning of 5 February 2024 as normal and "did not feel impaired whatsoever".<sup>10</sup> He travelled to work as usual on his motorbike to commence his 7.00am shift.

[23] Mr Gauci was assigned to operate a shuttle carrier that day. Mr Gauci's statement provides that after beginning work, he only picked up one container box before being informed over the radio that he had been selected for a random drug and alcohol test.<sup>11</sup>

[24] He proceeded to the security hut where the test was conducted.<sup>12</sup> Attempts to take a saliva sample were unsuccessful however Mr Gauci did produce a urine sample which returned

an initial non-negative result for THC.<sup>13</sup> In accordance with the AOD Policy, the sample was then sent away for confirmatory testing and Mr Gauci was stood down on full pay pending the results.

### **The disciplinary process**

[25] Two days later, on 7 February 2024, DP World received test results which confirmed the presence of THC in Mr Gauci's urine at a level of 635ug/l (630 micrograms per litre of urine).<sup>14</sup> This result was 42 times higher than the cut off level of 15ug/l prescribed by both the Australian Standards and the AOD Policy and some 10 times higher than the high range threshold of 60ug/l prescribed in the AOD Policy.<sup>15</sup>

[26] On 8 February 2024 DP World wrote to Mr Gauci notifying him of the results and advising that he was stood down without pay pending an investigation.<sup>16</sup> The letter outlined the particulars of DP World's concerns and required that he attend a meeting to discuss "concerns about his conduct and the prospects that his employment could be terminated for serious misconduct for a breach of the AOD Policy".<sup>17</sup>

[27] The meeting was held on 14 February 2024 and was attended by Mr Hanley and Mr Brendan Cleaver, HR Manager.<sup>18</sup> Mr Gauci attended with his support person, Mr Jason Miners, Branch Secretary, MUA.<sup>19</sup>

[28] During the meeting, Mr Gauci explained the personal issues he had been experiencing and for the first time, disclosed to DP World that he had been prescribed, and consuming medicinal cannabis.<sup>20</sup> The meeting was adjourned to give Mr Gauci the opportunity to obtain further information from his treating practitioner including:<sup>21</sup>

- what had been prescribed,
- when it had been prescribed, and
- any advisory warnings Mr Gauci may have been given in relation to driving or the use of heavy vehicles whilst taking the prescription.

[29] The next day, a follow up letter was sent confirming the information sought and that it was to be provided by 23 February 2024.<sup>22</sup>

[30] On 23 February 2024, Mr Johnston emailed Mr Hanley seeking further time to obtain a "treatment letter" and providing a copy of a patient consent form that had been signed by Mr Gauci which included a signed acknowledgement that Mr Gauci understood that he must not operate heavy machinery whilst taking medicinal cannabis containing THC.<sup>23</sup>

[31] On 7 March 2024, a further meeting was held. At this meeting Mr Miners provided three documents for consideration:<sup>24</sup>

- a treatment letter from Mr Gauci's doctor, Dr Joshua Gabriel,
- a letter listing 14 matters that should be considered as mitigating factors, and
- a letter highlighting Dr Gabriel's comments, to the effect that "testing positive for THC does not indicate impairment."

[32] On 13 March 2024, Mr Gauci was advised that the outcome of the disciplinary process was that his employment would be terminated due to serious breaches of the AOD Policy and his employment contract.<sup>25</sup>

### **DP World's drug and alcohol framework**

[33] DP World have had an AOD Policy since 2012.<sup>26</sup> The current version of the AOD Policy has been in place since 2021.<sup>27</sup>

[34] It is not in dispute that among other things, the AOD Policy provides:<sup>28</sup>

- a. "(e)mployees must not attend for work with an alcohol or other drug level that exceeds the limits contained in Appendix B of this Policy".
- b. "(e)mployees who are required to take medications, such as over the counter medications or prescription drugs that may impact their physical or mental alertness are required to notify their Manager or Supervisor".
- c. "(b)reaches of this Policy are serious and have the ability to put the health and safety of Employees and others at significant risk".
- d. "DP World has discretion to take the appropriate disciplinary action for breaches of this Policy which may include termination of employment"; and
- e. "(b)reaches of this Policy may be considered serious misconduct which may result in instant dismissal in particular where there is a "high range" level detected or where this is a second breach".

[35] Relevantly, the AOD Policy includes, at Appendix B, a table providing "Alcohol & Other Drugs Detection Levels" for various substances, along with a note that these cut off levels are intended to reflect Australian Standard detection levels. The policy also prescribes what are "High Range" readings.

[36] Importantly, within the table outlining high range levels, are the words "High range detection will be considered a serious breach of this Policy."<sup>29</sup>

[37] DP World's Code of Conduct (**Code**) also outlines DP World's expectations of employees as they relate to fitness for work.<sup>30</sup>

"I will be drug and alcohol free at work and advise of any injuries, medications or medical conditions that could impede my ability to do my job safely before I commence work".

[38] It is Mr Hanley's uncontested evidence that the AOD Policy and the Code are available on the People Portal, an intranet site that has been setup by DP World for employees.<sup>31</sup>

[39] Mr Hanley gave evidence about the steps taken by DP World to continually reinforce the importance of the policy to employees including.<sup>32</sup>

- on induction;
- in e-mail updates sent to mailing lists – (including a June 2023 email which included a copy of the AOD Policy and the employee declaration form, which had been sent to all employees at the request of the Safety Committee);
- during toolbox meetings;
- more generally, for example, through posters on the walls around the terminal; and
- through the distribution of workplace bulletins and circulars.

[40] Annexed to Mr Hanley’s statement were a selection of bulletins that had been sent to all employees including one titled “Update to our Alcohol and Other Drugs Policy” sent 20 July 2020.<sup>33</sup> This bulletin included a specific reference to a lowering of the cut off levels for THC.<sup>34</sup> Importantly, it included a link to the new policy and reminded employees of their obligations to familiarise themselves with, and comply with the policy.<sup>35</sup> Mr Hanley also included a bulletin issued on 30 August 2022 which explains DP World’s expectations about the disclosure of medications.<sup>36</sup>

[41] On 27 June 2022, following a decision of the Fair Work Commission in a matter that shares many similarities with this matter, Mr Mark Hulme, Chief Operating Officer - Ports & Terminals, sent a circular to all employees which stated:<sup>37</sup>

**“FAIR WORK COMMISSION CONFIRMS THAT DP WORLD POLICY SHOULD BE COMPLIED WITH BY EMPLOYEES**

DP World is committed to providing a safe work environment, and our Alcohol and other Drugs Policy clearly set out that employees may not use either alcohol or illicit drugs and attend the workplace. Doing so places you and your workmates at an unacceptable risk.

DP World terminated the employment of a long serving employee, from the Fishermans Island terminal who tested non-negative to THC (cannabis). He elected to challenge this in the Fair Work Commission who upheld DP World's decision to terminate his employment. The case has highlighted a number of key findings which are important to share:

Firstly, the work being performed by employees at our Terminals, whether it be as a Stevedore, on a vessel or in the Control Room, is safety critical and that DP World's zero tolerance stance is proportional and required.

Secondly, there is no safe 'window of detection' and that certain drugs can stay in your system for days, weeks or months. This means there is no means by which an employee can be confident there are no drugs in their system when they attend for work.

Thirdly, attending for work with drugs in their system shows reckless indifferent to breaching the policy.

This decision is an important reminder for all workers to follow the Policy at all times.

Our Policy is based on the "presence" of a drug rather than "impairment". This means DP World does not need to prove that your work or performance has been adversely affected by the drugs- the presence of the substance is the breach.

The employee has decided to appeal this decision. DP World will continue to defend its zero tolerance approach to managing drugs and alcohol in the workplace.

**REMINDER:**

We all share a responsibility for maintaining a safe working environment DP World has a **zero tolerance to drugs and alcohol in the workplace**. Its simply not worth the risk to yourself or others.



Any employee who returns a non-negative reading will be stood down and subject to a show cause process. With disciplinary action, up to and including termination.”

[42] In addition to DP World’s internal policies and procedures, the DP World Enterprise Agreement 2020 (**the Agreement**), to which the MUA are a party, acknowledges the existence of the AOD Policy and outlines the various testing methods that may be used, including random testing, as was undertaken on 5 February 2024.<sup>38</sup>

[43] Mr O’Sullivan references DP World’s “Drug and Alcohol Framework” as being a combination of the AOD Policy and the circular issued to employees 27 June 2022. The AOD Policy is part of a broader framework, however, it seems quite selective to suggest that any applicable “framework” was limited to these two documents. Taking the above into consideration, I find that the AOD policy is a part of a broader framework that includes the Code, supplementary bulletins and circulars, and the Agreement.

## **THE MEDICAL EVIDENCE**

### **The evidence of Dr Robertson**

[44] Dr Robertson notes that the presence of THC in Mr Gauci’s urine is consistent with some prior ingestion of a THC-containing product.<sup>39</sup> Whilst he is not aware of the amount of THC-containing product that was actually consumed by Mr Gauci, if he had used the maximum dose of 1 gram for each of the flower products (2 grams per day), in the 24 hours before his test, this could reasonably have produced the result returned by Mr Gauci.<sup>40</sup>

[45] Dr Robertson references a range of studies that show that the concentrations found in Mr Gauci’s urine were reasonable in the first 24 hours and would decline slowly over the following days.<sup>41</sup>

[46] Much of Dr Robertson’s report goes to the question of impairment. Dr Robertson notes that the risk of impairment by THC will differ depending on the dose, the time of use and the tolerance of the individual to the effects of THC.<sup>42</sup> He further notes that the detection of THC in a urine sample does not in and of itself, infer impairment at the time the sample was taken.

[47] Dr Robertson states that on the assumption that Mr Gauci last used THC-containing products 24 hours prior to attending work, it is not likely that any material impairment would have remained the following day.<sup>43</sup>

[48] Dr Robertson notes that Mr Gauci would have been observed by several individuals the morning of his test, and that there is no reference in any of the documentation he has seen that indicated Mr Gauci was displaying any signs of indicia consistent with intoxication.<sup>44</sup>

[49] During cross examination, it was put to Dr Robertson and accepted that he could not rule out without scientific certainty that Mr Gauci was impaired when he attended work.

[50] Doctor Robertson described the level of THC in Mr Gauci’s system as being consistent with significant consumption.

[51] With respect to the declaration Mr Gauci had signed acknowledging he understood that he must not drive or operate heavy machinery whilst taking medicinal cannabis, Dr Robertson's response was that this is also dependent on whether the intention was to reference impairment or presence of THC. If the former was the intention, then Dr Robertson says it would be "unlikely" that Mr Gauci was in breach however if the intention was that he does not have the presence of THC in his urine, then he would be in breach of this acknowledgment.<sup>45</sup>

### **The evidence of Dr Williams**

[52] Dr Williams agrees with the statements of Dr Robertson with respect to variables associated with impairment and that no inference of impairment can be drawn from a positive urine test, rather the detection of THC in the urine is only evidence of prior use, within a day or days of the test.

[53] On the topic of duration of effect, Dr Williams notes that the higher the dose the more profound the impairment and that logically, the longer it will take for the body to excrete it.<sup>46</sup>

[54] Dr Williams notes that THC is the euphoric compound in both recreational and medicinal cannabis and that because the concentration of THC is consistent across doses/gram, the effects of medicinal cannabis are identical to the effects of cannabis consumed recreationally.<sup>47</sup>

[55] Dr Williams notes that there is a difference between detectable (i.e. above the cut off specified in Australian Standards being 15ng/ml and returning a result as high as the one returned by Mr Gauci being 635ug/ml (ug/ml is synonymous with ng/ml).<sup>48</sup>

[56] Dr Williams disagrees with Dr Robertson's contention that Mr Gauci would not have experience any material impairment 24 hours after consuming medicinal cannabis, sighting various contrary studies and reports.<sup>49</sup>

[57] In response to Dr Robertson's comments about the lack of reports of any visual or other signs of impairment prior to the test, Dr Williams notes that the type of impairments noted are not readily observable from a brief interaction and that "lack of overt impairment is not the same as a person being fit to perform their high-risk job role".<sup>50</sup>

[58] Dr Williams goes on to note that, on the basis of Mr Gauci's statement, that he used medicinal cannabis infrequently, he would not be characterised as a "regular high dose cannabis user".<sup>51</sup> However, if (as he may have suggested in his oral evidence) he was using cannabis to the extent that he would be characterised as a regular high dose user then, based on her experience, the additional factor of withdrawal would need to be considered when assessing levels of impairment.

### **Conclusions on the medical evidence**

[59] Both Dr Robertson and Dr Williams noted that they had prepared their reports per the Expert Witness Code of Conduct and agreed to be bound by it. I note that the reports of both doctors are based on similar assumptions – as they relate to the time of the test; the method of

testing used; Mr Gauci's prescription; and when Mr Gauci says he had last consumed medicinal cannabis.

[60] In response to Dr Williams' statement, Mr O'Sullivan disputed the assumption behind Dr Williams' findings, suggesting that the assumption that Mr Gauci had consumed .25ml of Phytoca CBD oil 150 twice a day; and 0.1g of Therapeutics Canopy JH 22 THC Flower 22% twice a day in the days preceding 5 February 2024 were incorrect as Mr Gauci had not made any disclosure about the amount of THC he consumed during that period at the time the report was written.<sup>52</sup> He went on to state that in the period 4 January 2024 to the evening of 3 February 2024, he consumed, on some days, medicinal cannabis up to but no more than the amount prescribed. This was noted and accepted by Dr Williams.

[61] Notwithstanding the above, it was common ground between the experts that the dose that would have been consumed by Mr Gauci was equivalent to about 280 milligrams of THC, a level of THC Dr Robertson acquainted with, having smoked 10 to 15 joints.

[62] The evidence provided by Mr Aaron Johnston and submissions about Ms Williams qualifications compared to Dr Robertson, and the suggestion that Dr Williams lacked impartiality have been considered in light of the Code. I found the evidence of both Doctors to be credible and I am not persuaded that any lack of impartiality exists.

[63] Notwithstanding the above, much of the evidence provided by both Doctors aligns, particularly with respect to the difficulties posed when trying to measure impairment from THC and both experts agree that the concentration of THC in urine only relates to exposure, not impairment.

#### **Mr Gauci's evidence about his use**

[64] During Mr Gauci's oral evidence, he said that he consumed 1g to 2g a day but was unclear how much he would consume on a weekly basis. Furthermore, he was unsure which flower he would consume, noting he would take 22% THC Flower for day and 28% THC Flower for sleep. Though when asked how much of the 22% THC Flower he took, Mr Gauci said sometimes none. Mr Gauci also said that the 22% THC Flower and 28% THC Flower would sometimes get mixed up.

[65] Viewed objectively, I find Mr Gauci's statements about the amount of cannabis he had consumed, particularly his reference to "a small' amount" were unreliable due to the imprecise nature of measurement and the risk that the 22% THC Flower and 28% THC Flower may have been confused.

#### **WAS MR GAUCI UNFAIRLY DISMISSED?**

[66] There is no dispute, and I am satisfied that Mr Gauci was protected from unfair dismissal at the time he was dismissed.<sup>53</sup>

[67] The criteria that I must consider when deciding whether Mr Gauci's dismissal was harsh, unjust, or unreasonable are set out at s.387 of the Act. My consideration of each criteria follows below.

**Was there a valid reason for the dismissal related to the Applicant's capacity or conduct (including its effect on the safety and welfare of other employees)?**

[68] It is well established that the factual basis for the reason for dismissal will not of itself demonstrate the existence of a valid reason.<sup>54</sup> It must, as s.387(a) makes clear, be a valid reason for dismissal. To be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”<sup>55</sup> and should not be “capricious, fanciful, spiteful or prejudiced.”<sup>56</sup> As summarised by then Deputy President Asbury in *Smith v Bank of Queensland Ltd*, a “dismissal must be a justifiable response to the relevant conduct or issue of capacity”.<sup>57</sup> The Commission must consider the entire factual matrix in determining whether an employee's termination was for a valid reason.<sup>58</sup>

*Submissions of Mr Gauci*

[69] Mr Gauci submits that there was no valid reason for the dismissal related to his capacity or conduct.

[70] Mr Gauci maintains that he was in a fit and healthy state and able to competently perform his duties without compromising the health and safety of himself or others when he commenced work on 5 February 2024.<sup>59</sup> And further, that the mere existence of traces of the metabolite THC in his system in circumstances where he had a prescription and was not impaired is not a valid reason for dismissal.<sup>60</sup>

[71] Mr Gauci submits that he did not act deliberately or recklessly in returning the non-negative result. Mr Gauci knew that he was required to attend the terminal “fit for work” and held a reasonable and honest belief that enough time had passed between consuming a small amount of medicinal cannabis and the beginning of his shift.<sup>61</sup>

[72] Further, in attending for his 5 February 2024 shift, Mr Gauci believed that there would be no impact to his physical or mental alertness because he had allowed 24 hours to pass from the time of consuming a small amount of medicinal cannabis until the beginning of the shift.

[73] Mr Gauci does not dispute that he failed to declare to DP World that he had been prescribed and was taking medicinal cannabis and initially accepted that this was inconsistent with his obligations under the AOD Policy. He argues that this failure to disclose was not a valid reason for the dismissal related to his capacity or conduct.<sup>62</sup> I note at this point an inconsistency that arose during cross examination, where Mr Gauci retracted from this position, seeming to disagree that his actions were in fact in breach of the policy.

[74] Mr Gauci further argued that he was confused about his obligation to disclose the medicinal cannabis prescription, with this confusion further exacerbated by him not being properly informed of his obligations under DP World's drug and alcohol policy framework.<sup>63</sup>

[75] Mr Gauci states that he held an honest and genuine belief that DP World would prohibit him from attending the workplace and/or terminate his employment if he disclosed the medicinal cannabis prescription.<sup>64</sup> This he believed to be true despite any assurances he could make as to impairment. He contends that this was a reasonable conclusion to have drawn in that

the AOD Policy requires employees to notify DP World of certain medications, while at the same time, DP World purports to have a blanket zero tolerance approach to drugs in the workplace, including prescribed medicinal cannabis.

*Submissions of DP World*

[76] DP World submitted that there was a valid reason for the dismissal related to Mr Gauci's capacity or conduct because DP World operates in a safety critical environment, and is entitled to implement and expect compliance with its AOD Policy in order that it can discharge its own obligations to take reasonable steps to ensure the safety of persons working at the Port.<sup>65</sup>

[77] They say Mr Gauci breached the AOD Policy by:

- a) failing to declare that he had been prescribed and was using medicinal cannabis; and
- b) attending for work with an elevated level of a proscribed substance in his system.

[78] And that such breaches of policy constitute a valid reason, as a failure by an employee to comply with a lawful and reasonable policy will be a breach of a fundamental term of the contract of employment.<sup>66</sup> Noting that Mr Gauci would reasonably have been aware that termination of employment was a potential outcome of a breach of the AOD Policy.<sup>67</sup>

[79] Relevantly, the AOD Policy, at least insofar as it requires employees to declare prescription medication and not attend for work with proscribed substances in their system, is evidently a lawful and reasonable one. The observations of the Full Bench in *Sharp v BCS Infrastructure Support Pty Limited (Sharp)* are relevant, where the Full Bench, after noting the difficulties of establishing whether an employee is impaired because of cannabis use, concluded:

“[f]or that reason, employer policies which provide for disciplinary action including dismissal where an employee tests positive for cannabis simpliciter may, at least in the context of safety-critical work, be adjudged to be lawful and reasonable.”<sup>68</sup>

[80] DP World submit that Mr Gauci's ancillary contention that he was not impaired when he attended for work is simply not relevant in circumstances where impairment was not the reason relied on for terminating his employment. Rather, the finding of serious misconduct related to Mr Gauci breaching the AOD Policy, by attending work with a proscribed drug in his system and failing to declare that he had been prescribed and was consuming medicinal cannabis.<sup>69</sup>

[81] Furthermore, DP world submit that as Mr Gauci had committed two serious breaches of a lawful and reasonable policy, any matters raised in mitigation are relevant not to whether there was a “valid reason”,<sup>70</sup> but only to the subsequent question of whether dismissal was “harsh, unjust, or unreasonable”.<sup>71</sup>

[82] DP World argue that the submission that Mr Gauci was supposedly not impaired by the presence of elevated levels of THC in his system are of peripheral relevance, given he was dismissed not for being impaired but for attending work with a proscribed drug in his system.<sup>72</sup> And moreover, this submission is untenable given the level of THC detected.

## *Consideration*

### *The question of impairment*

[83] Mr Gauci's submissions focus on the distinction between returning a positive test for THC and impairment. Whilst I accept the Mr Gauci may well have felt completely fine, the evidence of both Dr Robertson and Dr Williams concurs with respect to the many variables that exist when determining the level of impairment that any individual may experience.

[84] As noted in Mr Hanley's evidence, the AOD Policy is not based on levels of impairment, rather it sets "cut-off" limits" for proscribed drugs which are based on Australian Standards.<sup>73</sup> Mr Hanley says, and I accept, that the policy was developed in this way due to the medical evidence that clearly suggests that there is no meaningful way to test for impairment.

[85] As explored above, I find Mr Gauci's evidence regarding the amount, and strength of cannabis he had consumed to be unreliable. Similarly, I find Mr Gauci's statements that the last time he consumed medicinal cannabis was "approximately" 7:00am the day before he was due to return to work to be of concern. This is not a definitive recollection, and leaves open the possibility that the cannabis was consumed after 7:00am. Each of these factors cast doubt over Mr Gauci's contention that he held a reasonable and honest belief that enough time had passed between consuming a small amount of medicinal cannabis and the beginning of his shift.

[86] Notwithstanding the above, I find that Mr Gauci was dismissed because he breached the AOD Policy by failing to declare his use of prescription medication and for attending work with an elevated level of a proscribed substance in his system.

[87] Consequently, I find Mr Gauci's submission that he was not impaired by the presence of elevated levels of THC in his system to be of peripheral relevance, given he was dismissed not for being impaired, but for attending work with a proscribed drug in his system and for failing to declare his use of prescription medication.

### *Prescription medication v recreational use*

[88] I do not accept Mr Gauci's suggestion that a distinction should be made between drugs that are consumed recreationally and those consumed via a prescription. Noting Dr Williams' report, the effects of medicinal cannabis taken in accordance with a prescription and recreational use of cannabis are identical.<sup>74</sup>

[89] Mr McLean notes similarities between this present matter and the decisions of the Full Bench in *Sharp*, and *Harbour City Ferries Pty Ltd v Mr Christopher Toms (Toms)* however Mr O'Sullivan argues that these cases are distinguishable from this matter because, unlike the applicants in *Sharp* and *Toms*, who had both consumed unlawful substances recreationally, Mr Gauci was prescribed medicinal cannabis to treat a serious medical condition.

[90] Having found that Mr Gauci was dismissed for two breaches of his employer's policy, I do not accept this argument. The AOD policy clearly outlines the responsibility of employees to not return positive test results for THC. The policy does not distinguish between prescribed

or recreational consumption in this regard. Where the policy does make a distinction between the two, however, is with respect to the requirement that employees report the use of any prescription medication – which, as will be further explored below, Mr Gauci failed to do.

*Requirement to report prescription medication*

[91] Mr Gauci clearly understood the requirement to notify his supervisor of his prescription and made a conscious decision not to. Whilst I accept his fears relating to reporting, the fact remains that he knowingly and willingly breached this requirement, resulting in DP World being unable to undertake a risk assessment or consider any reasonable adjustments that may have been required to accommodate Mr Gauci’s medical condition and its treatment.

[92] The AOD policy specifically notes that once such prescriptions have been reported, the employee may be required to seek a medical clearance from their treating doctor to confirm they are fit to perform their role whilst taking the medication.<sup>75</sup>

[93] Had Mr Gauci reported this prescription, it may well have been the case that his doctor and DP World could have agreed on an appropriate number of hours that should be left between the consumption of medicinal cannabis and commencing work — this may well have been 24 hours, it may have been more. What is clear however, is that it was not open to Mr Gauci to have made this assessment himself, without DP World’s input.

[94] It is also of note that having received a prescription for medicinal cannabis, Mr Gauci signed a patient consent form acknowledging that he understood that he must not drive or operate heavy machinery whilst taking medicinal cannabis containing THC. Viewed objectively, this acknowledgment should have served as a clear indication to Mr Gauci of the health and safety risks associated with his consumption of medicinal cannabis. Noting the safety critical nature of his work, that he signed this declaration, yet still chose not to disclose his use of medical cannabis does not weigh in his favor.

[95] I accept DP World’s submissions that Mr Gauci’s failure to report his use of medicinal cannabis impacted on their ability to discharge their obligations to take reasonable steps to ensure the safety of persons working at the Port, and their capacity to provide a safe working environment.

*The Lawfulness and reasonableness of the policy*

[96] Consistent with the above comments from the Full Bench in *Sharp*, and the safety critical role performed by Mr Gauci, I find the AOD policy to be both lawful and reasonable.

*Was Mr Gauci aware of his obligations under the policy?*

[97] Mr Gauci submits that DP World has failed in its obligation to explain the application of its drug and alcohol policy framework in a way that is comprehensible for the average stevedore,<sup>76</sup> particularly as it relates to inconsistencies between the AOD Policy and the 27 June 2022 circular.<sup>77</sup>

[98] As noted in paragraphs 33 to 43, DP World’s drug and alcohol framework is broader than just the AOD Policy and the 27 June 2022 memorandum. Further, it is clear that Mr Gauci received multiple bulletins and circulars outlining his responsibilities. Whilst I accept that Mr Gauci may well have held some confusion, no evidence was advanced by Mr Gauci to indicate that the drug and alcohol framework was incomprehensible to the average stevedore, nor was any evidence advanced to suggest that either he or the MUA had raised any issues of comprehension or confusion with DP World.

[99] Noting the safety critical nature of stevedoring work, the industrial maturity of the MUA and the relationship between the union and DP World, it is reasonable to suggest that if such confusion had existed, it would have been raised either at a Safety Committee meeting or during bargaining. No evidence was advanced in this regard.

[100] I also note that Mr Gauci’s contract of employment, which he last signed on 17 November 2022 references his responsibility to familiarize himself with and comply with all DP World Policies, including the AOD Policy and the Code.

[101] Viewed objectively, it is reasonable to assume that had Mr Gauci been confused about his obligations, the safety critical nature of his work, combined with:

- the knowledge that he was in receipt of a prescription that may lead to him returning a non-negative test result,
- that he had signed a declaration confirming that he understood he should not operate heavy machinery whilst taking medicinal cannabis, and
- his knowledge that breaches of the policy may lead to disciplinary action (including dismissal)

Should reasonably have led him to seek clarification of these points prior to commencing consumption.

[102] Taking the above into consideration, I find that Mr Gauci was clearly aware of his obligations under the AOD Policy as they related to reporting his use of prescription medication. Further, that he understood his responsibility to not attend work with an elevated level of a proscribed substance in his system.

### *Breach of Policy*

[103] DP World note that it is uncontroversial that breaches of lawful AOD policies have been found to constitute a valid reason. As noted in *B, C and D v Australia Postal Corporation T/A Australia Post*, a failure by an employee to comply with the lawful and reasonable policy will be a breach of a fundamental term of the contract of employment.<sup>78</sup>

[104] This was acknowledged by Mr O’Sullivan in his closing submissions however he took issue with DP World’s failure to reflect the second sentence of that quoted paragraph, that is, “in this way is **substantial and willful** breach of a policy will often, **if not usually**, constitute a “valid reason” for dismissal” (emphasis added).<sup>79</sup>



[105] Mr O’Sullivan went on to suggest that this was relevant, firstly, because Mr Gauci’s breaches of the policy were neither substantial nor willful and secondly, because even if the breaches are substantial or willful, they do not necessitate a valid reason for dismissal.

[106] For the reasons outlined above, I do not accept that Mr Gauci’s conduct in failing to comply with the AOD Policy was not willful.

[107] Further, I do not accept the argument advanced by Mr O’Sullivan that the breaches were not substantial, rather, I accept DP World’s contention that they were serious.

[108] As relevantly noted in a recent decision of Deputy President Coleman:

“Nothing can be more important than protecting health and safety in the workplace, and a drug and alcohol policy is one important means of doing so. Failure to comply with a reasonable workplace drug and alcohol policy is unacceptable, first and foremost because it undermines efforts to keep workers safe, and secondly because it exposes the employer to risk.”<sup>80</sup>

#### *Conclusions on valid reason*

[109] Having regard to the above, I find that:

- The AOD policy was lawful and reasonable.
- Mr Gauci was aware of his responsibilities under the AOD Policy as they related to:
  - the requirement that he report the use of prescription medication and
  - his responsibility to not attend or perform work with a level of any drug within his system that would result in him returning a positive test.
- Mr Gauci was aware that breaches of the AOD Policy would be likely to result in disciplinary action, including the termination of his employment.
- Mr Gauci knowingly and willfully breached the AOD Policy.

[110] Consequently, I find Mr Gauci’s actions to be a serious breach of the AOD Policy and as such, his conduct was a valid reason for his dismissal.

#### **Was the Applicant notified of the valid reason?**

[111] It is not in dispute, and I find that Mr Gauci was notified of the reasons for his termination.<sup>81</sup>

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

[112] Mr Gauci submitted that DP World’s zero tolerance to drugs and alcohol in the workplace meant that he did not have a true opportunity to respond.<sup>82</sup>

[113] Put another way, Mr Gauci believes that because DP World have zero tolerance for drugs and alcohol in the workplace, Mr Gauci’s dismissal was a “fait accompli” as the decision to terminate his employment had already been made, irrespective of any mitigating circumstance or defense.<sup>83</sup>

[114] In support of this argument, Mr O’Sullivan drew the Commissions attention to Moore J’s comments *Wadey v YMCA Canberra*<sup>84</sup> which was referred to in *Dover-Ray, Tamicka Louise v Real Insurance Pty Ltd* which stated:<sup>85</sup>

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

[115] In response, Mr McLean reiterated Mr Hanley’s explanation of zero tolerance, as being zero tolerance for employees attending work with drugs or alcohol in their system. Further, that DP World’s zero tolerance approach does not mean that all breaches of the policy would necessarily result in termination of employment. This, they say, is demonstrated by the AOD Policy, which provides for discretion regarding disciplinary outcomes and other sanctions depending on the circumstances.

[116] DP World submit there is no substance to the contention that the disciplinary process was “perfunctory” as Mr Gauci was afforded multiple opportunities to respond to the concerns raised, and all of the matters he raised in response were considered.

[117] Ultimately. DP World argue, and I accept, that the mere fact that the outcome in this matter did not result in an outcome other than dismissal does not mean that Mr Gauci was deprived of an opportunity to respond.<sup>86</sup>

[118] The disciplinary process was undertaken over a period of five (5) weeks. During the process, DP World’s concerns were clearly outlined, and Mr Gauci was given multiple opportunities to respond, both in writing and in-person, to the allegations. Where more time was required to seek further material, it was granted.

[119] In all the circumstances, I find that Mr Gauci was given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss him being made.

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

[120] It is not in dispute, and I find that DP World did not refuse the attendance of Mr Gauci’s union representatives at discussions relating to the dismissal.

**Was the Applicant warned about unsatisfactory performance before the dismissal?**

[121] As Mr Gauci’s dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.<sup>87</sup>

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

[122] Mr Gauci submitted that DP World is a large company and, as such, should have provided him with procedural fairness, including a real opportunity to respond to the conduct.<sup>88</sup>

[123] DP World does not contend that the size of its enterprise had an impact on the procedures followed in effecting the dismissal.<sup>89</sup>

[124] Having regard to the matters above, and having found that Mr Gauci was afforded an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made, I find that the size of DP World's enterprise did not impact on the procedures followed in effecting the dismissal.

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

[125] Mr Gauci submitted that DP World has dedicated human resource staff that should ensure compliance with appropriate procedures when terminating the employment of employees.<sup>90</sup>

[126] The Respondent does not contend that any absence of dedicated human resource expertise had an impact on the procedures followed in effecting the dismissal.<sup>91</sup>

[127] As noted above, the fact that Mr Gauci does not agree with the final determination made by DP World at the conclusion of the process does not mean that the process followed was flawed.

[128] Considering the above, this factor is not a relevant consideration.

**What other matters are relevant?**

*Length of service, cooperation and remorse*

[129] Mr Gauci submits that he was a loyal and hardworking employee for more than 19 years. Further, he has an excellent employment history across those many years of service and has expressed honest and genuine contrition for his actions. However, as noted above, Mr Gauci appeared to walk back this position during cross-examination by denying that he breached the AOD Policy. As such, this appears inconsistent with someone that is properly remorseful and taking accountability for his conduct.

[130] I acknowledge that Mr Gauci is a long standing employee, however, as the Full Bench observed in *Toms*, whilst an employee's length of service may be a factor attracting a degree of sympathy, it is also a factor that demands a high level of compliance with policy;<sup>92</sup> and ultimately, a significant period of service cannot be a "licence" for significant breaches of policy that amount to serious misconduct, and particularly when that intercession has potential consequences for the safety of others.

[131] Consistent with the views of the Full Bench, I do not consider Mr Gauci's service, cooperation, and remorse to be relevant to the core issue, which is Mr Gauci's serious breaches of the AOD Policy.

*Mr Gauci's personal circumstances*

[132] Mr Gauci submits that consideration should have been given to his personal circumstances, including his mental health and financial situation.

[133] DP World acknowledge Mr Gauci's personal circumstances but submit that they cannot excuse Mr Gauci's serious and conscious breaches of the AOD Policy.

[134] Whilst I sympathise with Mr Gauci's personal situation and accept that his mental health struggles are central to him having been prescribed medicinal cannabis, I am not persuaded that Mr Gauci's personal circumstances outweigh his obligations to comply with DP World's AOD Policy.

*Serious Misconduct*

[135] Mr Gauci submits that his conduct does not fall within the meaning of "serious misconduct" as he did not act wilfully or deliberately, nor could his conduct be said to have caused serious and imminent risk to the health and safety of a person or the reputation, viability, or profitability of DP World's business.

[136] DP World however, submit that Mr Gauci's conduct was plainly serious misconduct within the ordinary meaning of that term.

[137] I note the various submissions in this regard, however as acknowledged by both parties, the question of serious misconduct is only relevant to my considerations as they relate to s 387(h) — whether the dismissal was harsh, unjust or unreasonable.

*Summary dismissal was disproportionate - Other appropriate sanctions*

[138] Mr Gauci submits that the AOD Policy provides for flexibility in outcomes in certain circumstances, including a range of options that may be utilised when an employee self-identifies or following an employee's first non-negative result, suggesting that similar options may have been more appropriate in Mr Gauci's case.<sup>93</sup>

[139] As noted by DP World, this contention ignores the fact that Mr Gauci had breached two parts of the AOD Policy. The AOD Policy makes it clear that breaches of the policy may be considered serious misconduct which may result in instant dismissal, particularly where there is a "high range" level detected or where there is a second breach. In this case, it is not disputed that the level of THC detected in Mr Gauci's urine was 10 times greater than the "high level" prescribed by the policy.

[140] Mr Hanly stated that he considered the matters Mr Gauci and his representatives had raised, and was open to the possibility that Mr Gauci may have identified a consideration that

warranted a disciplinary outcome other than termination.<sup>94</sup> As noted by DP World in their closing submissions, this is supported by Mr Gauci's final termination letter, which referenced each of the mitigating factors raised by Mr Gauci, and notes that all his submissions have been taken into consideration.

[141] As such, I find that DP World's decision to summarily dismiss Mr Gauci was consistent with the policy and not disproportionate in the circumstances. This weighs against a finding of harshness.

### **Conclusion**

[142] Mr Gauci was aware of his responsibilities under DP World's AOD Policy as they related to:

- the requirement that he report the use of prescription medication; and
- his responsibility to not attend or perform work with a level of any drug within his system that would result in him returning a positive test.

[143] He was aware that a breach of the policy could result in the termination of his employment yet failed to disclose his prescription to DP World. Further, being aware of the safety critical nature of his role, and the high-risk work being undertaken around him, Mr Gauci chose to consume an unconfirmed amount of medicinal cannabis around 24 hours before beginning his shift.

[144] Mr Gauci presented for work the following day and tested positive to THC at a level that was 10 times higher than the high range prescribed by the AOD Policy.

[145] Following a disciplinary process, throughout which Mr Gauci was provided multiple opportunities to explain his conduct and raise any mitigating factors, DP World made the decision to summarily dismiss him on grounds of serious misconduct.

[146] Having considered each of the matters specified in s.387 of the Act, I am not satisfied that Mr Gauci's dismissal was harsh, unjust or unreasonable. Accordingly, I find that his dismissal was not unfair. On that basis the application pursuant to s.394 is dismissed.

[147] I Order accordingly.



COMMISSIONER

*Appearances:*

*S. O'Sullivan for the Applicant*  
*J. McLean for the Respondent*

*Hearing details:*  
*2024*  
*Brisbane*  
*16 & 17 July*

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<sup>1</sup> P.17 of the DCB – Termination Letter.

<sup>2</sup> P.459 of the DCB – Letter from Dr Joshua Gabriel.

<sup>3</sup> P.50 of the DCB – Witness Statement of Michael Gauci at 46.

<sup>4</sup> Ibid P.44 at 9.

<sup>5</sup> Ibid P.45 at 12 to 18.

<sup>6</sup> Ibid P.50 at 45.

<sup>7</sup> Ibid P.46.

<sup>8</sup> Ibid P.50 at 21.

<sup>9</sup> P.50 of the DCB – Witness Statement of Michael Gauci at 12.

<sup>10</sup> Ibid P.46 at 24.

<sup>11</sup> Ibid at 25.

<sup>12</sup> Ibid P.47 at 25.

<sup>13</sup> Ibid at 25 to 26.

<sup>14</sup> P.690 of the DCB – Confirmatory Result.

<sup>15</sup> P.12 of the DCB – Show Cause Letter.

<sup>16</sup> Ibid.

<sup>17</sup> P.743 of the DCB – Witness Statement of Benjamin Hanley at 22 to 23.

<sup>18</sup> Ibid at 24.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid at 24 (b).

<sup>21</sup> Ibid at 24 (f).

<sup>22</sup> Ibid at 25.

<sup>23</sup> P.48 of the DCB – Witness Statement of Michael Gauci at 32 & P.455 of the DCB – Patient Consent Form.

<sup>24</sup> P.745 of the DCB – Witness Statement of Benjamin Hanley at 28.

<sup>25</sup> P.15 to 17 of the DCB – Termination Letter.

<sup>26</sup> P.741 of the DCB – Witness Statement of Benjamin Hanley at 13.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> P.876 of the DCB – Alcohol and Other Drugs Policy at Appendix B.

<sup>30</sup> P.781 of the DCB – Code of Conduct.

<sup>31</sup> P.742 of the DCB – Witness Statement of Benjamin Hanley at 17.

<sup>32</sup> Ibid at 16.

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- <sup>33</sup> P.851 of the DCB – Bulletin of Policy Update.
- <sup>34</sup> Ibid.
- <sup>35</sup> Ibid P.852.
- <sup>36</sup> P.815 of the DCB – Bulletin regarding Prescription Medicine Declarations.
- <sup>37</sup> P.902 of the DCB – Policy Circular.
- <sup>38</sup> P.89 of the DCB – DP World Brisbane Enterprise Agreement 2020 & P.473 of the DCB – DP World Alcohol and Other Drugs Policy.
- <sup>39</sup> P.516 of the DCB – Expert Report of Dr Michael Robertson.
- <sup>40</sup> Ibid.
- <sup>41</sup> Ibid P.517.
- <sup>42</sup> Ibid P.517 to 518.
- <sup>43</sup> Ibid P.518.
- <sup>44</sup> Ibid.
- <sup>45</sup> Ibid P.519.
- <sup>46</sup> P.965 of the DCB – Expert Report of Dr Michelle Williams.
- <sup>47</sup> Ibid P.978.
- <sup>48</sup> Ibid P.980 to 981.
- <sup>49</sup> Ibid P.965.
- <sup>50</sup> Ibid P.970.
- <sup>51</sup> Ibid P.980.
- <sup>52</sup> P.545 of the DCB – Reply Witness Statement of Michael Gauci.
- <sup>53</sup> *Fair Work Act 2009* (Cth) s.382.
- <sup>54</sup> *Raj Bista v Group Pty Ltd t/a Glad Commercial Cleaning* [\[2016\] FWC 3009](#)
- <sup>55</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- <sup>56</sup> Ibid.
- <sup>57</sup> [\[2021\] FWC 4](#) at 118.
- <sup>58</sup> *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [\[2016\] FWC 4185](#), [46] citing *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410, 413.
- <sup>59</sup> P.35 of the DCB – Applicant Submissions.
- <sup>60</sup> Ibid.
- <sup>61</sup> Ibid.
- <sup>62</sup> Ibid P.36.
- <sup>63</sup> Ibid.
- <sup>64</sup> Ibid.
- <sup>65</sup> P.729 of the DCB – Respondent Submissions.
- <sup>66</sup> *B, C and D v Australian Postal Corporation* [\[2013\] FWC 6191](#); (2013) 238 IR 1 at [36].
- <sup>67</sup> P.731 of the DCB – Respondent Submissions.
- <sup>68</sup> [\[2015\] FWC 1033](#) at [24].
- <sup>69</sup> P.730 of the DCB – Respondent Submissions.
- <sup>70</sup> Ibid.
- <sup>71</sup> *Sharp v BCS Infrastructure Support Pty Limited* [\[2015\] FWC 1033](#) at [26]-[27].
- <sup>72</sup> P.731 & 732 of the DCB – Respondent Submissions.
- <sup>73</sup> P.742 of the DCB – Witness Statement of Benjamin Hanley at 13.
- <sup>74</sup> P.965 of the DCB – Expert Report of Dr Michelle Williams.
- <sup>75</sup> P.472 of the DCB – DP World Alcohol and Other Drugs Policy.

<sup>76</sup> P.40 of the DCB – Applicant Submissions at 32.

<sup>77</sup> Ibid.

<sup>78</sup> [\[2013\] FWCFB 6191](#); (2013) 238 IR 1 at [36].

<sup>79</sup> Ibid.

<sup>80</sup> *Mr Jake Candido v Scalzo Food Industries* [\[2024\] FWC 2129](#) at [11]

<sup>81</sup> P.37 of the DCB – Applicant Submissions at 16 & P.732 of the DCB – Respondent Submissions at 33.

<sup>82</sup> P.37 of the DCB – Applicant Submissions at 17

<sup>83</sup> Ibid.

<sup>84</sup> [1996] IRCA 568.

<sup>85</sup> [\[2010\] FWA 8544](#) at [85].

<sup>86</sup> P.733 of the DCB – Respondent Submissions at 35.

<sup>87</sup> P.733 of the DCB – Respondent Submissions at 37.

<sup>88</sup> P.38 of the DCB – Applicant Submissions at 20.

<sup>89</sup> P.733 of the DCB – Respondent Submissions at 38.

<sup>90</sup> P.38 of the DCB – Applicant Submissions at 21.

<sup>91</sup> P.733 of the DCB – Respondent Submissions at 38.

<sup>92</sup> *Harbour City Ferries Pty Ltd v Toms* [\[2014\] FWCFB 6249](#) at (25).

<sup>93</sup> P.41 of the DCB – Applicant Submissions at 35 to 37.

<sup>94</sup> P.747 of the DCB – Witness Statement of Benjamin Hanley at 34.