DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Shyama Weerasekara Arachchi
v
Serco Australia Pty Limited.
(U2024/5738)

DEPUTY PRESIDENT MASSON MELBOURNE, 12 SEPTEMBER 2024

Application for an unfair dismissal remedy - termination not harsh, unjust, or unreasonable – application dismissed.

[1] On 21 May 2024, Ms Shyama Weerasekara Arachchi (the Applicant) made an application to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy, alleging she had been unfairly dismissed from her employment with Serco Australia Pty Limited (the Respondent) on 30 April 2024.

[2] Conciliation of the matter before the Commission was unsuccessful and the matter was then listed for determinative conference/hearing before me on 2 September 2024 to determine the merits of the application. Materials were filed by the Applicant and Respondent in advance of the proceedings in accordance with directions issued by the Commission. After hearing from the parties, I determined to conduct the proceeding as a hearing pursuant to s 399 of the Act.

[3] At the hearing, the Applicant was represented by Liam McDonald of the United Workers Union (UWU) and was called to give evidence. The Respondent was granted permission to be legally represented by Paul Brown of Baker McKenzie pursuant to s 596(2)(a) of the Act. Mr Brown called the following witnesses to give evidence for the Respondent;

- Cameron King – Seconded to position of General Manager Melbourne Immigration Detention Centre (MIDC).
- Trent Hudson – Regional People and Capability Manager – South (based at MIDC)

Background and evidence

Applicant's employment

[4] The Applicant states that she commenced employment with the Respondent as a Detention Service Office (DSO) in Darwin in April 2012 and moved to Melbourne to work for the Respondent at the MIDC in 2014[1]. Employment records produced by the Respondent appear to indicate that she commenced employment with the Respondent on 2 July 2014 with prior service not recognised. The Applicant formally accepted an offer of employment dated 24

September 2015 for the role of DSO – Level 2 based at the MIDC with a commencement date of 5 October 2015[2]. At the time of the Applicant's dismissal, she was employed on a full-time basis, was covered in her employment by the *Serco Immigration Services Enterprise Agreement 2023*[3] (the Agreement) and was in receipt of an hourly rate of pay of $36.27 per hour.

[5] While the Applicant states that she does not recall receiving any warnings during her employment with the Respondent, Mr Hudson states that she received a formal written warning on 7 December 2021 for misconduct as she was found to have failed to call a 'code blue' when advised a detainee was having chest pains on 17 October 2021[4].

Melbourne Immigration Detention Centre (MIDC)

[6] According to Mr Hudson, the MIDC which is located at Broadmeadows, has been under the control of the Respondent since 2009. The campus is approximately 61,705 square metres and is made up of several pavilions or dedicated areas and surrounding grounds. Detainees who are accommodated at the MIDC only have access to dedicated areas[5]. One such dedicated area is the Dargo compound[6] at which the Applicant worked an overtime shift from 8.30am to 6.30pm on 28 January 2024. The Applicant states that the Dargo Compound is used for COVID quarantine, that is, for detainees either having or having been exposed to COVID. She further states that the number of detainees quarantined in the Dargo Compound fluctuates[7].

DSO role, policies and procedures

[7] Mr Hudson explained that the DSO role held by the Applicant operates in a high-risk environment where teamwork and constant adherence to policy and procedures is required. Potential events that pose risks to detainees and staff of the Respondent include attempts to escape, self-harm, refusal to obey directions, violence, use of illegal drugs and antisocial behaviours. Mr Hudson also states that the presence of DSOs in the detention environment act as a visual deterrent to such potential events and may act to prevent or deescalate events as they occur[8]. A job description, or as it called a 'Success Profile', applies to the DSO position[9].

[8] Also relevant to the role of the Applicant's employment obligations are the following;

- Clause 15.1(m) of the Agreement identifies that one of the employment obligations is that *'It is a condition of employment that employees maintain a state of readiness on duty and conduct themselves in a manner which ensures their ability to respond throughout their period of duty.'*

- Enhanced Monitoring Policy and Procedures Manual[10].

- Serco Immigration Services Code of Conduct signed off by the Applicant on 17 March 2015[11].

- DIBP FDSP Code of Conduct signed off by the Applicant on 19 March 2015[12].

- Professional Conduct Policy[13].

Events leading to dismissal

[9] Evidence was introduced by the Respondent by way of CCTV footage taken in the Dargo Compound on 28 January 2024 which showed the single detainee (the Detainee) in the compound that day engaging in what appeared to be multiple escape attempts from the fenced and secure compound. The various CCTV footage was.

(i) footage taken in the period between 11.16am – 11.39am which showed the Applicant attempting to climb the Dargo CMC gate on several occasions and also showed the Applicant inspecting the sewerage drain cover[14]; and

(ii) CCTV footage taken at or around 5.53pm which shows the Applicant again trying to climb the Dargo CMC gate[15].

[10] The timeline of escape attempts provided by the Respondent, which was not challenged by the Applicant, may be summarised as follows;

11.16am: Detainee checks the Dargo Central Movement Control (CMC) gate and then attempts to climb the gate by using the gate hinges as footholds (1st escape attempt).

11.18am: Detainee attempts to climb the Dargo CMC gate (2nd escape attempt).

11.23am: After going to his room the Detainee returns with a charger cable and makes a further attempt to climb the gate using the charger cable as a step hold on the face of the fence (3rd escape attempt).

11.24am: Detainee conducts a fourth attempt to scale the fence by attempting to tie the charger cable to the Erskine fence while standing on the Dargo CMC gate (4th escape attempt).

11.27am: Detainee checks a bin that is in the compound.

11.27am: Detainee makes a further attempt to tie the cable to the Erskine fence while standing on the Dargo CMC gate hinges (5th escape attempt).

11.29am: Detainee hops down for one minute and then makes a further attempt to scale the Dargo CMC gate using the cable as a handhold (6th escape attempt).

11.30am: After sitting for a brief period the Detainee is observed to be checking the structural integrity of the sewerage drain cover near the Dargo CMC gate.

11.35am: After again briefly sitting on the ground, the Detainee makes a further attempt to climb the Dargo CMC gate (7th escape attempt).

11.36am: Detainee makes a further attempt to scale the Dargo CMC gate (8th escape attempt)

11.37am: Detainee attempts to tamper with the Colourbond fence adjacent to Erskine compound by kneeling and pulling it up.

11.38am: Detainee moves around the side of the veranda of the compound building close to the X-Ray 3 gate and attempts to climb the mesh before dropping back to the ground (9th escape attempt)

17.51pm: Detainee exits the compound building and moves towards the Dargo CMC gate carrying what appears to be a velcro strap.

17.53pm: Detainee uses the gate hinges to elevate himself and then attempts to put the strap between the fence gaps before dropping it, then lowers himself to the ground and sits down.

17.54pm: Applicant exits officer station and engages with Detainee from her position on the veranda of the compound building before moving to the Detainee's position where she engages with him while he is sitting on the ground.

[11] The Applicant gave the following relevant evidence in her witness statement about the events on 28 January 2024;

- On arriving for an overtime shift at the MIDC at approximately 8.30am she was asked by Shift Manager Leigh Bowie if she had previously worked at the Dargo Compound area to which she responded she had.

- She was advised by one of the other DSOs present in the office at the time that the Detainee in the Dargo Compound was a 'junkie' who was going through drug withdrawal and was on 'Enhanced Monitoring'.

- She was the only DSO working in the Dargo Compound on that shift and clarified that Enhanced Monitoring differs from Constant Monitoring. The latter requires at least one DSO to have eyes on a detainee at all times while the former requires the detainee to be checked once every hour.

- The Dargo Compound contains the officers' station, an open courtyard individual detainee rooms, a common area and a laundry.

- She checked on the Detainee throughout the shift at least once every hour and spoke to him briefly although she says he did not engage in conversation with her.

- Sometime around 9.00 - 9.30am, two nurses came to check on the Detainee, which required the Applicant to retrieve the Detainee from his room and escort him to the common area to speak to the nurses. The nurses gave the Detainee some medicine before leaving although the Applicant was unsure what time the nurses left.

- Around 10.00am some emergency response staff were in the Dargo Compound officer's area to use the computer.

- Sometime between 11am and midday, the Applicant took her meal break in the officer station, although she says she was unsure of the exact time. During the time she was taking her meal break the Applicant says she could not see the Detainee.

- Sometime after lunch two nurses returned a second time, spoke to the Detainee and gave him some medicine.

- Sometime around 5.00 – 5.30pm, a member of the emergency response staff came into the officer station, at which point the Applicant asked if they could stay while she got the Detainee's dinner, which they agreed to do.

- Around 6.00pm, the Applicant states she went for a bathroom break at the officers' station following which she saw on her return the Detainee lying on the ground near the external gate of the compound, at which point she went outside and approached the Detainee.

- On approaching the Detainee when he was lying on the ground the Applicant asked him if he was ok to which he replied he wasn't going to run away and started crawling on the ground and stated he was in pain.

- The Applicant then called for medical to come and check on the Detainee. She says she spoke to a DSO on the phone who told her that the nurses would come and check on the Detainee and that it was ok to allow the Detainee to remain where he was and sleep. The nurses did not arrive prior to the end of the Applicant's shift.

- At the end of the Applicant's shift, she had a verbal handover with the DSO replacing her, told them what had occurred, the nurses' advice and that the nurses should be coming.

- The Applicant states that it was her understanding that two DSOs are required to be in each area for the safety of the DSOs and detainees regardless of the number of detainees.[16]

[12] Both Mr King and Mr Hudson were cross-examined on staffing levels. Both stated that the number of DSO's required to staff a particular compound depended on the circumstances and the assessed risk. It was not unusual or contrary to procedures for there to be one DSO on duty as was the case with the Applicant on 28 January 2024. Mr King elaborated and explained that a decision to increase staffing would depend on both the number of detainees and/or the observed behaviour of an individual or individuals. If a detainee was aggressive, posed a medical or escape risk then those factors might lead to more than one DSO being placed on duty in a particular compound. As to a detainee being on drug withdrawal, Mr King responded that placing more than one DSO on duty would depend on the observed behaviour. Both men confirmed that having only one DSO on duty was not an unusual practice and that the Detainee had not been identified as an escape risk prior to 28 January 2024. In relation to the Applicant's evidence that she had not received a proper handover, both Mr King and Mr Hudson agreed that a verbal handover would normally take place at shift changeover, but this may not have occurred because the Applicant did not commence her overtime shift until 8.30am.

[13] The Applicant during cross-examination gave the following evidence about the needs of detainees;

- She agreed that she was an experienced DSO with good knowledge of detainee behaviour.
- She accepted that the cohort of people held in the MIDC were vulnerable people and were generally not happy about being detained.
- Detainees often had special needs variously including drug addiction, visa breaches, risk of self-harm and violence.
- Because of the nature of detainee vulnerabilities and needs, a high level of care and vigilance was required by the Respondent's staff that were looking after detainees.
- Without vigilance and appropriate monitoring by the Respondent's staff, detainees could engage in impulsive behaviour including self-harm, violence or escape attempts.
- Agreed that enhanced monitoring was implemented at times because of particular vulnerabilities of detainees which could include physical and/or mental health issues, a detainee had been identified as an escape risk or was suffering from drug addiction.

[14] When questioned on the Enhanced Monitoring that was in place on 28 January 2024 for the Detainee in the Dargo Compound, she agreed that the first requirement of Enhanced Monitoring was that of vigilance and being aware of the person and environment which required a high component of observing the Detainee. She also agreed there was only one detainee in the Dargo Compound on 28 January 2024 and that monitoring him was her only role that day. She confirmed that Enhanced Monitoring involved closer supervision and engagement which required her to regularly talk with the Detainee and be aware of how he was going. When pressed on what other duties she had that day apart from monitoring the Detainee, the Applicant responded that she took a couple of phone calls and spoke to the nurses both when they came to give medicine to the Detainee and later in the day when she called and requested that they come and check the Detainee.

[15] Mr King was questioned on what Enhanced Monitoring required and how it was different to Constant Watch. He explained that the latter required constant supervision in close physical proximity. By comparison, Enhanced Monitoring requires constant supervision but does not require close physical proximity while doing so and disagreed with the proposition that it was unreasonable to have expected the Applicant to maintain the Detainee under constant monitoring. Both Mr Hudson and Mr King agreed that there was evidence in the timeline of events produced by the Respondent of the Applicant making notes in the shift log that were consistent with her obligation to maintain Enhanced Monitoring of the Detainee. They both rejected however that evidence of some notes being made indicated she was doing her job as required on 28 January 2024, as evidenced by her failure to observe multiple escape attempts.

[16] The Applicant was also cross-examined at length on how she failed to observe the multiple escape attempts of the Detainee, particularly between 11.16am and 11.39am. She responded that she was having lunch during that period and was positioned in the kitchen area

of the officers' station during her lunch break. A photograph of the officers' station[17] was shown to the Applicant which showed the kitchen area as being several feet from the DSO desk and bank of CCTV monitors but still allowed for visibility to the outside area of the Dargo Compound and the CCTV monitors. She agreed that she was required to have her meal break 'at post' for which she was paid, and also agreed that she could have looked at the monitors and the outside area of the compound from where she states she positioned herself during her lunch break in the kitchen area.

[17] Mr King when questioned on meal break arrangements when only one DSO was on duty, explained that it was the DSO's responsibility to take her meal break 'at post' which required her to continue monitoring the Detainee while she was having her meal break. Provision for requiring a meal break 'at post' is said by the Respondent to be found in clauses 29.2 supported by clause 35.1 of the Agreement. Mr King also explained that the specific timing of the meal break may be dictated by operational requirements, but in any case, it was the Respondent's expectation that the Applicant would have continued to monitor the Detainee during her meal break on 28 January 2024.

[18] Under questioning on the Detainee's escape attempts, the Applicant agreed that she had been shown the CCTV footage during the investigation prior to her dismissal. She also agreed that there were number of 'red flags' in the Detainee's behaviour captured on the CCTV footage including his use of a charger cable and strap to assist his attempts to scale the fence. She further conceded that all of the actions of the Applicant in attempting to escape over an extended period of time would have been regarded as an emergency if she had witnessed those events. She rejected however that she had failed to monitor the Detainee during her overtime shift on 28 January 2024. The Applicant referred to observing the Detainee sitting and lying near the fence which prompted her to engage with him and subsequently contact the nurses. Records of her Enhanced Monitoring of the Applicant were also partially captured in the timeline prepared by the Respondent. She reaffirmed that Enhanced Monitoring required at least hourly checks on the Detainee which she states she did.

[19] Mr Hudson states that the findings of misconduct made against the Applicant related to her non-observance of the Detainee within the Dargo Compound on 28 January 2024. According to Mr Hudson, the Detainee had recently arrived at the MIDC from the community and because of this had been separated from other detainees and placed in quarantine in the Dargo Compound in accordance with the Respondent's normal practice. Due to the Detainee's isolation, Mr Hudson says it was an unusual situation in that the Applicant and Detainee were the only two individuals in the compound on that shift on 28 January 2024[18].

[20] Mr Hudson further states that the Applicant's sole task during her shift on 28 January 2024 was that of the observation of the Detainee. From his familiarity with the MIDC and its layout, Mr Hudson says the Applicant should have maintained a direct line of sight on the Detainee or been able to observe him on the CCTV monitors at her post in the officers' station. Mr Hudson disagrees with the Applicant's statement that she could not see the Detainee and stated that the Applicant should have been able to see the Detainee from the officers' station and relies on evidence of the available direct view and the CCTV monitor views which provide visibility over the outside compound area in which the Detainee was present between 11.16am and 11.39am[19]. Further, any meals taken by the Applicant during her shift were required to be taken at the DSO's post and if temporary relief from her post was required at any time, the

Applicant could have requested this via the two-way radio to the Facilities Operations Manager (FMO) or via the telephone located in the officer's station[20].

[21] Mr Hudson states that on the shift on 28 January 2024, the Detainee made multiple attempts to scale the fence surrounding the compound and attempted to open a drain hole cover within the compound. This repeated behaviour should have alerted the Applicant, but she failed to observe this behaviour, intervene or take appropriate action when the Detainee made these escape attempts[21].

Disciplinary process and dismissal

[22] The Applicant was contacted by the MIDC Residential Manager Rajev Tandon on 30 January 2024 and advised that her shift for that day was cancelled. She was subsequently notified of her standdown on pay pending the outcome of a full investigation in a letter dated 1 February 2024[22] (the Standdown Letter). The letter relevantly stated that *'The reason for the suspension from duty is as a result of information received that causes Serco to be concerned that you may have failed to carry out your duties in your role on 28 January 2024.'* The Standdown Letter explicitly mandated a requirement for confidentiality, save for the Applicant's right to discuss the matter with her support person or representative.

[23] The Applicant states that she attended a fact-finding meeting on 15 March 2024 (the First Fact-Finding Meeting), although Mr Hudson clarified that this meeting was actually held on 15 February 2024. Present at the meeting were the Applicant, the Applicant's support person Surya Nagulapalli (UWU Organiser), Alex Howell (Serco Security Manager) and Ben Goodman (Serco Manager). The Applicant states that during the meeting she was asked what happened during her shift on 28 January 2024 to which she responded. She was also asked whether she had seen anything unusual like the Detainee trying to climb a fence which she replied she had not[23].

[24] The Applicant further states that she attended a second fact-finding meeting on 20 March 2024 (the Second Fact-Finding Meeting) which Mr Hudson also clarified was actually held on 8 March 2024. In attendance at this meeting were the Applicant, Mr Nagulapalli, Rajev Tandon for the Respondent and Mr Goodman. The Applicant states that she was advised during this meeting that the Detainee had made multiple escape attempts during her shift on 28 January 2024, mostly by trying to climb the fence. She further states that she was told these escape attempts took place between 11.16am and 11.39am and at 5.54pm and she was shown the CCTV footage. After viewing the CCTV footage, she was asked what had happened to which she responded, she had not seen the escape attempts, had not been told the Detainee was an escape risk, the Detainee had been moving around during her shift when she had observed him, she had been on her breaks at the times of the escape attempts and no-one was available to cover her breaks. Around this point, the Applicant states that she felt the meeting was turning hostile and Mr Nagulapalli stopped the meeting and advised that if the Respondent wanted to proceed with formal discipline, it needed to set out the allegations against the Applicant. She further states she was then told there would be a further disciplinary meeting[24].

[25] On 20 March 2024, the Applicant was notified by letter of a disciplinary meeting to be held on 22 March 2024[25] (Disciplinary Meeting Letter). The letter required the Applicant to attend the meeting, reaffirmed the need for confidentiality, outlined the consequences of a

failure to attend the meeting and notified her of the right to be accompanied by a support person. The letter also detailed the relevant Code of Conduct and Contract of Employment obligations that the Applicant's alleged conduct may have breached. The specific allegations set out in the Disciplinary Meeting Letter were as follows;

"……..

1. You have failed to correctly follow Serco's policies and procedures and it is alleged:

    a. On 28 January 2024 when responsible for one Detainee in the Dargo compound, failing to observe, intervene or take appropriate action when this same Detainee attempted to climb the CMC gate fence and escape eight (8) times between approximately 11.16hrs and 11.39hrs.

    b. On 28 January 2024 when responsible for one Detainee in the Dargo compound, failing to take appropriate action or seek assistance when this same Detainee was sitting on the concrete path and trying to open the drain hole at approximately 11.36hrs.

    c. On 28 January 2024 when responsible for one Detainee in the Dargo compound, failing to observe, intervene or take appropriate action when this same Detainee attempted to climb the outdoor veranda side fence and escape at approximately 11.39hrs.

    d. On 28 January 2024 when responsible for one Detainee in the Dargo compound, failing to observe, intervene or take appropriate action when this same Detainee attempted to climb the CMC gate fence and escape again at approximately 17:54hrs.

    e. On 28 January 2024 when responsible for one Detainee in the Dargo compound, failing to take appropriate action or seek assistance when this same Detainee was sitting and laying on the concrete path at approximately 17:54hrs.

……."[26]

[26] The above-referred disciplinary meeting took place at approximately 11.30am at the MIDC on 22 March 2024. Attendees at the meeting were the Applicant, her support person Mr Nagulapalli, Tegan Edwards (Transport and Escort Manager) and Mr Hudson. Mr Hudson detailed the content of the meeting in his witness statement. After introducing the purpose of the meeting, Mr Nagulapalli was asked to leave the meeting while the Applicant was again shown CCTV footage of the Dargo Compound for the times on 28 January 2024 relevant to allegations (a), (b) & (c) following which Mr Nagulapalli rejoined the meeting and the Applicant was then asked questions by Mr Hudson in relation to those allegations. After answering various questions related to allegations (a), (b) & (c) Mr Nagulapalli was then asked to leave the meeting again so that CCTV footage relevant to allegation (d) could be shown to the Applicant following which Mr Nagulapalli again returned. The Applicant was then questioned in relation to allegations (d) & (e). The Applicant's responses to the various

questions put to her by Mr Hudson are captured in Mr Hudson's record of the meeting in his witness statement[27].

[27] The Applicant agreed during cross-examination that on attendance at the meeting on 22 March 2024, she was aware of and understood each of the five allegations, she was supported by a UWU organiser at that meeting and in prior meetings, that each of the allegations was put to her during the meeting, she was shown the CCTV footage, the alleged breached of the Code of Conduct and other obligations were detailed and she was told that the allegations if substantiated could lead to her dismissal. She agreed that allegation (e) was ultimately found not to have been substantiated and that during the meeting she was provided with an opportunity to raise any other matters she believed were relevant to the investigation of the allegations and potential disciplinary outcome. She confirmed that she had not raised any other relevant matters during or following the meeting on 22 March 2024.

[28] Mr Hudson states he reviewed and considered the Applicant's responses to each of the numbered allegations in the Disciplinary Meeting Letter and a timeline[28] of the CCTV footage prepared by Benjamin Goodman (MIDC Intelligence Manager). The Applicant's responses provided to the allegations during the disciplinary meeting were summarised by Mr Hudson as follows;

> "The Applicant's position in respect of each allegation put to her by me was that:
>
> (a) **Allegation (a)**: Denied seeing the Detainee's attempts to climb the fence. The Applicant claimed that she was having her meal at the time and was having breakfast and lunch at the same time. The Applicant claimed everybody knows what time she has her meals.
>
> (b) **Allegation (b)**: Denied seeing the Detainee trying to open the drain at the specified time. The Applicant again claimed that she was having her meal at the time. The Applicant also claimed that every time she checked in on the Detainee, he was wandering around and not attempting to escape.
>
> (c) **Allegation (c)**: Denied seeing the Detainee trying to climb the outdoor veranda side fence. The Applicant stated that the Detainee was on hourly EMW, and that she was not told he was high risk. The Applicant claimed that if he was an escape risk, a second person ought to have been there to monitor the Detainee in case he attempted to harm her as the sole officer.
>
> (d) **Allegation (d)**: Denied seeing the Detainee trying to climb the fence again. The Applicant claimed that all she knew was that he was suffering from drug withdrawal and did not question any of his strange behaviour. When she saw him sitting on the footpath, she told him to sleep in his room, the Detainee then claimed to have a pain in his leg.
>
> (e) **Allegation (e)**: Denied the allegation and stated that she did not call a code for the Detainee because she believed he was fine and did not therefore warrant a code at the time. She further said that she did notify the Night FOM."[29]

[29] Mr Hudson states that he considered the Applicant's responses as evasive and lacking necessary detail and clarity from a DSO with 11 years of experience. He also referred to her apparent indifference to or distraction from her duties as evidenced by her failure to notice the Detainee's escape attempts and says that this was serious and posed a significant risk to the security and stability of the facility and overall safety[30]. M Hudson states that he then discussed the content of the disciplinary meeting with Mr King who had responsibility for determining the Applicant's ongoing employment.

[30] Mr King states that after consultation with Mr Hudson he determined to proceed with the dismissal of the Applicant and confirmed this outcome in a letter dated 30 April 2024[31] (the Termination of Employment Letter) which relevantly stated as follows;

> "……
>
> In taking into consideration your responses, the relevant documentation and facts known to Serco, I have formed the view that the below allegations have been substantiated on the balance of probabilities:
>
> 1. On 28 January 2024 when responsible for one (1) Detainee in the Dargo Compound, failing to observe, intervene or take appropriate action when this same Detainee attempted to climb the Central Movement Control (CMC) gate / fence and escape eight (8) times between approximately 11:16hrs and 11:39hrs;
>
> 2. On 28 January 2024 when responsible for one Detainee (1) in the Dargo Compound, failing to take appropriate action or seek assistance when this same Detainee was sitting on the concrete path and trying to open the drain cover at approximately 11:36hrs;
>
> 3. On 28 January 2024 when responsible for one (1) Detainee in the Dargo Compound, failing to observe, intervene or take appropriate action when this same Detainee attempted to climb the outdoor veranda side fence and escape at approximately 11:39hrs; and
>
> 4. On 28 January 2024 when responsible for one (1) Detainee in the Dargo Compound, failing to observe, intervene or take appropriate action when this same Detainee attempted to climb the CMC gate fence and escape again at approximately 17:54hrs.
>
> …….
>
> **Decision**
>
> I have considered your responses, as well as any other relevant documentation and information, and consider your breaches of Serco's requirements constitute Serious Misconduct, which is inconsistent with the continuation of your employment contract. Your employment will therefore cease effective today, 30 April 2024.

> Under the Serco Immigration Services Enterprise Agreement 2023, Serco has the right to terminate an Employee's employment without notice for Serious Misconduct. Given the circumstances of your termination, Serco is exercising this right, and no notice will be paid.
>
> ……..”

[31] The Applicant gave evidence that following her dismissal she has made multiple job applications[32] but has so far been unsuccessful in securing new employment. The Applicant states she has received no income for the performance of work since her dismissal. As regards the remedy of reinstatement she seeks, the Applicant agreed that working in a team as DSOs are required to, high levels of trust and confidence in colleagues following policies and procedures is necessary. She also acknowledged the Respondent’s loss of trust and confidence in her because of events on 28 January 2024.

Has the Applicant been dismissed?

[32] A threshold issue to determine is whether the Applicant has been dismissed from his employment. Section 386(1) of the Act provides that the Applicant has been dismissed if:

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

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

[33] Section 386(2) of the Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant. There was no dispute and I find that the Applicant’s employment with the Respondent terminated at the initiative of the Respondent.

Initial matters

[34] Under section 396 of the Act, the Commission is obliged to decide the following matters before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code; and

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

[35] Relevant to the determination of the preliminary matters I am satisfied that;

- the Applicant was dismissed on 30 April 2024 and filed her unfair dismissal application on 21 May 2024, that latter date being within 21 days of the date of her dismissal;

- at the time of the Applicant's dismissal the Respondent employed approximately 2400 employees and is therefore not a small business employer within the meaning of s.23 of the Act.

- the Applicant commenced employment with the Respondent on 28 May 2012 and at the time of her dismissal had been employed for a period of over 11 Years, that period being more than the minimum employment period of six months;

- the Applicant was covered in her employment by the *Serco Immigration Services Agreement 2023* and at the date of her dismissal was in receipt of an hourly base rate of pay of $36.27; and

- the Applicant was not dismissed due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[36] Having considered each of the initial matters, I am satisfied that the application was made within the required period in subsection 394(2), the Applicant was a person protected from unfair dismissal, the small business fair dismissal code does not apply, and the dismissal was not a genuine redundancy. I am now required to consider the merits of the application.

Was the dismissal harsh, unjust, or unreasonable?

[37] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust, or unreasonable, the Commission must take into account:

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

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

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

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

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

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

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

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

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct – s.387(a)?

[38] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[33] and should not be "capricious, fanciful, spiteful or prejudiced[34]." However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it were in the position of the employer[35].

[39] In cases relating to alleged misconduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.[36] It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.[37] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.[38] In cases such as the present where a serious allegation is made, the *Briginshaw* standard applies so that any findings, if made, of the misconduct alleged are not made lightly;

> "The standard of proof remains the balance of probabilities but 'the nature of the issue necessarily affects the process by which reasonable satisfaction is attained' and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences' or 'by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion."[39]

[40] It is uncontroversial that the Detainee made multiple attempts to escape from the Dargo Compound on 28 January 2024, all but one of the ten attempts being made between 11.16am and 11.39am. The Applicant was the sole DSO on duty in the Dargo Compound on that shift, having started an overtime shift at 8.30am which then finished at 6.30pm that day. The Applicant did not witness any of the escape attempts, which she explained as being due to her being on her meal break at the time of the majority of the escape attempts between 11.16am and 11.39am.

[41] I accept that the potential escape of a detainee from the MIDC is an extremely serious matter for the Respondent, given the care and custody of detainees is the service which the Respondent has been contracted by the Commonwealth to provide. The Applicant readily accepted the seriousness of the matter, agreed that she was aware of her various Code of Conduct, contractual and Agreement obligations and also accepted that she was required to take her lunch break on 28 January 2024 'at post' as provided for under the terms of the Agreement.

[42] In defence of her failure to observe or intervene in the Detainee's multiple escape attempts on 28 January 2024, the Applicant raised a number of mitigating factors. They were that she was not informed that the Detainee was an escape risk, she did not have a proper handover on commencement of her overtime shift, the Respondent failed to ensure adequate staffing in the Dargo Compound that day and by failing to do so had no regard for her safety

on that shift. The Applicant also contended that Enhanced Monitoring is distinguishable from maintaining a Constant Watch and unlike the latter does not require a detainee to be under constant direct surveillance. The Applicant also sought to downplay the significance of her failure to observe the escape attempts on the basis that there was no real prospect of the Applicant succeeding. To place the blame on the Applicant for the unobserved escape attempts was said by her to be simply unreasonable in circumstances where the Respondent's failures contributed to the events of the 28 January 2024.

[43] The Applicant made much of the staffing levels in the Dargo Compound on 28 January 2024 and the fact that she was the only DSO on duty. She accepted however that she had previously worked as a sole DSO on other occasions and the Respondent's witnesses gave unchallenged evidence that it was not unusual for a single DSO to be posted to a particular compound depending on the number of detainees and assessed risks. There was no evidence led to indicate that the staffing arrangement (i.e. a single DSO) in place in the Dargo Compound on 28 January 2024 was either contrary to the Respondent's staffing policies/practices or had created an unacceptable health and safety risk to the Applicant that day. It is true that the Applicant by having commenced her overtime shift at 8.30am as opposed to the normal shift start of 6.30am, did not have the benefit of the normal verbal shift handover with the outgoing DSO. That said, the Applicant was made aware that the Detainee was withdrawing from drug use and therefore was deemed to require Enhanced Monitoring. Mr King also confirmed that there was no prior indication that the Detainee was to be regarded as high risk. I am not persuaded that these matters act to mitigate the Applicant's failures on 28 January 2024.

[44] The Applicant had one role on 28 January 2024 and that was to monitor a single Detainee in the Dargo Compound. When pressed during cross-examination to identify any other duties required of her on that day, she could only point to responding to phone calls of which she stated she made and received a couple of phone calls. In these circumstances it cannot be reasonably argued that other duties or responsibilities could have distracted the Applicant on the 28 January 2024. As to the Applicant's primary argument that she was having her lunch break during the relevant period between 11.16am and 11.39am, that may be accepted. She was however required to take her paid lunch break 'at post' which the Agreement provided for. She claimed that while having her lunch she was positioned in the kitchenette at the rear of the officers' station from which she says she was able to maintain visibility of the outside area of the Dargo Compound as well as via the CCTV monitors. When pressed however, she explained that while having her lunch she was not facing in the direction of either the compound or monitors.

[45] I accept that the Applicant's failure to observe a single or isolated attempts by the Detainee to scale the compound fence during her lunch break may be understandable given the need for her to prepare her lunch. However, the attempts of the Detainee to scale the fence in the 11.16am to 11.39 period were both sustained and significant in number. The Applicant also conceded that the conduct of the Detainee as observed on the CCTV footage, including the retrieval by the Detainee from his accommodation quarters of a cord and strap to assist his efforts to scale the fence, was extremely serious. She further agreed that had those escape attempts been observed by her, it would have triggered an emergency notification. These concessions by the Applicant underscore the seriousness of the events that took place in the Dargo Compound on 28 January 2024. All the escape attempts were made in clear view from the officers' station or via the CCTV monitors at the DSO desk adjacent to the window but

were not witnessed by the Applicant despite being repeated and sustained over a period of almost 25 minutes. In my view it is almost inconceivable that the Applicant could not have witnessed some of these attempts had she been having her meal break 'at post' which required her to continue to monitor the Detainee. It strains credibility to suggest that the Applicant continued to actively monitor the Detainee during her meal break yet failed to observe any of the Detainee's attempts to scale the fence. It follows that I do not accept that the Applicant was monitoring the Detainee during the period from 11.16am to 11.39am on 28 January 2024 as she was required to.

[46] The Applicant contends that Enhanced Monitoring does not require constant surveillance and that all she was required to do was check on the Detainee at least on an hourly basis. This begs the question, if that was all that was required of the Applicant on 28 January 2024, what else was the Applicant required to do for the rest of the time. While the Applicant sought to distinguish Enhanced Monitoring from Constant Watch in terms of the required frequency of observing a detainee, that distinction based on observation frequency was rejected by Mr King. He explained that the difference between the two was based on physical proximity, that being Constant Watch required a close physical proximity to the relevant detainee at all times. Mr King maintained that Enhanced Monitoring required continual monitoring and rejected that it was unreasonable in the circumstances. I agree, particularly in the circumstances where the Applicant's sole responsibility on 28 January 2024 was that of monitoring one detainee.

[47] I am satisfied that the Applicant's failure to observe multiple attempts by the Detainee to scale the Dargo Compound fence was not an isolated incident of inattention which might be excused over a 10-hour overtime shift. It was a sustained period of inattention which represented a failure by the Applicant to discharge the only duty she had on 28 January 2024, that of monitoring the Detainee to ensure his health, safety and welfare as well as maintaining the security of the MIDC facility. She singularly failed to discharge that duty during the relevant period of the Detainee's escape attempts. Nor is it an answer for the Applicant to argue that there was no reasonable prospect of the Detainee succeeding in his attempts. That is akin to arguing that the crime of robbery is only found to have been committed if the robbery is successful. The fact that the Detainee was unsuccessful in his attempts is not decisive of the seriousness of the escape attempts. There is also the welfare of the Detainee to be considered and what those escape attempts disclosed about the Detainee's state of mind and future risk profile. In any case, the Applicant undermined her own argument on this point by her concession that had she witnessed the events it would have triggered an emergency notification.

[48] I am not satisfied that the conduct of the Applicant was 'wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment'[40]. It was however conduct that had the potential to cause 'serious and imminent risk to: (i) the health or safety of a person; or (ii) the reputation, viability or profitability of the employer's business.'[41] That is because self-evidently, the Respondent is contracted to the Commonwealth to provide a service that ensures the health, safety and welfare of detainees as well as the maintenance of security of the MIDC facility. A failure to provide that service to the required standard clearly poses risks to both the health and safety of detainees as well as to the reputation of the Respondent as a reliable operator of immigration detention centres.

[49] I am comfortably satisfied that the Applicant by her failures to properly carry out her required duties during the relevant time periods on 28 January 2024 engaged in serious misconduct within the meaning of Reg 1.07 of the *Fair Work Regulations*, due to the potential for harm to the Detainee and risks to the Respondent's reputation. The conduct of which I have made findings of misconduct is consistent with allegations (a)-(d) relied on by the Respondent in terminating the Applicant's employment. Having been satisfied that the conduct constituted serious misconduct I am further satisfied that the conduct established a valid reason for her dismissal. This weighs in favour of a finding that the dismissal was not unfair.

Notification of the valid reason – s.387(b)

[50] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[42] and in explicit[43], plain and clear terms[44].

[51] The allegations of misconduct were set out in clear and unambiguous terms in the Disciplinary Meeting Letter sent to the Applicant on 20 March 2024 in advance of the disciplinary meeting on 22 March 2024. The Applicant agreed during cross-examination that on attendance at that meeting she understood each of the five allegations made against her and that a possible outcome of the disciplinary process could be the termination of her employment. Ultimately, the Respondent found four of those allegations (allegations (a), (b), (c) & (d)) to have been substantiated which they then relied on in terminating the Applicant's employment.

[52] As found above, I am satisfied that the Respondent in relying on the substantiated allegations (allegations (a), (b), (c) & (d)) has established a valid reason for the Applicant's dismissal. In these circumstances I am satisfied that the Applicant was notified of a valid reason for her dismissal before a decision was made to dismiss her. This weighs in favour of a finding that the dismissal was not unfair.

Opportunity to respond to any dismissal reason related to capacity or conduct – s.387(c)

[53] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[45]

[54] The opportunity to respond does not require formality and the factor is to be applied in a common-sense way to ensure the employee is treated fairly.[46] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to the concern, this is enough to satisfy the requirements.[47]

[55] The Applicant attended two 'fact finding' meetings on 15 February and 8 March 2024 before being required to attend a disciplinary meeting on 22 March 2024. She was shown the relevant CCTV footage at both the fact-finding meeting on 8 March 2024 and again at the disciplinary meeting on 22 March 2024. The Applicant agreed that she was notified of the alleged breaches of the Code of Conduct and other contractual or Agreement obligations, was invited to respond to each of the allegations set out in the 20 March 2024 Disciplinary Meeting

Letter and was afforded an opportunity to raise any other matters relevant to the investigation or potential disciplinary action.

[56] It follows from the foregoing that I am satisfied that the Applicant was provided with an opportunity to respond to the reason relied on by the Respondent in dismissing her, that of her misconduct on 28 January 2024. This finding weighs in favour of a finding that the dismissal was not unfair.

Support person – s.387(d)

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

[58] I am satisfied that the Applicant was afforded an opportunity to be accompanied by a support person in each discussion held in relation to the investigation of the alleged misconduct and in respect to her dismissal. This included 'fact-finding' meetings on 15 February 2024, 8 March 2024 and the disciplinary meeting on 22 March 2024. The Applicant was accompanied by UWU Organiser Suyra Nagulapalli in each of those meetings. This weighs in favour of a finding that the dismissal was not unfair.
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Warnings regarding unsatisfactory performance – s.387(e)

[59] The dismissal did not relate to unsatisfactory performance. This factor is therefore not relevant in the circumstances.

Impact of the size of the Respondent on procedures followed and impact of absence of dedicated human resources management specialist/expertise on procedures followed – s.387(f)

[60] The Respondent's *Form F3 - Employer Response* indicates that at the time of the Applicant's dismissal it employed approximately 2,400 employees. There is no evidence before me, and nor did either party contend, that the Respondent organisation's size impacted on the procedures followed by it in dismissing the Applicant. This factor weighs neutrally in my consideration.

Impact of absence of dedicated human resources management specialist/expertise on procedures followed – s.387(g)

[61] The evidence in this matter indicates that the Respondent had access to the services of an in-house human resources specialist. This factor weighs neutrally in my consideration.

Other relevant matters – s.387(h)

[62] The Applicant has raised a number of matters she submits should be taken into account in assessing whether her dismissal was harsh. They are her long service and work history with the Respondent and the financial impact of the dismissal. In respect of the former, the Applicant refers to her over 10 years of service. As regards the financial impact of the dismissal, the Applicant states she is the sole bread winner for her family, has an adult child she financially

supports, has personal debts and has been actively searching for alternate employment, so far without success.

[63] The Respondent in its closing submissions contends that the financial impact of the dismissal is not a relevant matter to be taken into account as any dismissal is liable to bring with it potential financial hardship. As regards the Applicant's service of over ten years, the Respondent accepts that service of the Applicant is a relevant matter that may be taken into account. However, that service according to the Respondent is not without blemish and refers to the formal written warning issued to the Applicant on 7 December 2021. More importantly however, the Respondent says the Applicant's service must be weighed against the gravity of the misconduct and potential consequences of the Applicant's failure to discharge her duties on 28 January 2024. When the nature of the misconduct is considered along with the procedural fairness elements, consideration of the Applicant's service is said by the Respondent to not outweigh those other factors.

[64] I accept that the financial impact of a dismissal may be a relevant matter to be weighed in circumstances where there is evidence of poor prospects of re-employment due perhaps to the employment market or the remote or regional location of a dismissed employee. Such circumstances may limit employment opportunities for a dismissed worker. No evidence was led by the Applicant that she confronted such circumstances. I accept that she has made multiple job applications but that does not indicate that she confronts a weak employment market. In fact, recent employment data suggests that the labour market remains healthy. As regards her financial responsibilities, that does not in my view distinguish her circumstances from other employees who may have lost their employment. In the circumstances I am not persuaded that the financial impact of the Applicant's dismissal weighs in favour of a finding of harshness.

[65] Turning now to the Applicant's service with the Respondent. There is some doubt as to the exact date of commencement of the Applicant with the Respondent, but it appears that on the Respondent's information she started in mid-2014 while the Applicant says she commenced in 2012. Little turns on the 2-year difference as the Applicant has worked for the Respondent for at least 10 years, which is a substantial period of service. I accept while that the Applicant's service is not without blemish having received a formal warning in 2021, there is no other material before me to suggest her performance prior to or since the warning was issued has been anything less than acceptable.

[66] In my view a period of at least 10 years' service is a matter that would ordinarily weigh in favour of the Applicant. That length of service is however something of a double-edged sword in the sense that one would have expected the Applicant with her level of experience to have understood the importance of vigilance and regular monitoring of the Detainee on 28 January 2024. Nevertheless, on balance I do regard the Applicant's length of service as a matter that weighs in favour of a finding of harshness of the dismissal.

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

[67] I have made findings in relation to each matter specified in s 387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust, or unreasonable.[48]

[68] As set out above, I am satisfied that a valid reason for the Applicant's dismissal related to her serious misconduct on 28 January 2024 is established, and that the dismissal process followed by the Respondent was procedurally fair. The dismissal was not related to the Applicant's performance and the size and capacity of the Respondent did not impact on the procedures that it followed and as such these matters weigh neutrally in my consideration of whether the dismissal was unfair. The only other matter that I have identified that weighs in favour of a finding that the dismissal was unfair is that of the Applicant's length of service of over ten years and her employment record. I am not persuaded that the Applicant's length of service is of sufficient weight such as to render the dismissal unfair. That is because of the gravity of the misconduct which I have found.

[69] It follows from the above that having considered each of the matters specified in s 387 of the Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust, or unreasonable because there was a valid reason for the dismissal and the other factors weighing in favour of a finding that the dismissal was unfair were not sufficient to displace the weight I accord to other s 387 criteria and in particular the valid reason for dismissal.

Conclusion

[70] Not being satisfied that the dismissal was harsh, unjust, or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the Act.

[71] The application is dismissed. An Order will be separately issued giving effect to my decision.

DEPUTY PRESIDENT

Appearances:
L McDonald for the Applicant.
P Brown for the Respondent.

Hearing details:
2024.

Melbourne:
September 2.

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[1] Exhibit A1, Witness Statement of Shyama Weerasekara Arachchi, dated 22 July 2024, at [2]-[3]

[2] Exhibit R2, Witness Statement of Trent Hudson, dated 5 August 2024, Annexure TH2

[3] AE519245

[4] Exhibit R2, at [59], Annexure TH-13, Formal Written Warning, dated 7 December 2021

[5] Exhibit R2. At [4]

[6] Exhibit R3, Map of MIDC

[7] Exhibit A1, at [7]-[10]

[8] Exhibit R1, at [7]

[9] Exhibit R1, Annexure TH-3, Detention Services Officer Success Profile, dated 14 April 2020

[10] Exhibit R1, Annexure TH-4, Policy and Procedures Manual - Enhanced Monitoring, dated 28 November 2022

[11] Exhibit R1, Annexure TH-5, Serco Immigration Service Code of Conduct Employee Declaration, signed by Applicant on 17 March 2015

[12] Exhibit R1, Annexure TH-6, DIBP DJSP Code of Conduct, signed by Applicant on 19 March 2015

[13] Exhibit R1, Annexure TH-7, Policy & Procedure Manual – Professional Conduct, dated 6 April 2024

[14] Exhibit R4, CCTV footage in respect of allegations (a), (b) & (c)

[15] Exhibit R5, CCTV footage in respect of allegation (d)

[16] Exhibit A1, at [9]-[28]

[17] Exhibit R2, Photograph of Dargo Compound officer's station

[18] Exhibit R1, at [12]-[13]

[19] Exhibit R1, Annexure TH-10, CCTV images of Dargo Compound available on monitors in officer's station.

[20] Exhibit R1, at [14]

[21] Exhibit R1, at [15]

[22] Exhibit A1, Annexure SA-1, Letter to Applicant, dated 1 February 2024, titled 'Re: Suspension from Duties'

[23] Exhibit A1, at [32]-[34]

[24] Exhibit A1, at [35]- [40]

[25] Exhibit A1, Annexure SA-2, Letter to Applicant, dated 20 March 2024, titled 'Notification of Formal Disciplinary Meeting'

[26] Ibid

[27] Exhibit R1, at [19]-[45]

[28] Exhibit R1, Annexure TH-11

[29] Exhibit R1, at [48]

[30] Exhibit R1, at [49]-[52]

[31] Exhibit A1, Annexure SA-3, Termination of Employment Letter, dated 30 April 2024

[32] Exhibit A3, Third Witness Statement of Applicant, dated 29 August 2024, at [4], Annexure SA-5, Job applications

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

[34] Ibid.

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

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

[37] Ibid.

[38] Ibid.

[39] *Briginshaw v Briginshaw* (1938) 60 CLR 336, [1938] HCA 34.

[40] *Fair Work Regulations 2009*, Reg 1.07 (2)(a)

[41] Ibid, Reg 1.07 (2)(b)

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

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

[44] Ibid.

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

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

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

[48] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]– [7].