



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Paul James McAllister**

**v**

**Ahoy Club Fleet Management Pty Ltd**

(U2024/6411)

DEPUTY PRESIDENT CROSS

SYDNEY, 24 OCTOBER 2024

*Application for an unfair dismissal remedy*

[1] On 5 June 2024, Mr Paul McAllister (the Applicant) lodged an application (the Application) in the Fair Work Commission (the Commission) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act), for relief in respect of the termination of his employment by Ahoy Club Fleet Management Pty Ltd (the Respondent). The termination of the Applicant's employment occurred on 31 May 2024 by way of a letter that stated the Applicant had breached his contract and Company policies.

[2] The Applicant commenced full-time employment as the Captain of the Motor Vessel "Rascal" (the Vessel), operated by the Respondent, on 7 September 2023.

[3] In the hearing of the matter the Applicant represented himself. The Respondent was represented, with permission, by Ms C Dowling of Barry Nilsson, Lawyers.

[4] On 12 August 2024, directions were issued to program the manner in which the Application was to proceed to hearing (the Directions). The Directions included the following:

*1. Paul James McAllister (the Applicant) is directed to file with the Fair Work Commission, and serve on Ahoy Club Pty Ltd (the Respondent), an outline of submissions, witness statements and other documentary material the Applicant intends to rely on in support of the application in this matter by 4pm on 26 August 2024.*

*2. The Respondent is directed to file with the Fair Work Commission, and serve on the Applicant, an outline of submissions, witness statements and other documentary material the Respondent intends to rely on in opposition to the application in this matter by 4pm on 2 September 2024.*

*3. The Applicant is directed to file with the Fair Work Commission, and serve on the Respondent, any reply material, that is, any witness statements and other documentary material in reply to the Respondent's witness statements and*

*documents by 4pm on 9 September 2024.*

[5] The Applicant did not comply with Order 1 above in the timeframe directed. Instead, on 9 September 2024, he sent a one-page email in the form of a submission.

[6] On 20 September 2024, the Respondent filed an Outline of Submissions as to Merit, and a Statement of Mr Dean Alexandre, the Yacht Manager of the Respondent.

[7] On 20 September 2024 the Applicant filed a 72-page bundle of documents that were said to be reply materials.

[8] The Hearing of the Application occurred on 24 September 2024 (the Hearing). The Applicant and Mr Alexandre were subject to cross-examination.

### **Background Facts**

[9] Outlined below are the facts as I have found them to exist. The determination of some of those facts has involved determining facts where varying statements and assertions existed between Mr Alexandre on one hand, and the Applicant on the other. My reasons for preferring evidence is outlined under the heading "*Preferred Evidence and Witness Credibility*" below.

[10] The Applicant commenced employment with the Respondent on 7 September 2023, as a full-time Captain, subject to an employment contract dated 5 September 2023 (the Contract). The Contract expressly provided that that the Applicant was responsible for duties including but not limited to:

(a) Learning and putting into effect his duties according to the ship's safety management system (the SMS), always bearing in mind that the safety of those aboard the vessel, and the safety of the vessel itself, is the highest priority of the Employer and the Vessel's owner;<sup>1</sup> and

(b) Taking all reasonable care of equipment and other possessions of the Employer or the vessel owner, and report any lost, stolen or damaged property as soon as practicable, including in circumstances where he has been the cause of that loss or damage.

[11] The Contract provided further that the Applicant would be employed as Captain, and his position would involve the duties and responsibilities set out in the Safety Management System Manual (the Manual) for the vessels in accordance with the vessel's SMS. The Applicant's duties were outlined to extend to any lawful and reasonable duties which he was directed to perform by the Employer.

[12] In his employment, the Applicant was bound by the International Regulations for Preventing Collisions at Sea (referred to as "Colregs"). The Colregs are an international maritime organization convention that has been adopted for water safety. It is the duty of anyone in charge of a vessel to be able to correctly apply the Colregs in all circumstances. Two essential rules outlined in the Colregs are:

*Rule 5 – Lookout*

*Every vessel shall at all times maintain a proper lookout by sight and hearing, as well as by all available means appropriate in the prevailing circumstances and conditions, so as to make a full appraisal of the situation and of the risk of collision.*

And:

*Rule 7 – Risk of Collision*

*Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if a risk of collision exists. If there is any doubt such risk shall be deemed to exist.*

- If the bearing to an approaching vessel does not noticeably change a risk of collision exists.*
- Even if the bearing changes, a risk of collision may still exist – particularly when the approaching vessel is large or at close range.*
- If you are unsure you must assume there is a risk of collision and act accordingly.*

[13] Rule 5 particularly is fundamental to watchkeeping principles and practice and reinforces that the bridge is never to be left unattended.

[14] When a collision occurs, there is procedure that the Captain (and crew) must follow, as set out in the Emergency Plan – Collision, grounding and flooding (the Emergency Plan). As Master of the vessel, the Applicant was required to:

- (a) Sound the alarm;
- (b) Muster the guests; and
- (c) Check on guests and crew post the collision.

[15] The Applicant boarded the Vessel in Brisbane on 11 May 2023, and the Vessel was scheduled to arrive in Airlie Beach on 13 May 2024 to then commence charters. Standing Orders were issued by the Applicant to the crew for review and signing. The Standing Orders for 11 to 13 May 2024 included the “*Watch Schedule*” for the journey. The Applicant was scheduled to be Watch Keeper from 8pm until midnight, and from 8am until 12pm the following day (though the specific dates are not listed in the Standing Orders). It was expected that the Applicant would rest for the eight hours between the watch periods.

[16] On 15 May 2024, there was only one charter booked for the day, from 1700-1900hrs. The Vessel commenced the two-hour charter as scheduled, with twelve guests and seven crew on board. As the vessel was returning to enter the channel, the Vessel collided with the outer Hayman Island Port Channel Marker. The Applicant was Master of the Vessel when it collided with a channel marker. This resulted in approximately \$150,000 of damage to the Vessel. The video of the collision was in evidence and showed a deck hand almost crushed between the Vessel and the channel marker.

[17] Immediately prior to and after the collision, the Applicant, contrary to the provisions of the SMS, the Manual, the Colregs, the Standing Orders, and the Emergency Plan:

- (a) Allowed a guest to remain in the bridge while the vessel was underway;
- (b) Switched off the radar equipment as the vessel entered the Hayman Island waters;
- (c) Immediately after the collision, left the bridge (while the vessel was underway) without appointing a helmsman;
- (d) Left a guest completely unsupervised in the bridge, again while the vessel was underway; and
- (e) Failed to comply with the emergency plan post-collision, which required the Master to sound the alarm, muster and check on the crew and guests.

[18] Mr Alexandre travelled to Airlie Beach and conducted an investigation. He met with the Applicant on 17 May 2024 at onboard the Vessel to obtain his statement. The Applicant's statement included the following:

*1856 The [Applicant] in the bridge with a guest asking questions, I had already lined up the approach with the blue lead in lights and advised all crew I was going to swap stations for berthing, I pulled both main engines into neutral.*

*1857 I made my way out to the port wing station, through the saloon, into the galley and out the galley door, up the forward stairs to the port wing station.*

*As I reached the outside area I observed the 2 deck crew setting up fenders along the portside main deck, aft of the port side stairs. I continued up the stairs and immediately set about taking command of the wing station. At this point the vessel was estimated to be moving ahead at a speed less than 3 knots. My head was down and I was task focused on accepting command of the throttles, wing steering toggle and engaging the thrusters controller. I heard Kohler (mate) onboard say, "to look out for the marker"! At this point I looked up and the Portside bow made contact with the port lateral marker to the entrance to the Hayman Island marina channel.*

....

*Contributing Factors;*

- *Guest in bridge questioning me about the vessel details, distracting me from the task.*
- *Nighttime/Dark conditions in conjunction with backlighting from the island affecting distance gauging of the markers.*
- *This is the first nighttime approach at this location for the master onboard Rascal.*
- *20 knot SE wind in the narrow channel accessing the marina.*
- *Very narrow channel, approx less than 20m wide at channel markers.*
- *Accumulated Fatigue from previous yard period and relocation voyage (Brisbane to Airlie Beach)*
- *Time pressure from arrival in Airlie beach to prepare for this charter.*

- *Guests on bow area moving around the port side forward of the bridge.*

[19] Mr Alexandre interviewed other crew members, including Deck Crew, the Engineer and the Chef. He also reviewed security footage from the bridge of the Vessel on 12 May 2024, that disclosed two occasions<sup>2</sup> on 12 May 2024, where the Applicant is seen at the helm of the Vessel scrolling on his phone and vaping while inside the bridge in breach of the Respondent's Smoking Policy.

[20] Mr Alexandre identified several breaches of the Respondent's policies and procedures which he outlined in his final Investigation Report. That Investigation Report was as follows:

**Rascal collision investigation**

*Post collision with the Hayman Island Port channel marker on the 15th of May 2024 the following was observed through the investigation of video recordings and review of your incident report and the incident reports delivered by the crew & guests onboard.*

- *Breach of safety provisions*
- *Failing to implement your responsibilities of the safety management system*
- *Gross negligence*

*The following was observed but in no way limited to,*

*No lookout/helmsman posted in the bridge during the time of navigation pre collision*

*Disregarded of the radar and other navigational aids (Radar shut down by yourself prior to the collision/previous track entering Hayman Island channel in daylight hours not utilised for entering during night hours)*

*Disregard of Rule 5 & 7 of the collision regulations*

*Left bridge helm with guest on bridge (restricted area) whilst vessel underway to take control of port wing station (no helmsman/look out positioned in bridge during this time)*

*Post collision emergency response procedure not carried out completely. (General alarm not sounded, guests not mustered)*

*At no stage were guests checked on by master or an explanation of the incident given post collision*

*Disregard of bridge management and safety of navigation*

*Also found are recordings where you have been scrolling on your mobile phone whilst in charge of the navigational watch which is a complete breach of safety of navigation.*

*There have also been multiple incidents of the use of your vape onboard in the bridge which is a complete disregard of our "company smoking policy" which you have acknowledged.*

[21] Mr Alexandre considered the explanations contained in the Applicant's statement but did not accept that fatigue could have played a role. Mr Alexandre determined that the Applicant's employment could not continue as the Respondent could not trust that another safety breach would not occur.

[22] On 31 May 2024, the Applicant telephoned Mr Alexandre from his home in Perth to inquire when he would next be rostered to work. Mr Alexandre responded that the Applicant's employment was to be terminated effective immediately, by reason of his breach of the safety provisions, his failure to implement the safety management system, and his gross negligence.

[23] At 2:54pm on 31 May 2024, Mr Alexandre sent an email to the Applicant confirming his dismissal. That email largely repeated the contents of Mr Alexandre's final Investigation Report.

### **Preferred Evidence and Witness Credibility**

[24] In finding the above facts, I have preferred, where facts were contested, the evidence of Mr Alexandre to that of the Applicant. I note that Mr Alexandre's evidence was not challenged in reply, either in writing, or orally.

[25] The preference for the evidence of Mr Alexandre's was based on my observation of both the Applicant and Mr Alexandre in the witness box. Mr Alexandre was considered in dealing with questions asked of him, giving responsive answers to those questions. Mr Alexandre did not hesitate to answer questions with answers that were clearly unfavourable to the Respondent's interests where such answers were the truth. Two particular examples of such answers were:<sup>3</sup>

*Mr Alexandre, the allegation that is put by the applicant is that you said to him before he flew back home that he wasn't going to be terminated? --- Yes, Deputy President.*

*Now, did that occur? --- I met with Paul on the morning of the 17th, I believe it was, and we sat on the top deck of motor yacht Rascal. We discussed the incident. I said that I would carry out an investigation. I knew that he was fatigued after reading his report and obviously him explaining to me that he was fatigued. I flew in that morning with another captain so that he could be replaced because the charter was going up - sorry, was happening that day. There was another charter.*

*He then added that he wasn't fatigued and he could do the charter. Obviously I still said to him to go home. I can't recall exactly what I said in terms of termination. I stand corrected on that. I may have said, 'You're not going to be terminated now.' I mean, there*

*weren't going to be any grounds to terminate somebody unless a thorough investigation had taken place. At this stage I had no idea of what had happened. I mean, I knew what happened, I just didn't know how it had happened.*

[Emphasis added]

And:<sup>4</sup>

*Did you give the opportunity to the applicant to be heard in relation to your findings and whether in fact he should be terminated or not? --- No, I did not. I felt that the breach in safety was a clear determination for the termination. You know, the owners entrust in me to manage their vessel, the name of the company - and there were too many breaches in safety, too many red flags. With that in place, I had to make the decision of terminating Captain Paul's contract. If in the event that something like this were to happen again and something worse where an injury or a death were to occur, having not acted previously on the breach of safety I feel that that would have been a major concern in the event of an injury or death if it were to happen again.*

[Emphasis added]

[26] The Applicant, on the other hand, presented as someone who would say whatever he thought might excuse his abundantly clear conduct, regardless of its truth. His evidence consisted of constant attempts to mischaracterise his clearly culpable conduct as being somehow unremarkable, or explicable by other factors, particularly fatigue. While one of a number of examples of such conduct, the Applicant's evidence regarding the need to comply with Clause 5 of the Colregs was indicative and alarming. It was as follows:<sup>5</sup>

*Before I move on to that, you're familiar, aren't you, with the COLREGs? -- Yes.*

*In particular you would be familiar with rule 5, 'Lookout'? --- Yes.*

...

*So you agree that that's a requirement that applies to you when you're mastering a vessel? --- Yes.*

*And you didn't comply with that when you left the bridge unattended, did you? --- No, no, no, I didn't, because, once again, I was fatigued. Can we also go here - just go to the fatigue part of the SMS.*

*I will take you there in a moment, Mr Mcallister? --- Okay, yes.*

*Page 114. You see there at 7.45, Watchkeeping. It says:*

*Competent watchkeepers will be appointed at all times when the vessel is under way.*

*? --- Mmhm.*

*So that's consistent with your requirements under COLREGs, isn't it? --- Yes.*

*Just for clarity, you agree that you breached that position? --- No.*

*You don't agree? --- No.*

*You just gave evidence, Mr Mcallister, that you breached the COLREGs Rule 5, Lookout?  
--- Where are we looking, sorry?*

*It's page 114? --- Yes. Which part?*

*7.4, Watchkeeping? --- Okay, yes.*

*It says: Competent watchkeepers will be appointed at all times when the vessel is under way.*

*? --- Yes.*

*So you breached that provision, didn't you? --- Not really.*

*Not really? --- No.*

*The vessel was under way, wasn't it? --- It was in neutral.*

*Mr Mcallister, 'under way' as I understand it? --- Yes.*

*- - - correct me if I'm wrong, means the vessel was moving; correct? --- Yes.*

*The vessel was under way, wasn't it? --- Well, yes, and I also had asked Kole to stand up on the bow with a spotlight to keep an eye out for markers.*

*So your evidence is the vessel was under way; correct? --- Yes, yes.*

...

*Let me clarify, Mr Mcallister. Leaving the bridge unattended while under way is a very serious breach, isn't it? --- Well, that's just normal - that's normal procedure. That's how the boat always operates.*

*Is it how the boat operates or how you operate, Mr Mcallister? --- No, that's how the boat always operates. That's how I was trained and that's how I was shown, and that's how it operates.*

*Who told you that it was okay to leave the bridge unattended? --- The previous captain that trained me.*

*Who is that? [Deleted].*



So if someone tells you it's okay to breach the COLREGs, that's okay in your mind, is it? --- Yes.

It is. Okay. Someone tells you that compliance with the SMS is optional, that's okay by you, is it? --- Yes, you're really just going over and over on this point. Basically you're not seeing it for what it is. You're transferring stations, right, so you're taking command from the bridge out to the wing so you can berth alongside. There is a split second from a design fault that you have to leave the bridge and go around the outside, through the saloon, like I explained, to go take command on the outside wing station. There is nothing else you can do, all right?

[Emphases added]

### **Applicant's Submission**

[27] The Applicant noted that he had been a Captain for 27 years and this was the first and only major incident that he had been involved with. He conceded “*it was very severe and extreme*”,<sup>6</sup> but put it down purely to the fatigue and a lot of other factors.

[28] The Applicant submitted his dismissal was unfair and harsh because he was told that he was not going to be terminated because he had explained the circumstances and with fatigue. He was told to go home, have a rest and that he was going to be coming back once he had a rest.

[29] As far as the incident, the Applicant conceded he had been distracted with the guests in the bridge but that he was only trying to comply with the Respondent's request to keep the guests happy.

### **Respondent's Submissions**

[30] The Respondent submitted that the Applicant's substantiated conduct constituted a valid reason for dismissal, including:

- (a) Breach of safety provisions;
- (b) Failing to implement responsibilities of the safety management system;
- (c) Gross negligence.

[31] Section 387(a) explicitly requires consideration of the effect of the Applicant's conduct on the safety and welfare of other employees. Further, Fair Work Regulation 1.07 is applicable, which defines serious misconduct to include conduct that causes serious and imminent risk to the health and safety of a person or to the reputation, viability or profitability of the employer's business.

[32] The Respondent submitted that:

(a) The collision on 15 May 2024 could have been catastrophic, endangering the lives of crew and guests, particularly in circumstances where the Applicant abandoned the bridge, while the vessel was still underway, without a helmsman and leaving a guest unsupervised in the bridge;

(b) There are clear policies and procedures with respect to the safe operation of the Vessel, and the steps to be taken after a collision, which the Applicant either wilfully or negligently breached;

(c) In addition to the Respondent's clear policies and procedures, the Applicant was bound by the Colregs. The Applicant's use of a mobile phone while operating a vessel, together with leaving the bridge unattended (with a guest present) on 15 May 2024 are separate breaches of the Rule 5 of the Colregs.

(d) Video footage shows the Applicant using his mobile phone on multiple occasion on 12 May 2024, and indicates a pattern of behaviour that amounts to a flagrant disregard for safety obligations.

(e) The Applicant was the Master of the vessel at all material times and was expected to exercise the highest level of compliance with safety obligations.

[33] The Respondent further submitted a substantial and wilful breach of a policy will often, if not usually, constitute a valid reason for dismissal. Accordingly, the Respondent submits that there was a valid reason for the Applicant's dismissal

[34] The Respondent submitted the Applicant was notified of the reason for dismissal in the meeting with Mr Alexandre on 17 May 2024, when he was advised that an investigation would be conducted, and further in the phone call and subsequent email on 31 May 2024.

[35] The Respondent submitted the Applicant was given an opportunity to respond to the reason related to the conduct as he was provided with an opportunity to provide his statement regarding the collision. The Respondent considered those explanations but found them to be insufficient to mitigate the serious safety breaches, and the conclusion reached by the Respondent was, on balance, entirely reasonable.

[36] The Applicant did not request a support person at any stage, and while the Respondent is not a "small business" having regard to its associated entities, the Respondent as a discrete entity is a small business unit, without the benefit of a dedicated HR function.

[37] The Respondent submitted that should the Commission find that there was an error in the dismissal process, that the dismissal was nevertheless not harsh, unjust or unreasonable.<sup>7</sup>

## **CONSIDERATION**

### **Preliminary Findings**

[38] There are no jurisdictional objections to the Applicant's application being determined by the Commission. Specifically, I am satisfied that:

- (a) the Applicant was dismissed at the initiative of the employer (ss 385(a) 386(1)(a));
- (b) his unfair dismissal application was lodged within the 21 day statutory time limitation found at s 394(2) of the Act;
- (c) the Applicant is a person protected from unfair dismissal in that:
  - (i) he had completed the minimum employment period set out in ss 382 and 383 of the Act; and
  - (ii) his salary was below the high income threshold;
- (d) his dismissal was not a case of genuine redundancy (s.385(d)); and
- (e) his dismissal was not a case involving the Small Business Fair Dismissal Code (s.385(c)).

**[39]** The only outstanding issue is whether the Applicant’s dismissal was ‘harsh, unjust or unreasonable,’ and therefore an unfair dismissal. To this end, I must direct attention to s.387 of the Act, dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair. It is trite to observe that each of the matters must be considered and a finding made on each of them, including whether they are relevant or not.

#### **Was the Dismissal Harsh, Unjust or Unreasonable?**

**[40]** Section 387 of the Act identifies the matters that the Commission must take into account in deciding whether a dismissal was “harsh, unjust or unreasonable:”

- (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);*
- (b) Whether the person was notified of that reason;*
- (c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;*
- (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;*
- (e) If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal;*
- (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;*

*(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.*

### **Section 387(a) - whether there was a valid reason for the applicant's dismissal**

[41] In *Rode v Burwood Mitsubishi*,<sup>8</sup> a Full Bench of the then Australian Industrial Relations Commission discussed the meaning of valid reason in the context of the relevant provisions of the *Workplace Relations Act 1996*, and referring to *Selvachandran v Peteron Plastics Pty Ltd*<sup>9</sup> (*Selvachandran*). The Full Bench found:

*[18] While Selvachandran was decided under the former statutory scheme the above observations remain relevant in the context of s.170CG(3)(a). A valid reason is one which is sound, defensible or well founded. A reason for termination which is capricious, fanciful, spiteful or prejudiced is not a valid reason for the purpose of s.170CG(3)(a).*

*[19] We agree with the appellant's submission that in order to constitute a valid reason within the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason.*

[42] I find that each limb of conduct allegedly engaged in by the Applicant as specified in the Rascal Collision Investigation document actually occurred and constituted serious and wilful misconduct.

[43] It is without doubt that the collision was caused by there being no lookout/helmsman posted in the bridge during the time of navigation pre collision. The Applicant's various excuses for that failure were nothing short of disingenuous.

[44] While the Applicant asserted a "*design flaw*"<sup>10</sup> existed because it took 30 seconds to walk from the bridge to the fly bridge when about to moor, that alleged flaw did not require the bridge to be unmanned. Usually, the Applicant had the Engineer or other skilled helmsmen take over the bridge helm. It is noted there were 7 crew on the Vessel at the time of the incident. The Applicant's evidence was:<sup>11</sup>

*So is it your evidence that you regularly leave the bridge? --- You have to, yes.*

*And you leave the bridge unsupervised, do you? --- Well, no. The engineer - normally the engineer stays in there, but at that particular time he had just disappeared. He had to go to the toilet, which I didn't know about. He didn't tell me, so I had - like, I was basically committed to going in, so I just left the bridge. Like I said, there was all so much happening with having the guests there and from the fatigue, as well, and that's how it all unfolded.*

[45] While fatigue could never be a ground for disregarding the Colregs, I seriously doubt whether any fatigue was suffered. However, even if it were, the Applicant was responsible for managing the fatigue of himself and the crew. The “*Watch Schedule*” in the Standing Orders established the Applicant had 4 hours on watch and 8 hours off watch. Additionally, prior to the Vessel leaving Airlie Beach the Applicant had raised staffing levels with Mr Alexandre and had been provided with an extra deck hand.

[46] The Applicant’s explanation for turning off the Vessel’s radar prior to entering the port channel was even more obtuse. That evidence was:<sup>12</sup>

*But when you said you turn off the radar when you're coming alongside, why would you turn it off in the channel before you come alongside? --- Because I'm going outside to get a full visual view from out there, so I don't need the radar if I can see it better than using the radar.*

[47] Quite obviously, the crew member who should have been manning the helm on the bridge would have been greatly assisted by the radar.

[48] That the Applicant left the bridge helm, being a restricted area, with guest on bridge whilst vessel underway was not even contested by the Applicant. His evidence was:<sup>13</sup>

*The guest was left unsupervised in the bridge; correct? --- Yes.*

*For upwards - for at least two minutes; correct? --- Well, yes.*

*Based on that video? --- Yes.*

*Sorry, yes, yes. When you left the guest unsupervised in the bridge, the vessel was under way; correct? --- It was in neutral, yes.*

*But it was under way, yes? --- It was in neutral, yes. Moving, yes.*

[49] The evidence regarding the post collision emergency response procedure not being carried out completely, including general alarm not being sounded, and guests not being mustered, was clear, and as follows:<sup>14</sup>

*After the collision you didn't sound the alarm; correct? --- No, because I didn't want to leave the station then, again.*

*Okay. You didn't check on the safety of your crew, did you? --- Yes, I did.*

*Of all of them? --- Everyone who I could speak to, like - yes.*

*So your evidence is, yes, you did? --- Everyone I could speak to within sight, yes.*

*Who did you check the safety of, of your crew? --- I checked all the deck crew. I asked them to go around and have a - make sure everyone is okay, because I was too busy concentrating on not crashing the boat again.*

*You didn't check on the safety of the guests, did you? --- I asked the crew to do that while I was manoeuvring or while I was driving the boat, taking the boat - backing out to safety and then went back alongside just to tie it up.*

[Emphases added]

[50] Finally, the valid reasons regarding scrolling on his mobile phone whilst in charge of the navigational watch (akin, I accept, to texting while driving), and vaping onboard in the bridge in complete disregard of the smoking policy were irrefutably established by video evidence.

[51] It is uncontroversial that an employer can expect more from employees in senior positions. In *Hocking v Public Service Association of South Australia Inc.*,<sup>15</sup> Stanley J of the Industrial Court was considering a matter involving an applicant who was employed either in the capacity of Administrative Co-ordinator (Industrial) or Industrial Officer of the Union, and was dismissed from her employment with the respondent association following alleged misconduct by her in removing and playing to unauthorised persons a tape of a confidential meeting of the council of respondent association. Stanley J. held:

*The applicant was a senior officer in the employ of the respondent. The executive and council of that association were entitled to expect that they would receive loyalty, trustworthiness and honesty from the applicant. On the findings I have made they did not receive them.*

[52] Similarly, I consider the Respondent was entitled to expect loyalty, trustworthiness and honesty from the Applicant, even without recourse to the Contract, which also outlined such considerations. Such expectations were not forthcoming.

[53] The Applicant's conduct was wilful, deliberate and inconsistent with the continuation of his employment. That conduct, involving such serious safety breaches, constituted serious misconduct as defined in clause 1.07 of the *Fair Work Regulation 2009*.

#### **Section 387(b) – Notification of the reason for the dismissal**

[54] The Applicant was notified of the reason for the dismissal by telephone, and subsequent email, on 31 May 2024. That email, containing the detail of the Rascal Incident Investigation report, was a detailed explanation of reasons.

[55] While there has been some criticism in previous Commission decisions of the failure of employers to meet employees to be dismissed face to face, I note that the Applicant resided in Perth, while Mr Alexandre was based in Sydney. In that circumstance, I do not consider the Respondent can be criticised for the manner of dismissal.

#### **Section 387(c) – Opportunity to respond to any reason**

[56] The Applicant was provided with an opportunity to provide a statement, however he was denied the opportunity to respond to the allegations that were the foundation of his dismissal.

[57] I consider, however, that in light of the severity and sound basis of the reasons for his dismissal, had the Applicant been given an opportunity to respond it would not have affected the ultimate decision to dismiss him from employment.

#### **Section 387(d) – Unreasonable refusal by the employer of a support person**

[58] 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.

[59] There is no positive obligation on an employer to offer an employee the opportunity to have a support person, and I note the Applicant did not request a support person, however that is understandable because until he telephoned Mr Alexandre on 31 May 2024, he did not think he faced dismissal.

#### **Section 387(e) – Unsatisfactory performance**

[60] The dismissal was not for unsatisfactory performance, and this is not a relevant consideration.

#### **Sections 387(f) and 387(g) – The size of the employer’s enterprise/human resources**

[61] While the Respondent is not a small employer, it is certainly not a large employer, with access to dedicated human resource managers. I consider the relative size of the Respondent goes some way to explain the failure to provide the opportunity to respond to the allegations that were the foundation of his dismissal.

#### **Section 387(h) – Other relevant matters**

[62] The Respondent submitted that even if there is a finding that the procedure adopted in the dismissal of the Applicant was insufficient, the dismissal should not be held to be unfair.

[63] A Full Bench of the Commission has held, in relation to matters of misconduct generally, that in circumstances in which procedural faults are established that two questions arise for consideration. They are:<sup>16</sup>

- (a) Did the seriousness of the misconduct outweigh any procedural faults?; and
- (b) Would the procedural faults have affected or altered the ultimate outcome of the dismissal?

[64] In *Farquharson v Qantas Airways Ltd*<sup>17</sup> the Full Bench held that in circumstances in which a dismissal for misconduct has been found to be justified, it will be rare for a defect in

an internal disciplinary process that preceded the dismissal to justify a conclusion that the dismissal was nevertheless harsh, unjust or unreasonable.

[65] In this matter, the seriousness of the misconduct heavily outweighed any procedural faults, and the procedural faults would not have affected or altered the ultimate outcome of the dismissal.

### **Conclusion**

[66] I have made findings in relation to all matters 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 and therefore an unfair dismissal.

[67] I have found the Respondent had valid reasons for the dismissal of the Applicant, and that while there were failures in procedural fairness afforded to the Applicant, those procedural defects ultimately did not affect the final outcome. Had the Applicant been given the opportunity to provide his responses as part of the investigation process, the result would have been the same.

[68] I therefore do not find that the dismissal of the Applicant was harsh, unjust or unreasonable.

[69] The Application is dismissed.



DEPUTY PRESIDENT

*Appearances:*

*Mr P McAllister, the Applicant.*

*Ms C Dowling, Solicitor on behalf of the Respondent.*

*Hearing details:*

10AM.

23 September 2024.

Sydney.



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<PR779599>

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<sup>1</sup> Contract Clause 2.1(c).

<sup>2</sup> Transcript PN 486.

<sup>3</sup> Transcript PN 514 to 516

<sup>4</sup> Transcript PN 522.

<sup>5</sup> Transcript PN 307 to 379.

<sup>6</sup> Transcript PN 586.

<sup>7</sup> See *Michael Albert v Alice Springs Town Council* (U2016/10304) and *Carmelo Sapienza v Cash in Transit Pty Ltd T/A Secure Cash* (U2017/8576)

<sup>8</sup> Print R4471, at [18] and [19].

<sup>9</sup> (1995) 62 IR 371

<sup>10</sup> Transcript PN 141.

<sup>11</sup> Transcript PN 143 and 144.

<sup>12</sup> Transcript PN 213.

<sup>13</sup> Transcript PN 237 to 241.

<sup>14</sup> Transcript PN 244 to 249.

<sup>15</sup> (1978) 45 S.A.I.R. 637

<sup>16</sup> *Siriwardana Dissanayake v Busways Blacktown Pty Ltd* [\[2011\]FWAFB 6487](#) [16].

<sup>17</sup> (2006) 155 IR 22 [40]–[41].