



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Evelyn Josey

v

OS MCAP Pty Ltd

(U2024/386)

COMMISSIONER DURHAM

BRISBANE, 2 OCTOBER 2024

Application for an unfair dismissal remedy – applicant found to have breach policy – harassment – sexual harassment – valid reason – dismissal not unfair – application dismissed

[1] On 18 July 2023, Ms Evelyn Josey, a fly-in fly-out (**FIFO**) Production Technician employed by OS MCAP Pty Ltd (**OS MCAP**) at their Daunia mine site, arrived at the Brisbane Airport to fly to Moranbah. Ms Josey was due to begin her next rostered shift the following morning.

[2] Ms Josey had been drinking that afternoon and when she arrived at the airport she was “extremely intoxicated”.¹ Whilst waiting for her flight, Ms Josey continued drinking at the Qantas airport lounge (**Lounge**). A number of Ms Josey’s co-workers were also in the Lounge awaiting their flights. Ms Josey’s co-workers observed Ms Josey’s behaviour to be out of character and quite erratic, particularly her interactions with Mr Jade Glenbar. Ms Josey’s conduct in the Lounge would later be the subject of a formal complaint.

[3] When Ms Josey boarded her flight, she was seated next to a co-worker Mr Reece Parker, who would later lodge a formal complaint about her conduct during the flight.

[4] On 21 December 2024, following an investigation and disciplinary process, Ms Josey was dismissed for serious misconduct and a breach of company policies and procedures.

[5] Ms Josey disputes that the conduct occurred as described by OS MCAP and with respect to her conduct in the Lounge, she argues that any conduct that did occur was out of hours and as such could not constitute a valid reason for dismissal.

[6] Ms Josey seeks reinstatement to her former position, continuity of employment and lost pay. In the alternative, she seeks compensation of six (6) months of her income.

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

PROCEDURAL BACKGROUND

[8] The matter was initially allocated to Deputy President Dobson on 27 February 2024, before it was subsequently reallocated to my Chambers on 7 March 2024. Following an unsuccessful conciliation conference on 26 March 2024, the matter proceeded to hearing on 6 and 7 June 2024. At the hearing, Ms Josey was represented by Ms Leanne Tacey and OS MCAP by Ms Catherine Pase (Counsel).

[9] Both parties filed written submissions and witness statements. Ms Josey gave evidence in support of her application.

[10] The following witnesses gave evidence on behalf of the Respondent:

- Mr Matthew Aldous (Production Technician)
- Mr Samuel Godfrey (Step-Up Supervisor)
- Mr Ashley Blee (Production Technician)
- Mr Andrew Fox (Mine Services Superintendent)
- Mr John Lindsay (Improvement Manager)
- Ms Morgan Cleaver (Specialist Investigations, Ethics & Investigations)
- Mr Reece Parker (Production Technician)

[11] Mr Glenbar, whom was involved in the first incident and witnessed the second incident has not provided direct evidence in this matter. OS MCAP submitted that it did not intend to call Mr Glenbar to give evidence, as he was not willing to participate in this matter before the Commission.² OS MCAP further submits they respect the privacy and personal wishes of all impacted persons who come forward to make complaints or reports of sexual harassment and for that reason is not willing to require his participation or attendance at the hearing.³ They have instead chosen to rely on the evidence of Ms Morgan Cleaver and the record of Mr Glenbar's interview as recorded during the investigation process.

BACKGROUND AND TIMELINE LEADING TO THE DISMISSAL

Employment history

[12] Ms Josey commenced employment with OS MCAP on 12 March 2019. She worked a one week on, one week off, FIFO swing roster.⁴ At the time of dismissal, her total annual income was \$130,192.⁵ Ms Josey notes, and I accept, that she has been a dedicated and loyal employee during her more than three (3) years with OS MCAP.

Ms Josey's personal circumstances

[13] In December 2021 Ms Josey's 26-year relationship with her partner ended and she turned to alcohol as a means to cope with stress.⁶ It is Ms Josey's evidence that by 18 July 2023, she had an alcohol problem and was experiencing mental health issues.⁷

The events of 18 July

Qantas Lounge – Incident 1

[14] On the afternoon of 18 July 2023, Ms Josey arrived at the Brisbane Airport to catch her scheduled flight to Moranbah so that she could begin her next rostered shift the following day. OS MCAP had booked and paid for Ms Josey's flight.

[15] Ms Josey had been having a particularly hard time that day and recalled:⁸

"I was just having a little bit of a harder time on that particular day and I didn't particularly want to go to work and I started drinking really early."

[16] Ms Josey acknowledges that she had been drinking prior to arriving at the airport⁹ and that she was "extremely intoxicated" when she arrived.¹⁰

[17] Ms Josey states that after checking in she entered the Lounge and "went straight to the bar and ordered two bourbon and cokes".¹¹

[18] A number of other employees of OS MCAP were also in the lounge that afternoon including Mr Parker and Mr Glenbar.

[19] A group of employees were gathered around a few big tables close to the bar area. It is not in dispute that Ms Josey approached the group and had a conversation with Mr Glenbar.

[20] Ms Josey's interaction with Mr Glenbar in the Lounge that afternoon resulted in the first finding against her, that she approached another OS MCAP employee, being Mr Glenbar, turned her back to him and rubbed her body up against his.¹² OS MCAP found this conduct amounted to harassment.

The flight to Moranbah – Incident 2

[21] Shortly after the incident in the Lounge, Ms Josey and the other OS MCAP employees boarded their scheduled flight to Moranbah. Ms Josey was seated next to Mr Parker.

[22] The flight to Moranbah was the subject of the second set of allegations against Ms Josey, in which it was found that during the flight from Brisbane to Moranbah, Ms Josey lent on another OS MCAP employee, being Mr Parker, who was seated next to her, placed her head near his lap, grabbed his arm and tried to hold hands with him multiple times.¹³ OS MCAP found this conduct to amount to sexual harassment.

What Happened the next morning - 19 July 2023?

[23] The next morning Ms Josey self-identified that she may still have been impacted by the effects of alcohol and, in accordance with the Alcohol and Other Drugs Policy, she notified her supervisor that she was not fit to commence her shift.¹⁴

[24] Ms Josey did not work her rostered shift for which she travelled to Moranbah and instead returned home and commenced a period of personal leave.

Ms Josey's Return to work

[25] Ms Josey took around five (5) weeks leave. During this time, she sought medical advice and treatment.¹⁵ Ms Josey submits, and I accept, that she has been sober since 19 July 2023.¹⁶

[26] Ms Josey states that from the time she returned to work, she was subjected to rumours and gossip about what had occurred on 18 July 2023.¹⁷ Ms Josey notes that she was embarrassed by what was being said and felt ostracized in the workplace.¹⁸ I note at this point however that no submissions were made, nor evidence provided to suggest that Ms Josey sought to discuss what she was hearing with her supervisor, nor did she lodge a complaint via the employee complaint system. In fact, Ms Josey states she did not discuss the rumours against her with anyone.¹⁹

[27] Ms Josey does acknowledge that she did approach Mr Parker sometime in the week of 13 September 2023 to “apologise for sleeping on him during the flight”.²⁰ Mr Parker’s recollection of the apology differed slightly from Ms Josey. He recalled that a few days after the incident, Ms Josey approached him and very quickly stated something to the effect of “I’m sorry for the other day.” Mr Parker states that this was the only interaction he had with Ms Josey following the flight.²¹

[28] Ms Josey disagrees with Mr Parker’s statement, as she did not speak to him on 19 or 20 July 2023 because she had left on 20 July 2023.²² During the hearing, Mr Parker agreed with when the conversation took place but disagreed with the wording of the conversation used by Ms Josey. She stated that she used words to the effect of:²³

“Reece for what it’s worth, I’m so sorry for sleeping on you. I am mortified that I was drunk in the first place and mortified that I was sleeping and potentially slept on you. I don’t remember doing this, but if I did, I’m so sorry.”

Ms Josey states she ended the conversation with:²⁴

“I hope that you can one day find it in your heart to forgive me.”

[29] Mr Parker states that it was a shorter conversation and more to the effect of “sorry for what happened” and “hope you can forgive me for what happened”. Mr Parker does not remember hearing the words “drunk” or “mortified” used by Ms Josey.

The Complaints

[30] Mr Fox states he first became aware of Ms Josey’s conduct when Mr Danny Boyle, Production Supervisor and acting Step-Up Superintendent Production (while Mr Fox was on leave) called him on or around 20 July 2023 to report he had been informed by Mr Cameron Bassett, Production Supervisor, of an incident involving Ms Josey being intoxicated and grabbing or touching other individuals inappropriately.²⁵

[31] Mr Fox states that he was immediately concerned by the sexual nature of the alleged conduct so he asked Mr Boyle to gather the information that had been reported and to send him an email so that he could lodge an EthicsPoint report (**EP report**).

[32] Upon Mr Fox's return from leave on 21 July 2023, he received an email from Mr Boyle which stated:²⁶

“it has been brought to my attention by Craig Duncan about a potential event we will have to follow-up on. Allegations have been made that at the airport on the 18/07/2023 Evelyn Josey may have been drinking and has grabbed guys in the genital region. Can we please escalate this to HR and seek advice on the best way to handle this in regards to the situation faced yesterday with Evelyn's mental health”

[33] After receiving this email Mr Fox formed the view that he had sufficient information about the incident to warrant further investigation and to lodge an EP report on that same day.²⁷

[34] On 23 July 2023, Mr Fox received an email from Mr Bassett, advising him that Mr Glenbar had brought to his attention an incident that had occurred at the airport on 18 July 2023. The incident involved Ms Josey allegedly approaching Mr Glenbar in the Lounge then turning her back towards him, rubbing up against him and grabbing him in his genital area.²⁸ Mr Glenbar reported to Mr Bassett that he told Ms Josey to stop multiple times, but she continued to do it, and that at one stage he pushed her hand away, causing it to knock over the drinks on the table.²⁹

[35] It is unclear why Mr Fox's EP report was not allocated until 17 August 2023, however he does state that on or around 27 July 2023, he was contacted by Ms Maria Pearce, Employee Support Services, to discuss next steps regarding the EP report. Mr Fox told Ms Pearce that:³⁰

- (a) Ms Josey had returned home from site early on personal leave due to mental health concerns;
- (b) both Ms Josey and Mr Glenbar were due to return to site on 2 August 2023;
- (c) the incident the subject of the EP report was reported initially by Mr Bassett to Mr Boyle; and
- (d) Mr Fox did not know whether Mr Glenbar was aware that an EP report had been lodged with respect to the incident.

[36] Mr Fox also discussed the potential of placing Ms Josey on stand aside due to the nature of the conduct and the impact on the ongoing safety of the crew and Mr Glenbar.³¹

[37] On 4 September 2023, Mr Parker lodged a complaint against Ms Josey on the EthicsPoint online portal.³² Mr Parker states between 18 July 2023 and 4 September 2023, one of his supervisors, either Mr Troy Holzberger or Mr Bassett, approached him regarding what happened on the plane on 18 July 2023.³³ Either Mr Holzberger or Mr Bassett had heard about Ms Josey's conduct from employees who had either witnessed or heard about the incident, and therefore encouraged him to make a complaint through EthicsPoint if he felt this was appropriate.³⁴ It is unclear why Mr Parker took a month to lodge a formal complaint, however he states he chose to report the incident as he did not want Ms Josey's actions to be accepted as “the status quo” or for anything similar to happen again, either to himself or someone else.³⁵

The Investigation

[38] On or around 17 August 2023, Ms Cleaver was allocated to the EP report lodged by Mr Fox on 21 July 2023 (**Incident 1**).³⁶ Between 29 August 2023 and 14 September 2023, Ms Cleaver made multiple unsuccessful attempts to contact Mr Glenbar.³⁷ On 14 September 2023, Ms Cleaver spoke with Mr Glenbar via telephone, to arrange an interview for 15 September 2023.³⁸ Ms Cleaver's notes indicate that during the telephone interview, Mr Glenbar used words to the effect that:³⁹

- (a) Ms Josey still worked on the same crew as him;
- (b) he felt uncomfortable at work as a result; and
- (c) Ms Josey had dropped him home once and he was worried because she knew where he lived.

[39] On 7 September 2023, Ms Cleaver was allocated the EP report lodged by Mr Parker on 4 September 2023 (**Incident 2**).⁴⁰

[40] On 15 September 2023, Ms Cleaver interviewed Mr Glenbar via video conferencing software (Webex). After the interview, Ms Cleaver made the following observations/formed the following views:

- (a) Mr Glenbar was able to provide a very descriptive recount of the events the subject of the investigation;
- (b) Mr Glenbar was not overly emotional in his responses and was able to speak to the events logically; and
- (c) Ms Cleaver had no reason to believe Mr Glenbar was not speaking honestly with her.

[41] Additionally, Mr Glenbar provided Ms Cleaver with the names of a number of witnesses who would have observed the conduct the subject of the investigation. Ms Cleaver subsequently arranged interviews with Mr Matthew Aldous and Mr Ashley Blee.

[42] On 15 September 2023, Ms Cleaver contacted Mr Parker by telephone to arrange an interview on 18 September 2023.⁴¹ During the call, Mr Parker told Ms Cleaver he presently felt safe and comfortable at work because he did not work in the same team as Ms Josey, however he was uncomfortable about flying to and from site, as he was worried he would have to sit next to her on another flight.⁴²

[43] On 18 September 2023, Ms Cleaver interviewed Mr Parker via Webex regarding what occurred on the plane.

[44] Mr Parker provided Ms Cleaver with the name of a witness who would have observed the conduct the subject of the investigation. Ms Cleaver subsequently arranged an interview with Mr Samuel Godfrey.

[45] Mr Fox states the decision to stand down Ms Josey was made by him and Mr Lindsay on or around 30 October 2023.⁴³

[46] On 30 October 2023, nearly two months since returning to site, Ms Josey was called to attend a meeting with Mr Fox. During this meeting, she was advised that allegations had been made against her, that she was being stood down on full pay and was to return home whilst the allegations were investigated.⁴⁴

[47] Ms Cleaver notes the delay between the first EP report being made and Ms Josey being made aware of the allegations, citing difficulties in contacting Mr Glenbar, Mr Parker and Ms Josey as well as the administrative burden in arranging for FIFO rostered witnesses to be interviewed as part of the Investigation.⁴⁵

[48] After several unsuccessful attempts to contact Ms Josey, Ms Cleaver was able to speak with her on 6 November 2023. Ms Cleaver states that Ms Josey became quite emotional during the call so she decided not to discuss the specific allegations at this time and instead talked her through the process, suggesting that they would talk about the allegations when she felt she was ready. Ms Cleaver asked Ms Josey to contact her when she felt ready to talk again.⁴⁶

[49] On 10 November 2023, Ms Josey called Ms Cleaver to discuss the investigation and sought to be provided with the allegations.⁴⁷ Ms Cleaver notes that Ms Josey was again quite emotional and upset during the call and that it was her preference to not provide her with the allegations on a Friday where there would be no support available to her for two days.⁴⁸ Ms Cleaver instead chose to have another general discussion about the process and coordinating an interview.⁴⁹

[50] On 14 November 2023, Ms Josey received a phone call from Ms Cleaver who put to her the allegations as formulated throughout the investigation process.⁵⁰ And later that same day, she received an email titled “Request for Interview relating to an EthicsPoint investigation”.⁵¹

[51] The email advised Ms Josey that the following allegations regarding her conduct had been made on EthicsPoint:⁵²

- “1. It is alleged that, on 18 July 2023 in the Qantas Lounge at the Brisbane Airport, you:
 - a. approached a male employee, turned your back to him and started rubbing your body up against his; and
 - b. grabbed the male employee's genitals.

2. It is alleged that, on 18 July 2023, during the flight from Brisbane to Moranbah, you:
 - a. leant on a male employee who was seated next to you;
 - b. put your head near the male employee's lap; and
 - c. grabbed the male employee's arm and tried to hold hands with the male employee multiple times.”

[52] Ms Josey was advised that OS MCAP was conducting an investigation into the allegations which, if substantiated could amount to a breach of the OC MCAP’s Code of Conduct. She was invited to attend an interview 16 November 2023.⁵³

[53] The 16 November 2023 meeting was attended by Ms Cleaver, and Ms Jessica Asher, Principal Investigator.⁵⁴ Ms Josey attended the meeting via Webex with her support person,

Ms Angela Nikolosi.⁵⁵ Ms Josey consented to the interview being recorded. A transcript of this interview was attached to Ms Josey's statement.⁵⁶

[54] On 13 December 2023, Ms Josey received a call from Mr Fox advising that the investigation had been completed.⁵⁷ That same day, Ms Josey received correspondence dated 12 December 2023 titled "Investigations findings and Show Cause". The letter advised that the investigation had concluded, and it had been found that:⁵⁸

- "On 18 July 2023, in the Qantas Lounge at the Brisbane Airport, you approached another OS MCAP employee, turned your back to him and rubbed your body up against his. This conduct amounts to harassment.
- On 18 July 2023, during a flight from Brisbane to Moranbah, you lent on another OS MCAP employee who was seated next to you, placed your head near his lap, grabbed his arm and tried to hold hands with him multiple times. This conduct amounts to sexual harassment.
- Your conduct rises to the definition of sexual harassment and harassment outlined in OC MCAP's Code of Conduct."

[55] Ms Josey was advised that these actions constituted serious misconduct and a breach of Company policies and procedures, including the OC MCAP's Code of Conduct (**the Code**), the Operations Services Employee Handbook (**OS Handbook**) and the OS MCAP Charter of Value and Respect (**the Charter**). Ms Josey was asked to "show cause" why disciplinary action, including dismissal, should not be taken against her. Ms Josey remained stood down on full pay.

[56] On 18 December Ms Josey provided a written response to Mr Fox in which she disputed the findings, and set out her employment history and record.⁵⁹ Ms Josey also raised a number of allegations relating to "overt racism, misogyny and sexual harassment that she had either observed or been subjected to during her employment, including an incident she alleged Mr Fox was aware of, but for which took no action."⁶⁰

[57] Ms Josey proposed that rather than disciplinary action being taken against her, an appropriate outcome was that she be transferred to another site.⁶¹

[58] On 21 December 2023, Ms Josey and her support person Ms Nikolovski participated in a phone call with Mr Fox and Mr Lindsay.⁶² Ms Josey was advised that the decision had been made to terminate her employment. Later that same day, she received a formal notice of termination. Ms Josey was paid five (5) weeks in lieu of notice.⁶³

The Code

[59] Relevantly, the Code states that employees must never:⁶⁴

- Engage in harassment, sexual harassment, bullying, racism (including racial harassment), or discrimination.
- Behave in a way that would be reasonably viewed as offensive, insulting, intimidating, malicious or humiliating, including making comments about someone's personal characteristics.
- ...
- Make unwelcome requests for a romantic or intimate relationship with a colleague.

[60] The Code further defines “harassment” and “sexual harassment and sexual assault” as follows:⁶⁵

“Harassment:

An action or behaviour that would be reasonably viewed as humiliating, intimidating or offensive.

A single, one-off incident of unreasonable behaviour that would be reasonably viewed as humiliating, intimidating or offensive is not workplace bullying, but it could constitute harassment. Single incidents of harassment should not be ignored. This behaviour is in breach of Our Code and there is a risk the behaviour might be repeated or escalate.

Sexual harassment and sexual assault:

Sexual harassment is an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature, which makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances.

Sexual harassment encompass a range of conduct including displaying sexually graphic images, sexually suggestive comments, suggestive or inappropriate looks gestures or staring, non-consensual touching or acts of a sexual nature and sexual assault. Sexual harassment is not always obvious, repeated or continuous. While bullying is characterised by repeated behaviour, sexual harassment can be a one-off incident.”

The above are considered to be behaviours that breach the Code and have no place at OS MCAP and will not be tolerated.⁶⁶

[61] It is Mr Lindsay’s uncontested evidence that the Code is available on the companywide digital workspace, which all employees have access to.⁶⁷ Further, all employees receive training on the Code from time to time,⁶⁸ noting that Ms Josey received training on this policy during her employment as evidenced by a copy of Ms Josey’s training record.⁶⁹

[62] I also note that Ms Josey’s contract of employment, references her responsibility to familiarise herself with and comply with company policies, such as the Code.⁷⁰

WAS MS JOSEY UNFAIRLY DISMISSED?

[63] There is no dispute, and I am satisfied that Ms Josey was protected from unfair dismissal at the time she was dismissed.⁷¹

Consideration

Was the dismissal harsh, unjust or unreasonable?

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

Was there a valid reason for the dismissal related to the Applicant’s capacity or conduct?

[65] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”⁷² and should not be “capricious, fanciful, spiteful or prejudiced.”⁷³ However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.⁷⁴

[66] OS MCAP submitted that there was a valid reason related to Ms Josey’s conduct. For there to be a valid reason related to the applicant’s conduct, I must find that the conduct occurred and justified termination.⁷⁵ “The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.”⁷⁶

What occurred in the Lounge (Incident 1)?

The Evidence of Ms Josey

[67] On 18 July 2023, Ms Josey attended the Brisbane airport to return to work. She had been drinking before going to the airport.⁷⁷ Ms Josey went to the Lounge, a place she did not normally go, so she could get more alcohol and would not have to pay for it, subsequently she went to the bar and got two bourbon and cokes.⁷⁸

[68] Ms Josey saw Mr Glenbar, a person whom she regarded as a friend as well as work colleague whom she says she had talked about many personal issues with.⁷⁹ Ms Josey went over and sat down at the table with Mr Glenbar, noting she did not recall the conversation but that she put her drinks down and sat next to Mr Glenbar.⁸⁰ Ms Josey noted that there were other persons sitting at the table and that a conversation was taking place but that she did not recall what it was.⁸¹

[69] Ms Josey says that she “skolled” one of her drinks and when she went to put the glass down, she missed the table and the glass fell on the floor with ice spilling everywhere.⁸² Mr Glenbar and the other persons laughed at her.⁸³ Feeling embarrassed, Ms Josey grabbed her other drink and left the table to sit at a vacant table until she had to board the flight.⁸⁴

[70] Ms Josey subsequently submits that she was not guilty of the misconduct alleged and that the incident at the Lounge if it occurred as alleged, which is denied, was out of hours conduct in a social setting and an interaction with a friend.⁸⁵

The Evidence of Mr Aldous

[71] On 18 July 2023, Mr Aldous arrived at the Lounge at around 3:30pm and was seated at one of the large round high tables with his back to the entrance.⁸⁶ He was seated across the table from Mr Glenbar along with a few other employees, though he cannot specifically recall who.⁸⁷

[72] At some point, Mr Aldous observed Ms Josey walk up to Mr Glenbar holding a drink.⁸⁸ Mr Aldous found Ms Josey’s demeanour to be quite strange when she approached Mr Glenbar, noting she was very loud and boisterous, and was swaying around and “making a scene”. Ms Josey appeared to be impacted by alcohol or drugs.⁸⁹ Mr Aldous recalls Ms Josey was standing

very close to Mr Glenbar, to the extent that her body was essentially pressed up to the left side of his body.⁹⁰ Given the physical closeness, Mr Aldous felt Ms Josey's proximity was unusual for colleagues or even friends.⁹¹

[73] After a few moments of standing in close proximity to Mr Glenbar, Ms Josey sat down next to him at the table. Mr Aldous thought Ms Josey's behaviour towards Mr Glenbar was quite strange, given they were in a public place surrounded by both colleagues and strangers, and he had never seen Ms Josey act this way towards Mr Glenbar before.

[74] At some point, Mr Glenbar responded quite abruptly to something that occurred whilst Ms Josey was seated next to him. Mr Glenbar pushed Ms Josey away and stepped back quickly from the table. In doing so, a glass was knocked off the table and onto the floor which made quite a commotion. Mr Aldous did not see what had occurred to make Mr Glenbar react in that way however he recalled that he looked very uncomfortable throughout the interactions.

[75] Mr Aldous also felt quite uncomfortable observing the behaviour, as it was clear Ms Josey's actions had made Mr Glenbar feel embarrassed and uneasy based on his observations of Mr Glenbar's reaction.

[76] Mr Aldous believes the entire interaction between Ms Josey and Mr Glenbar would have lasted approximately five (5) minutes.

[77] Mr Aldous states that Mr Glenbar helped the bar staff clean up the broken glass, and he looked quite flustered and embarrassed. Noticing that Mr Glenbar appeared quite concerned, he asked him if he was ok, and he said words to the effect of "I don't want to talk about it right now, we can talk later".

[78] Mr Aldous did notice, after the glass was knocked off the table, Ms Josey got up and walked away to sit at a booth nearby but he did not see or interact with her again until after the flight to Moranbah.

The Evidence of Mr Blee

[79] Mr Blee arrived at the Lounge sometime between 3.30 to 4.00pm and sat at one of the large round high tables along with Mr Glenbar, who was on his right-hand side. Ms Josey was seated to the right of Mr Glenbar. There were a few other workers also at and around the table, but Mr Blee cannot specifically recall who.

[80] Based on Mr Blee's observations, Ms Josey's behaviour was unusual in that she was very loud and boisterous and was swaying around in her chair. Mr Blee formed the view that Ms Josey was impacted by alcohol or drugs.

[81] Ms Josey was sitting very close to Mr Glenbar and kept touching him by leaning on him, hugging him and entering what Mr Blee consider to be a person's "personal space". He observed that she was being "touchier" with Mr Glenbar than he had previously seen her be.

[82] At one point, Mr Glenbar gave Mr Blee a look that suggested to him that he was uncomfortable with what was happening. Mr Blee was not sure what was happening at this

stage so he did not say anything to Ms Josey or Mr Glenbar at this time, nor did he feel the need to go over to diffuse the situation.

[83] At one point, Mr Glenbar got up to leave the table and Mr Blee saw out of the corner of his eye Ms Josey make a reaching and grabbing motion with her hand or hands towards Mr Glenbar as he got up. Mr Blee did not see specifically where Ms Josey's hand grabbed, however Mr Glenbar responded quite abruptly to this interaction and pushed Ms Josey away and left the table.

[84] Mr Blee states the entire interaction he observed between Ms Josey and Mr Glenbar would have lasted approximately 10 to 15 minutes, while she was sitting next to him.

[85] When Mr Glenbar returned to the table, he mentioned to Mr Blee that what had just occurred with Ms Josey was strange and out of character for her, but he did not discuss it in any more detail.

The evidence of Mr Parker

[86] Mr Parker was standing to Mr Glenbar's right and they were chatting as part of a larger group gathered around a few big round tables close to the bar area in the Lounge.

[87] Ms Josey entered the Lounge at some point while Mr Parker was there and approached Mr Glenbar. Mr Parker recalled a glass was knocked over and this drew his attention to Ms Josey and Mr Glenbar. At this point Mr Parker noticed that Ms Josey's body was rocking and she seemed to be throwing herself around, she was stumbling and acting very differently to normal, with exaggerated movements.

[88] Ms Josey was standing very close to Mr Glenbar and was in his personal space, close enough to be brushing against him. Mr Glenbar appeared to be uncomfortable with how close Ms Josey was standing to him, as he observed him jump back from Ms Josey and appeared as if he was trying to move out of her proximity. Mr Parker did not see any further interactions between Ms Josey and Mr Glenbar in the Lounge. Ms Josey left the Lounge before Mr Parker, and he did not interact with her while in the Lounge.

The evidence of Ms Cleaver – her interview with Mr Glenbar

[89] On 15 September 2023, Ms Cleaver interviewed Mr Glenbar whom told her, among other things, that:⁹²

- (a) he did not consider Ms Josey a friend. When he first started on site, Ms Josey introduced herself to him as they were both indigenous. However, he said words to the effect that he did not have anything to do with her other than that;
- (b) on 18 July 2023, at around 3.00pm, he was in the Lounge prior to flying out to site to commence his shift. Ms Josey entered the Lounge, came up to him and started pressing and rubbing her buttocks up against his side. He asked her "what are you doing" and she replied "just good to see you".
- (c) Mr Glenbar said something to the effect that she looked really "out of it", but it didn't make him feel uncomfortable as it was typical behaviour from Ms Josey;

- (d) Ms Josey then sat down at the table with Mr Glenbar. When Mr Glenbar got up to get a drink, Ms Josey grabbed him by the shirt and asked him to stay as her anxiety was playing up. Mr Glenbar informed her he was just going to get a drink;
- (e) when Mr Glenbar returned with his drink, he then went to leave the table again to get a snack. As he went to get up from the table, Ms Josey grabbed him on his penis. When asked to expand on this, Mr Glenbar said words to the effect that she had gone to grab him by the shirt again, but had actually grabbed him on his genitals. Mr Glenbar said he had assumed that this was an accident;
- (f) Mr Glenbar finished his snack and got up from the table again to get another drink. As he went to get up from the table again, Ms Josey grabbed him on the penis a second time. When asked to expand on this, Mr Glenbar said words to the effect that:
 - i. she had gone to grab him a second time and has again grabbed him on his genitals;
 - ii. he had to knock her hand off; and
 - iii. he had said "what are you doing"
- (g) During the action of knocking her hand away, Mr Glenbar knocked the drinks that were sitting on the table onto the floor;
- (h) Ms Josey then got up from the table and moved to sit somewhere else;
- (i) When Mr Glenbar then approached the bar to obtain another drink, the bar staff at the Lounge said words to him to the effect that they were told to stop serving him, however they had seen what had happened to him;
- (j) Mr Glenbar remained in the Lounge until he boarded the flight at around 4.20 pm;

The Evidence of Ms Cleaver – Interview with Mr Parker

[90] On 18 September 2023, Ms Cleaver interviewed Mr Parker whom said among other things, that:⁹³

- (a) He observed Ms Josey approach Mr Glenbar, and touch and 'dance' on him;
- (b) as he went to get a drink at the bar, he heard someone knock a glass off a table, however he did not observe what caused the glass to fall off the table. He did however, observe Mr Glenbar standing near the table looking concerned;
- (c) when he approached the bar, he heard the bar manager tell the bartender words to the effect of what is going on over there;

Consideration of Ms Cleaver's evidence

[91] I note that the Commission is not bound by the rules of evidence and procedure, further the Commission 'may inform itself in relation to any matter before it in such manner as it considers appropriate'. Further, s.577(a) provides that the Commission must perform its functions and exercise its powers in a manner that 'is fair and just'. The hearsay rule is fundamentally concerned with issues of fairness, and the Commission will give consideration to its application in an appropriate case. With respect to this point, I have accepted Ms Cleaver's evidence regarding Mr Glenbar's recalling of his experience noting that Ms Josey's representative Ms Tacey was afforded an opportunity to test its validity by way of cross-examination of Ms Cleaver.

[92] I note that Ms Cleavers evidence regarding her recollection of Mr Parkers interview aligns with Mr Parker's evidence.

Were they “friends” and does this impact on the seriousness of the conduct?

[93] Ms Josey's evidence indicates that she was friends with Mr Glenbar, however this is in contradiction to Ms Cleaver's evidence of her interview with Mr Glenbar where she states he indicated they were not friends.

[94] As already noted, Mr Glenbar did not attend the hearing nor provide a witness statement, however in any event regardless if they were or were not friends, Ms Josey's conduct as evidenced by those who witnessed the incident appears to go beyond friendship to the extent that Mr Glenbar was witnessed pushing Ms Josey away and appeared uncomfortable to those around him.

Out of Hours Conduct

[95] It is submitted on Ms Josey's behalf that her conduct in the Lounge was out of hours conduct that occurred in a social setting with a friend. Noting *Sydney Trains v Bobrenitsky (Bobrenitsky)* it is argued that Ms Josey's conduct in the Lounge is not subject to regulation by OS MCAP as:

- (a) OS MCAP did not require Ms Josey to attend the Lounge;
- (b) OS MCAP did not require any other employee to attend the Lounge;
- (c) OS MCAP did not pay Ms Josey for her time in making her way to the airport or while she was in the airport;
- (d) Ms Josey was not working and the Lounge was not a work site of OC MCAP;
- (e) Ms Josey rarely entered the Lounge and made a split-second decision on the day to do so;
- (f) Ms Josey was indistinguishable from the general public in the Lounge;
- (g) Ms Josey had not made any prior plans to meet any other employees in the Lounge;
- (h) by happenstance Ms Josey saw Mr Glenbar in the Lounge and went to sit with him; and
- (i) Mr Glenbar was a friend of Ms Josey as well as a work colleague.

[96] As such, Ms Josey submits that there is insufficient connection to the employment.

[97] OS MCAP however submit that applying the commonsense approach to the factual context of Ms Josey's conduct and having regard to the legal test in *Bobrenitsky*⁹⁴ then there is a clear and sufficient connection to Ms Josey's employment. This is on the basis that Ms Josey was only present in the Lounge by reason of her employment that is:

- (a) Ms Josey was in the Lounge waiting to board a flight to her place of work to commence her roster swing and which was booked for her by OC MCAP;

- (b) in the Lounge, Ms Josey was surrounded by her work colleagues and was interacting with her work colleagues in the Lounge; and
- (c) Lounge membership is acquired by reaching a certain status of membership with the relevant airline carrier (Qantas), with the Ms Josey's status presumably having been contributed to by reason of flights paid for by OS MCAP for the purpose of her work.

[98] With respect to (c), Ms Josey confirmed during the hearing that she gained access to the Lounge via a free voucher that came with her membership.

[99] It is clear that Ms Josey would not have been at the airport in the first place if she was not required to attend in order to board a flight to commence her rostered shift. As such, I find it inconsequential that she entered the Lounge in that it is not considered separate from the airport.

[100] Notwithstanding the above, even if Ms Josey's conduct in the Lounge could be considered to be out of hours, it is well established that out of hours conduct can be a valid reason for dismissal where the conduct, viewed objectively, is likely to cause serious damage to the relationship between the employer and the employee, damage the employer's interests, or is incompatible with the employee's duties as an employee.⁹⁵ OS MCAP submit, and I accept, that Ms Josey's conduct in the Lounge was likely to do all of these things.

Findings – Incident 1

[101] In closing submissions, Ms Josey notes some inconsistencies in the recollections of Mr Aldous and Mr Parker regarding exactly who was standing where. Whilst I note these submissions, I am not convinced that they detract from the fact that all witnesses describe conduct that aligns with Mr Glenbar's account of the incident.

[102] I found all of the witnesses who observed the incident to be credible and reliable and noting the minor inconsistencies above, I accept their evidence as their recollection of what they observed on the day.

[103] I similarly found Ms Josey to be a credible witness and note that she was clearly quite distressed during much of the hearing. Whilst Ms Josey is to be commended for her efforts to get herself sober since the incident, regard must be had to the fact that her recollection of the what occurred would have been clouded by her extreme intoxication, as supported by the number of times during both her interview and whilst giving her evidence, that she simply was unable to recall what had happened with any level of certainty.

[104] Viewed objectively, I prefer the recollection of Mr Glenbar and those who witnessed the incident over the recollection of Ms Josey.

[105] I note that at the commencement of the investigation there were two allegations regarding Ms Josey's conduct and that the allegation relating to her "grabbing a male employee's genitals" was not substantiated. In relation to Incident 1, Ms Josey was found to have:⁹⁶

“approached another BHP employee, turned your back to him and rubbed your body against his.”

[106] OS MCAP found that this conduct did occur and that it amounted to harassment. I also find that the conduct as described did occur.

Was the conduct harassment?

[107] As explored above, the Code defines “harassment” as “an action or behaviour that would be reasonably viewed as humiliating, intimidating or offensive.” Noting “a single, one-off incident of unreasonable behaviour that would be reasonably viewed as humiliating, intimidating or offensive is not workplace bullying, but it could constitute harassment.”

[108] It is clear from the evidence of those who observed the incident that Mr Glenbar appeared quite uneasy. Viewed objectively, I find that Mr Glenbar would have found the situation he was placed in by Ms Josey to have been humiliating. It is further clear that Ms Josey’s conduct had also made those who witnessed the conduct feel similarly uneasy.

Was the conduct a breach of the Code?

[109] It is clear that the conduct described above constitutes behaviours that breaches the Code, the OS Handbook, and the Charter.

What occurred on the flight to Moranbah (Incident 2)?

The Evidence of Ms Josey

[110] On the flight, Ms Josey found she was seated next to Mr Parker.⁹⁷ She recalls that Mr Glenbar walked past her and said something to her, as he was sitting behind her.⁹⁸ Throughout the flight Ms Josey was either dozing or fully asleep, noting she was tossing and turning.⁹⁹ However, Ms Josey recalls fully waking up once during the flight when the stewardess tapped her on the shoulder to see if she wanted something to eat.¹⁰⁰ It was at this time that she noticed that Mr Parker was holding her hand, at which point they looked at each other and she pulled her hand out of his hand, before turning away from him so that her back was towards him then returning to sleep.¹⁰¹

[111] Ms Josey subsequently submits that she was asleep at the relevant time and as such, would not have had the ability to have made any conscious decisions so as to constitute sexual harassment¹⁰² and that OS MCAP could not have reasonably substantiated the allegations on the material before it.

[112] In closing submissions, it was contended that if Ms Josey had leant on Mr Parker or had her head on one occasion near his lap while she was asleep this amounts to no more than the usual inconvenience of public travel whether on a bus, a train or an aeroplane whereby a person falls asleep and ends up encroaching on their fellow passenger.¹⁰³

The Evidence of Mr Parker

[113] On or around 5:00pm onboard the plane, Mr Glenbar was standing in the row of seats behind Mr Parker's assigned seat and Ms Josey was attempting to sit next to him. Both of them appeared to be arguing over where Ms Josey's assigned seat was, as she appeared to be trying to sit next to Mr Glenbar and he was telling her that it was not her assigned seat.

[114] Mr Parker took his seat and Ms Josey eventually sat in the seat next to him, which he assumed was her assigned seat. Once she sat down, Ms Josey began flopping around and closing her eyes, which caused her head to rest on Mr Parker. She appeared to be very drunk or under the influence of something. Ms Josey was very fidgety, extremely agitated and could not seem to sit still. This gave Mr Parker the impression that she was not only under the influence of alcohol but potentially something else.

[115] Mr Parker states the movements escalated and Ms Josey began touching him, noting over the course of the flight, Ms Josey touched Mr Parker by:¹⁰⁴

- (a) putting her head on his shoulder;
- (b) grabbing his arm and trying to snuggle into it;
- (c) trying to grab and clutch at his hand by linking their fingers;
- (d) rubbing up against him;
- (e) moving her hand up his leg; and
- (f) putting her head in his lap, in close proximity to his crotch.

[116] Mr Parker pretended to be asleep and 'played dead', hoping the touching would stop as he thought it would die down, but the touching continued for the whole flight. Mr Parker did not reciprocate or encourage Ms Josey's actions at any point during the flight. At times, he attempted to manoeuvre his body to prevent Ms Josey from falling onto him.

[117] Based on his previous observations of Ms Josey that day, she appeared very erratic and he was worried that she would start screaming or start getting violent, which is why Mr Parker did not say anything at the time. He did not want to enflame the situation. Mr Parker notes his usual response to her behaviour would have been to move away from her but as they were on a flight, he did not want the situation to escalate so he felt trapped and could not move.

[118] Mr Parker felt extremely uncomfortable and very embarrassed by the touching, as Ms Josey's hand moving up his leg and her head moving near his private area felt sexual to him. These actions were completely out of his comfort zone but he was just trying to lay low and stay calm. Mr Parker found the incident to be very awkward and felt embarrassed that he was not able to remove himself from the situation. Mr Parker states he was just trying to get to work and did not want to be subjected to any inappropriate touching.

[119] Following the flight, Mr Parker did not say anything to Ms Josey about her conduct.

The evidence of Mr Godfrey

[120] Mr Godfrey was scheduled to fly from Brisbane to Moranbah on the same flight as Ms Josey. Mr Godfrey boarded his flight at approximately 4:30pm and was seated in the aisle seat on the right-side of the aisle, where each row of seats consisted of two seats on either side of

the aisle when facing the front of the plane (i.e. a window seat and aisle seat on the left-side of the aisle, and an aisle seat and window seat on the right-side of the aisle).

[121] Ms Josey was seated in the row in front of where Mr Godfrey was sitting, in the aisle seat slightly diagonally across from him on the left side of the aisle. Mr Godfrey had a clear view of Ms Josey. Mr Parker, was seated in the window seat next to Ms Josey, however Mr Godfrey did not know this at the time, as he was wearing a hoodie up over his head and he could not see Mr Parker's face.

[122] At the beginning of the flight, Ms Josey was being quite loud and rowdy towards someone, and speaking quite loudly and boisterously. Mr Godfrey cannot specifically recall what she was saying or who she was speaking to, but it may have been an air hostess. Ms Josey's behaviour seemed quite strange to him on a quiet afternoon flight which is why he took notice of it.

[123] Almost as soon as the flight took off, Ms Josey appeared to be quite drunk or under the influence of something. Mr Godfrey says this because:¹⁰⁵

- (a) she was falling asleep with her head resting on her hand on the arm rest, and her head kept slipping forwards off of her arm. This stuck out as being odd to Mr Godfrey, as it was an afternoon flight, as opposed to a morning flight where people often sleep throughout; and
- (b) Ms Josey was much louder and more boisterous than normal.

[124] Over the course of the flight, Mr Godfrey saw Ms Josey getting physical with the person sitting on her left. Though, Mr Godfrey could not see Mr Parker's face at the time, he now knows this was Mr Parker. During the flight Mr Godfrey saw Ms Josey:¹⁰⁶

- (a) grab Mr Parker's arm and hand;
- (b) pull Mr Parker's hand down towards her crotch;
- (c) lie on Mr Parker's arm and shoulder; and
- (d) move her head towards Mr Parker's crotch.

[125] The intimate and sexual way Ms Josey was touching Mr Parker made him think that she was sitting next to a boyfriend she had met on site. Specifically, the way in which Ms Josey was pulling Mr Parker's hands towards her crotch, and was putting her head into Mr Parker's crotch, was very sexual in nature. Mr Godfrey states that this behaviour commenced almost immediately upon take-off, and continued for the majority of the flight.

[126] Whilst Mr Godfrey would not describe Mr Parker as a friend or someone he knows well, he has spoken to him regularly while onsite, as they are on the same crew and have children around the same age. As such, he was aware that he has a wife and children. When Mr Godfrey came to the realisation that Mr Parker was the man seated next to Ms Josey, he was initially confused as he knew Mr Parker has a wife and children, and due to the nature of the way Ms Josey was touching him, Mr Godfrey had assumed they were in a romantic relationship.

[127] As Mr Godfrey was disembarking the plane, he recalled locking eyes with Mr Parker, and he raised his eyebrows as if to say "what are you doing" because he was concerned with

the way Ms Josey had been touching him. Mr Parker put his hands up in the air and shook his head.¹⁰⁷

The Evidence of Ms Cleaver – Interview with Mr Parker

[128] On 18 September 2023, Ms Cleaver interviewed Mr Parker, with respect to the second incident, she recalls him stating that:¹⁰⁸

(a) when Mr Parker boarded the plane, he observed Mr Glenbar and Ms Josey speaking. Specifically, he said words to the effect that she was trying to sit in Mr Glenbar's seat, and he was explaining that it was not her seat;

(b) Mr Parker was seated directly in front of where Mr Glenbar and Ms Josey were speaking. When he was seated, Ms Josey stopped speaking to Mr Glenbar and sat down next to Mr Parker;

(c) immediately upon take-off Ms Josey began doing the following:

- i. grabbing Mr Parker's arm;
- ii. grabbing Mr Parker's hand and trying to pull it towards her; and
- iii. trying to hold his hand with fingers interlocked;

(d) when asked whether he indicated that he was uncomfortable or said anything to Ms Josey, Mr Parker said that he did not feel comfortable asking her to stop, as it appeared to him that she was under the influence of something and he was concerned that she may make a scene which may cause them both to be removed from the plane; and

(e) upon disembarking the plane, Mr Parker got on the bus and sat far from Ms Josey.

[129] When Ms Cleaver asked Mr Parker to describe the way Ms Josey allegedly touched him during the flight, he said words to the effect of:¹⁰⁹

(a) her head was down towards his leg, and at one point she had her head in his lap;

(b) her head was constantly against his shoulder;

(c) he tried to manoeuvre his body into a position where he could block her body from falling onto him;

(d) she was scratching at his arm as if it were a cat scratching pole.

[130] Ms Cleaver asked Mr Parker how Ms Josey's actions made him feel, he said words to the effect that:¹¹⁰

(a) he was really uncomfortable;

(b) when the air hostesses walked past, he gave them a look as if to say 'I don't want to be here';

(c) he thought it would be easier to speak up after they disembarked, as he was concerned that Ms Josey would react poorly if he asked her to stop and they were stuck in close confines on the airplane together.

[131] When Ms Cleaver asked Mr Parker if he felt as though there was a sexual element to Ms Josey's behaviour, he said words to the effect that her behaviour did have a sexual element because:¹¹¹

- (a) it was not how one would ordinarily behave towards someone they don't know well (and he didn't know Ms Josey well); and
- (b) he was of the view that her behaviour went beyond how you would even treat a friend.

[132] When asked if the behaviour was unwelcome, Mr Parker said words to the effect that it was unwelcome because:¹¹²

- (a) they are not friends and do not speak often;
- (b) since the incident he feels worried about getting on a flight or bus to work because he fears he will have to sit next to her; and
- (c) he does not want to be involved at all in that sort of behaviour.

[133] From the conduct of the interview with Mr Parker, Ms Cleaver made the following observations/formed the following views:¹¹³

- (a) Ms Josey's conduct had a lasting and extensive effect on Mr Parker. He continued to suffer from ongoing stress and anxiety related to travelling, and the fear that he may be seated next to Ms Josey on a plane or bus;
- (b) Mr Parker was able to provide a very clear, consistent and well-articulated recount of Ms Josey's alleged conduct on the flight the subject of the Investigation;
- (c) Mr Parker provided Ms Cleaver with the name of a witness who would have observed Ms Josey's alleged conduct ; and
- (d) Mr Parker appeared to genuinely want to speak up about the incident as he felt it was a breach of the Code of Conduct.

[134] As acknowledged previously at [91] the Commission is not bound by the rules of evidence and 'may inform itself in relation to any matter before it in such manner as it considers appropriate'. The hearsay rule is fundamentally concerned with issues of fairness, and consideration of its application will be afforded appropriately. In this matter, I have accepted Ms Cleaver's evidence regarding Mr Parker's account of the incident on the plane, which appears consistent with the statement he provided in these proceedings, noting that Ms Tacey was afforded an opportunity to test its validity by way of cross-examination.

The Evidence of Ms Cleaver – Interview with Mr Glenbar

[135] On 18 September 2023, Ms Cleaver interviewed Mr Glenbar regarding both incidents. With respect to the second incident, she recalls him stating that:¹¹⁴

- (a) at around 4:20 pm, Ms Josey boarded the flight. She tried to sit next to him, however her allocated seat was actually in the row in front of him. Mr Glenbar informed Ms Josey that her seat was in the row in front, and said words to the effect that she couldn't sit next to him. Ms Josey persisted with trying to sit next to him until another employee, Mr Parker, boarded the plane and sat in the row in front of him. Ms Josey then sat down next to Mr Parker; and

(b) Mr Glenbar described observing Ms Josey throughout the entire flight doing the following:

- i. 'feeling up' Mr Parker;
- ii. putting her hands down between his crotch and inner thighs;
- iii. feeling him on the inside of his arm;
- iv. putting her head down in his crotch;

[136] Further to my reasoning in [91] and [134], I have accepted Ms Cleaver's evidence regarding Mr Glenbar's account of the incident on the plane, noting that Ms Tacey was afforded an opportunity to test its validity when cross-examining Ms Cleaver.

Findings – Incident 2

[137] In closing submissions, Ms Josey argued that Mr Parker "cannot be considered a witness of credit", referring to "contradictions and exaggerations" in his evidence regarding Ms Josey's conduct. Having considered Mr Parker's evidence, I do not agree with this contention. Again, I found Mr Parker to be a credible witness. Any minor inconsistencies in his retelling of the events on the flight have not persuaded me to change my view.

[138] Mr Josey's closing submissions also take issue with what Mr Godfrey would have been able to see from his seat, submitting that "it was physically impossible and completely implausible" that Mr Godfrey saw Ms Josey engage in any of the conduct described.

[139] These assertions were put to Mr Godfrey during cross-examination. My observations of Mr Godfrey's evidence was that he was able to refute Ms Tacey's assertions on all counts, confirming that he did see what he said he saw.

[140] I found all of the witnesses who observed the incident to be credible and reliable and, I accept their evidence as their recollection of what they observed.

[141] As already noted, whilst I found Ms Josey to be a credible witness, her evidence can only be accepted to the extent of her recollections and I must take account of the degree by which her inability to recall the alleged conduct could be due to her level of intoxication, rather than it not occurring, particularly when faced with consistent recollections of the conduct from multiple witnesses.

[142] In particular, I noted two inconsistencies regarding Ms Josey's recollection of events onboard the plane. Specifically, what Ms Josey said during her interview with Ms Cleaver and her new evidence during cross-examination. Firstly, Ms Josey stated to Ms Cleaver that she did not recall what Mr Glenbar said to her exactly whilst on the plane, but that it was something "not nice" and something "smart arse".¹¹⁵ Her recollection during the hearing was that Mr Glenbar was actually referring to the incident in the Lounge. Secondly, Ms Josey said during the interview with Ms Cleaver that she subsequently reached around her chair and smacked Mr Glenbar's leg on the plane, however during the hearing Ms Josey said that she actually grabbed Mr Glenbar's leg. I suspect that Ms Josey's level of intoxication may explain why her memory of this was clouded, but that also casts doubt on her capacity to recall any of the events described.

[143] Viewed objectively, I prefer the recollection of Mr Parker and those who witnessed the incident over the recollection evidenced by Ms Josey.

[144] The evidence does not support Ms Josey's contention that she was asleep, and on the balance of probabilities, I find that the conduct as described did occur.

Was the conduct sexual harassment?

[145] As explored previously, the Code defines "sexual harassment and sexual assault" as "an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature, which makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances." Additionally, the Code includes the types of conduct considered to be sexual harassment. These include non-consensual touching or acts of a sexual nature and sexual assault, noting that sexual harassment can be a one-off incident.

[146] In deciding whether the conduct was sexual in nature, regard must be had to how the conduct was viewed by Mr Parker, the person who was the focus of it. Mr Parker described his views of the incident as follows:¹¹⁶

"I felt extremely uncomfortable and very embarrassed by the touching. The Applicant's hand moving up my leg and her head moving near my private area felt sexual to me.

These actions were completely out of my comfort zone but I was just trying to lay low and stay calm.

The incident was very awkward and I felt embarrassed that I was not able to remove myself from that situation. I was just trying to get to work and I did not want to be subjected to any inappropriate touching".

[147] Mr Parker's evidence is that the conduct was sexual in nature. The witnesses of the conduct also observed conduct that they described as being either sexual in nature, or that gave an indication that the Mr Parker and Ms Josey were in a relationship. Mr Godfrey stated that he saw Ms Josey touching Mr Parker on the plane in an "intimate and sexual way".¹¹⁷ And Mr Glenbar recalled to Ms Cleaver that amongst other things, he saw Ms Josey "feeling up" Mr Parker. Taking all of the evidence into consideration, and viewed objectively I find that the conduct was sexual in nature.

[148] OS MCAP notes that Ms Josey's submissions that the conduct "amounts to no more than the usual inconvenience of public travel" should be wholly rejected and I agree with their contention that:¹¹⁸

"this was not a case of strangers interacting on public transportation. This was two co-workers undertaking work related travel. Mr Parker was not simply inconvenienced. He was uncomfortable and embarrassed".

[149] Mr Parker's direct evidence that the conduct was unwelcome was not challenged in cross-examination.¹¹⁹ Mr Parker further confirmed the unwelcome nature of the conduct during cross-examination, stating:

"I didn't make it happen, I didn't want it to happen".

[150] Having already found that Ms Josey was not “asleep or dozing” and that the conduct on the plane (Incident 2) did occur as described, I further find that the conduct was such that a reasonable person would have anticipated the possibility that a person would be offended, humiliated or intimidated by the conduct.

[151] Ms Josey’s level of intoxication may well have hindered her capacity to assess the impact that her conduct may have had on Mr Parker, however it does not and cannot excuse it.¹²⁰

[152] Having considered all of the relevant evidence and submissions, I find that Ms Josey’s conduct on the plane did constitute sexual harassment and as such was clearly a breach of the Code.

Was there a valid reason for the dismissal?

[153] OS MCAP found Ms Josey’s actions on 18 July 2023 to be “totally unacceptable and constituted serious breached of our Code of Conduct, Charter Values and the Operations Services Employee Handbook”.¹²¹

[154] I have also found that Ms Josey’s conduct relating to Incident 1 constituted harassment and her conduct as it relates to Incident 2 constituted sexual harassment.

[155] I further note OS MCAP’s submissions about their obligations to protect the health and safety of its workforce and their legislated positive duty to eliminate sexual harassment in the workplace.¹²²

[156] It is not uncontroversial that sexual harassment in connection with employment is a valid reason for dismissal,¹²³ Having considered all of the relevant evidence and submissions, I find there was a valid reason for Ms Josey’s dismissal.

Was Ms Josey notified of the valid reason?

[157] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant “was notified of that reason”. Contextually, the reference to “that reason” is the valid reason found to exist under s.387(a).¹²⁴

[158] 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,¹²⁵ and in explicit¹²⁶ and plain and clear terms.¹²⁷

[159] Ms Josey was clearly notified of the reason by way of the termination letter dated 21 December 2023 which provided the findings of the investigation as well as the breaches which led to the outcome of her termination.

[160] Having regard to the matters referred to above, I find that Ms Josey was notified of the reason for her dismissal prior to the decision to dismiss being made, and in explicit, plain and

clear terms. I therefore find that OS MCAP's actions as they relate to this consideration were fair and reasonable.

Was Ms Josey given an opportunity to respond to any valid reason related to her capacity or conduct?

[161] 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.¹²⁸

[162] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.¹²⁹ Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.¹³⁰

[163] Ms Josey submits that she was denied an opportunity to respond, as the decision to dismiss had been made prior to her show cause response being provided and nothing she did say or could have said in the show cause response was taken into account or considered by OS MCAP. In particular, Ms Josey submits that the decision to dismiss her had already been made by 5 December 2023 prior to her being made aware that her employment was at risk.¹³¹ The basis of this submission relates to an email sent by Ms Shiralee Rudolph to Ms Morgan, Mr Lindsay, Mr Fox, Mr David Oliver and Ms Alecia Perry on 5 December 2023 at 4:10pm which states:¹³²

“Hi all,

Morgan – Thank you so much again for this.

Dave, John and Andrew – given the findings are two sexual harassment (category A) and one harassment (category B), I suggest that the next steps are to show cause the (sic) Respondent before moving to termination. To this end, please find attached show cause letter template for your consideration if you are minded to do so. If you would like, once you have prepared this letter, I would be more than happy to review it for you. Once you are happy with the contents of the show cause letter, convert into a PDF and sign.

Normally, we would use wording as per attached notification to notify a OC MCAP with 24 hours' notice and the opportunity to have a support person present, before meeting with them. However, @Perry, Alecia would you please advise if you suggest an alternative approach in this instance?”

[164] In *Wadey v YMCA Canberra*¹³³ Moore J stated the following regarding the right of an employee to appropriately defend allegations made by the employer:

“[T]he opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend.¹³⁴” (emphasis added)

[165] Based on this email, and other relevant emails within the chain, there does not appear to be a firm decision to terminate Ms Josey's employment. The words “I suggest that the next

steps are to show cause the (sic) Respondent before moving to termination.” do not necessarily confirm that Ms Josey’s employment was to be terminated regardless of the show cause process, my reading of this email is that a show cause process would be required before employment can be terminated. This does not mean that termination had already been decided.

[166] In all the circumstances, I find that Ms Josey was given an opportunity to respond to the reason for her dismissal prior to the decision to dismiss being made.

Did the OC MCAP unreasonably refuse to allow Ms Josey to have a support person present to assist at discussions relating to the dismissal?

[167] It is clear from the material provided that Ms Josey had the support of her support person throughout the investigation and show cause process. As such, I find that OC MCAP did not unreasonably refuse to allow Ms Josey to have a support person present at discussions relating to the dismissal.

Was Ms Josey warned about unsatisfactory performance before the dismissal?

[168] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of OC MCAP’s enterprise be likely to impact on the procedures followed in effecting the dismissal?

[169] Neither party submitted that the size of OC MCAP’s enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of OC MCAP’s enterprise had no such impact.

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

[170] Given OS MCAP is a large mining company with human resource specialists, I find that their enterprise did not lack dedicated human resource management specialists and expertise. This consideration is therefore not relevant.

Conclusion on Merits

[171] On 18 July 2023, Ms Josey attended the Brisbane Airport for the sole reason of boarding her flight to Moranbah so that she could commence her next rostered shift the following day. Ms Josey was extremely intoxicated upon her arrival and continued to consume alcohol in the Lounge.

[172] Whilst in the Lounge, Ms Josey engaged in conduct that I have found to be harassment of a co-worker, Mr Glenbar.

[173] Still heavily intoxicated, Ms Josey boarded her flight and took up her seat next to Mr Parker. Whilst Ms Josey does not recall much of what happened on the flight, I have found that during the flight, she engaged in conduct that constitutes sexual harassment.

[174] I have further found that Ms Josey's actions were a serious breach of OS MCAP's Code of Conduct and Charter of Values and were a valid reason for her dismissal.

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

[176] I Order accordingly.



COMMISSIONER

Appearances:

L. Tacey for the Applicant

C. Pase for the Respondent

Hearing details:

2024

Brisbane

6 & 7 June

Final written submissions:

2024

19 July

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¹ P.71 of the DCB – Interview Record of Evelyn Josey.

² P.151 of the DCB – Respondent Submissions at 15.

³ Ibid.

⁴ P.47 of the DCB – Evelyn Josey Witness Statement at 6.

⁵ Ibid at 5.

⁶ Ibid at 10 and 11.

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- ⁷ P.49 of the DCB – Evelyn Josey Witness Statement at 24.
- ⁸ P.71 of the DCB – Interview Record of Evelyn Josey.
- ⁹ P.48 of the DCB – Evelyn Josey Witness Statement at 13.
- ¹⁰ P.71 of the DCB – Interview Record of Evelyn Josey.
- ¹¹ P.48 of the DCB – Evelyn Josey Witness Statement at 14.
- ¹² P.18 of the DCB – Termination Letter.
- ¹³ Ibid.
- ¹⁴ P.49 of the DCB – Evelyn Josey Witness Statement at 23 and 24.
- ¹⁵ P.31 of the DCB – Applicant Submissions at 12.
- ¹⁶ Ibid.
- ¹⁷ P.49 of the DCB – Evelyn Josey Witness Statement at 27.
- ¹⁸ Ibid at 28.
- ¹⁹ Ibid at 30.
- ²⁰ Ibid at 26.
- ²¹ P.213 of the DCB – Reece Parker Witness Statement at 24.
- ²² P.110 of the DCB – Evelyn Josey Reply Witness Statement at 17.
- ²³ P.111 of the DCB – Evelyn Josey Reply Witness Statement at 19.
- ²⁴ Ibid at 20.
- ²⁵ P.164 of the DCB – Andrew Fox Witness Statement at 10.
- ²⁶ P.172 of the DCB – Email from Danny Boyle to Andrew Fox (AF-1).
- ²⁷ P.164 of the DCB – Andrew Fox Witness Statement at 14.
- ²⁸ P.164 to 165 & P.173 of the DCB – Andrew Fox Witness Statement at 15 & Email from Cameron Bassett to Andrew Fox dated 23 July 2023 (AF-2).
- ²⁹ Ibid.
- ³⁰ P.165 of the DCB – Andrew Fox Witness Statement at 16.
- ³¹ Ibid at 17.
- ³² P.214 & P.217 of the DCB – Reece Parker Witness Statement at 26 & EthicsPoint Complaint by Reece Parker (RP-1).
- ³³ P.213 to P.214 of the DCB – Reece Parker Witness Statement at 25.
- ³⁴ Ibid.
- ³⁵ P.214 of the DCB – Reece Parker Witness Statement at 27.
- ³⁶ P.369 to 370 of the DCB – Morgan Cleaver Witness Statement at 13.
- ³⁷ P.370 to 371 of the DCB – Morgan Cleaver Witness Statement at 20.
- ³⁸ P.371 of the DCB – Morgan Cleaver Witness Statement at 21.
- ³⁹ Ibid.
- ⁴⁰ P.373 of the DCB – Morgan Cleaver Witness Statement at 27.
- ⁴¹ P.374 of the DCB – Morgan Cleaver Witness Statement at 31.
- ⁴² Ibid.
- ⁴³ P.165 of the DCB – Andrew Fox Witness Statement at 19.
- ⁴⁴ P.50 of the DCB – Evelyn Josey Witness Statement at 31.
- ⁴⁵ P.379 of the DCB – Morgan Cleaver Witness Statement at 46.
- ⁴⁶ Ibid at 48.
- ⁴⁷ P.379 of the DCB – Morgan Cleaver Witness Statement at 50.
- ⁴⁸ Ibid.
- ⁴⁹ Ibid.

- ⁵⁰ P.379 of the DCB – Morgan Cleaver Witness Statement at 51.
- ⁵¹ P.64 of the DCB – Email from Morgan Cleaver to Evelyn Josey dated 14 November 2023 (EJ-2).
- ⁵² Ibid.
- ⁵³ Ibid.
- ⁵⁴ P.380 of the DCB – Morgan Cleaver Witness Statement at 54.
- ⁵⁵ P.50 of the DCB – Evelyn Josey Witness Statement at 33.
- ⁵⁶ P.65 to 93 of the DCB – Transcript of Meeting on 16 November 2023 (EJ-3).
- ⁵⁷ P.37 of the DCB – Evelyn Josey Witness Statement at 33.
- ⁵⁸ P.94 of the DCB – Show Cause Letter.
- ⁵⁹ P.51 of the DCB – Evelyn Josey Witness Statement at 38.
- ⁶⁰ Ibid at 39.
- ⁶¹ Ibid at 40.
- ⁶² Ibid at 41.
- ⁶³ Ibid at 43.
- ⁶⁴ P.242 of the DCB – OS MCAP Code of Conduct.
- ⁶⁵ P.243 of the DCB – OS MCAP Code of Conduct.
- ⁶⁶ P.242 of the DCB – OS MCAP Code of Conduct.
- ⁶⁷ P.221 of the DCB – John Lindsay Witness Statement at 16.
- ⁶⁸ Ibid at 16 & 17.
- ⁶⁹ P.303 to 306 of the DCB – Evelyne Josey Training Record (JL-3).
- ⁷⁰ P.61 of the DCB – Employment Contract (EJ-1).
- ⁷¹ *Fair Work Act 2009* (Cth) s.382.
- ⁷² *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- ⁷³ Ibid.
- ⁷⁴ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- ⁷⁵ *Edwards v Justice Giudice* [1999] FCA 1836, [7].
- ⁷⁶ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- ⁷⁷ P.48 of the DCB – Evelyn Josey Witness Statement at 13.
- ⁷⁸ Ibid at 14.
- ⁷⁹ Ibid at 15.
- ⁸⁰ Ibid at 16.
- ⁸¹ Ibid.
- ⁸² Ibid at 17.
- ⁸³ Ibid.
- ⁸⁴ Ibid at 18.
- ⁸⁵ P.35 of the DCB – Applicant Submissions at 33.
- ⁸⁶ P.356 – Matthew Aldous Witness Statement at 13.
- ⁸⁷ Ibid.
- ⁸⁸ Ibid at 14.
- ⁸⁹ Ibid at 15.
- ⁹⁰ Ibid at 16.
- ⁹¹ Ibid.
- ⁹² P.371 to 372 of the DCB – Morgan Cleaver Witness Statement at 22.
- ⁹³ P.374 to 375 of the DCB – Morgan Cleaver Witness Statement at 32.

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- ⁹⁴ [\[2022\] FWCFB 32](#) [140]-[141].
- ⁹⁵ Ibid.
- ⁹⁶ P.18 of the DCB – Termination Letter.
- ⁹⁷ P.48 of the DCB – Evelyn Josey Witness Statement at 19.
- ⁹⁸ Ibid at 20.
- ⁹⁹ Ibid at 21.
- ¹⁰⁰ P.48 to 49 of the DCB – Evelyn Josey Witness Statement at 22.
- ¹⁰¹ Ibid.
- ¹⁰² P.4 of Applicant Closing Submissions at 16.
- ¹⁰³ P.5 of Applicant Closing Submissions at 21.
- ¹⁰⁴ P.212 to 213 of the DCB – Reece Parker Witness Statement at 19.
- ¹⁰⁵ P.361 of the DCB – Samuel Godfrey Witness Statement at 17.
- ¹⁰⁶ P.361 to 362 of the DCB – Samuel Godfrey Witness Statement at 18.
- ¹⁰⁷ P.362 of the DCB – Samuel Godfrey Witness Statement at 23.
- ¹⁰⁸ P.374 to 375 of the DCB – Morgan Cleaver Witness Statement at 32.
- ¹⁰⁹ P.375 of the DCB – Morgan Cleaver Witness Statement at 33.
- ¹¹⁰ Ibid at 34.
- ¹¹¹ Ibid at 35.
- ¹¹² P.376 of the DCB – Morgan Cleaver Witness Statement at 36.
- ¹¹³ Ibid at 37.
- ¹¹⁴ P.371 to 372 of the DCB – Morgan Cleaver Witness Statement at 22.
- ¹¹⁵ P.74 of the DCB – Interview Record of Evelyn Josey.
- ¹¹⁶ P.213 of the DCB – Reece Parker Witness Statement at 22 to 23.
- ¹¹⁷ P.362 of the DCB – Samuel Godfrey Witness Statement at 19.
- ¹¹⁸ P.13 to 14 of Respondent Closing Submissions at 56 to 57.
- ¹¹⁹ P.213 of the DCB – Reece Parker Witness Statement at 22 to 23.
- ¹²⁰ *John Keron v Westpac Banking Corporation* [\[2022\] FWC 221](#), [283].
- ¹²¹ P.19 of the DCB – Termination Letter.
- ¹²² P.149 of the DCB – Respondent Submission at 9.
- ¹²³ *Fair Work Act 2009* (Cth) s.387(a) – see note.
- ¹²⁴ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#), [55].
- ¹²⁵ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.
- ¹²⁶ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).
- ¹²⁷ Ibid.
- ¹²⁸ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].
- ¹²⁹ *RMIT v Asher* (2010) 194 IR 1, 14-15.
- ¹³⁰ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.
- ¹³¹ P.44 of the DCB – Applicant Submissions at 59.
- ¹³² P.338 of the DCB – Email Chain dated 5 December 2023 (JL-10).
- ¹³³ [1996] IRCA568 ; cited in *Dover-Ray v Real Insurance Pty Ltd* [\[2010\] FWA 8544](#) (Thatcher C, 5 November 2010) at para. 85, [(2010) 204 IR 399].
- ¹³⁴ Ibid.