DECISION

Fair Work Act 2009
s.604—Appeal of decision

Coogee Legion Ex-Service Club Ltd
v
Deanna Giblin
(C2023/6965)

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT GRAYSON

MELBOURNE, 29 MAY 2024

Appeal against decision [2023] FWC 2785 of Deputy President Wright at Sydney on 24 October 2023 in matter number U2023/460 – Appeal dismissed – standard of proof discussed.

Introduction

[1] Coogee Legion Ex-Service Club Ltd (**the Appellant**) has lodged an appeal, for which permission to appeal is required, against a decision of Deputy President Wright made on 24 October 2023 (**the Decision**)[1] in which the Deputy President found that the Appellant had unfairly dismissed Ms Deanna Giblin (**Respondent**). Directions made on 21 November 2023 required the Appellant to lodge submissions with the Commission addressing permission to appeal and the merits of the appeal. The Appellant sought and was granted permission to be legally represented at the appeal hearing, pursuant to s.596(2)(a) of the *Fair Work Act 2009* (**the Act**).

[2] The circumstances which led to the Respondent's dismissal may be summarised as follows. The Respondent commenced employment with the Appellant as a casual customer service attendant on 15 October 2021 and from 25 August 2022 was engaged as a Duty Manager. An external audit of the Appellant's stock conducted in April 2023 revealed that the Appellant was missing a significant amount of stock. The Appellant responded by making some policy changes and amendments to its staff handbook with regard to the consumption of food and beverages by staff without payment. The Appellant sent a memorandum outlining the changes to all staff, together with the amended Staff Handbook. A meeting to discuss the changes was then scheduled for staff and it took place on 18 April 2023. The Appellant's Chief Executive Officer, Ms Gail Patrin and Operations Manager, Mr Matthew Armstrong, were in attendance and the contents of the memorandum were reiterated. Upon leaving the Appellant's premises following the conclusion of the meeting, Mr Armstrong noticed some staff members, including the Respondent, socialising at one of the Appellant's bars. When another external stocktake on 27 April 2023 revealed further and not insignificant stock variances, a review was undertaken of the CCTV footage covering a period of time following the staff meeting on 18

April 2023. This resulted in a number of employees of the Appellant being placed on suspension, including the Respondent.

[3] An investigation commenced and the Respondent was interviewed on 1 May 2023. During the course of the investigation, the Respondent was offered the option of resigning from her employment, failing which she would be dismissed. The Respondent declined the option of resigning and was asked to attend the Appellant's premises on 5 May 2023. During the ensuing meeting with Ms Patrin and Mr Armstrong, the Respondent was handed a letter notifying her that her employment was terminated with immediate effect for theft on 18 April 2023 and dishonesty during the investigation. At the hearing before the Deputy President, the Appellant submitted that the Respondent's actions in consuming alcohol prior to the staff meeting on 18 April 2023 also constituted valid reason for termination.

The Decision

[4] The Deputy President reviewed the factual background and the evidence and then dealt with the matters requiring preliminary determination under s.396 of the Act. Having done so, without issue, the Deputy President turned to the question of whether the Respondent's dismissal was harsh, unjust or unreasonable taking into account the mandatory matters for consideration in ss.387(a) – (h). The Deputy President stated that where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination, and the question of whether the alleged conduct took place and what it involved is to be determined on the basis of the evidence in the proceedings before it. The Deputy President also made reference to an employer having the onus of establishing that there was a valid reason for a dismissal on the balance of probabilities and that it must be more probable than not that the Applicant to an unfair dismissal application had engaged in the relevant misconduct.

[5] After outlining a summary of the submissions of the parties, the Deputy President outlined her findings. The Deputy President was satisfied that receiving or consuming beverages without payment is prohibited by the Appellant's policies and that the Respondent was aware of and agreed to comply with the policies. The Deputy President was also satisfied that the Appellant's policies with respect to receiving or consuming beverages extended to out of hours conduct by the Respondent while she was on the Appellant's premises and using its facilities. The Deputy President noted there was no dispute between the parties that the Respondent was provided with a vodka drink which she did not pay for at 6:55pm on 18 April 2023 by a bar attendant employed by the Appellant at that time, Mr Aedan Dunbar-Reid. The Deputy President noted there was CCTV footage in evidence and concluded there was no doubt that it showed that the Respondent ordered a drink from Mr Dunbar-Reid, that Mr Dunbar-Reid provided the drink to her, that Mr Dunbar-Reid did not put the transaction through the point of sale machine and that the Respondent did not pay for the drink. The Deputy President characterised the dispute as whether the Respondent did not pay for the drink deliberately.

[6] The Deputy President did not accept the Appellant's contention that the CCTV footage showed the Respondent holding her phone close to the EFTPOS machine to pay for the drink in an attempt to mislead anyone who would review the footage. Observing that the machine used was a type where the card reader is on the side rather than on top of the machine, the Deputy President considered that if the Respondent was trying to give the impression for the

CCTV cameras that she was paying for the drink, she would have held her phone to the side of the machine where the card reader is located but she did not do this. The Deputy President also stated that the fact that the CCTV shows that Mr Dunbar-Reid did not process the transaction would have thwarted any attempt by the Appellant to pretend she was paying for the drink.

[7] It was the Deputy President's opinion that the CCTV footage showed the Respondent receiving her drink then moving her phone towards but not tapping on the EFTPOS machine reader. The Deputy President considered these actions were consistent with the Respondent intending to tap on the EFTPOS machine reader, seeing that there was no payment recorded on the EFTPOS machine screen, assuming that she had already paid, then not tapping on the card reader. The Deputy President determined that the fact the home screen appeared on the Respondent's phone rather than the credit/debit card screen was of no consequence because it is not necessary to open the credit/debit card until immediately before the point of touching the card reader.[2]

[8] The Deputy President concluded that the Respondent was an honest and credible witness during the hearing. In support of this finding, the Deputy President outlined:

a) The Respondent had consistently maintained that her actions were unintentional.

b) The Respondent had apologised.

c) Apart from the incident which led to her dismissal, the Appellant did not allege that the Respondent had any history of dishonesty or of other wrongdoing.

d) The Appellant did not allege that any other incidents of this nature had occurred in the past.

[9] The Deputy President concluded the CCTV footage showed that the Respondent received a free drink, but that it did not establish that her actions were intentional. The Deputy President also opined it was implausible that the Respondent would have been able to act so quickly and decisively to cover up not paying for an unexpected free drink.[3]

[10] The Deputy President considered the circumstances of the Respondent were to be contrasted with two other employees who had been involved in providing and consuming free drinks on 18 April 2023. The Deputy President noted the two other employees of the Respondent were observed falsely ringing up drinks on the Club's cash register without payment being received and pretending to use a phone to pay for drinks without payment being made on multiple occasions respectively and considered that their actions suggested that there may have been some preplanning involved in providing and taking the free drinks. The Deputy President expressed the view that there was no evidence of preplanning with respect to the Respondent and suggested it was possible that the Appellant's view of the Respondent was tainted by the actions of the other employees who received and provided free drinks.

[11] Having had regard to these matters, the Deputy President concluded that, on the balance of probabilities, the Respondent did not deliberately take the free drink and that the alleged misconduct did not occur. The Deputy President accepted the Respondent's actions occurred

immediately after the meeting at which stock variances had been discussed, and employees had been instructed that they were required to pay for all food and drink consumed and considered that in these circumstances, the Respondent should have been more vigilant in ensuring that she paid for her drink. The Deputy President was not satisfied, however, that the Respondent's conduct amounted to misconduct and considered that the Respondent's good employment history and remorse were such that the incident could instead have been dealt with through a verbal warning. Having made these findings, the Deputy President further held that the Respondent had not been dishonest in responding to the allegations in the meeting of 1 May 2023.

[12] The Deputy President also found that the Appellant's prohibition on staff consuming alcohol prior to a shift did not extend to the staff meeting on 18 April 2023 and therefore determined there was no valid reason for the termination of the Respondent's employment.

[13] In consequence of this finding, the Deputy President determined that neither the s.387(b) nor s.387(c) considerations were relevant in the circumstances. The Deputy President determined that there was no refusal by the Appellant to allow the Respondent to have a support person to assist at discussions relating to the dismissal (s.387(d)) and that the s.387(e) consideration was not a relevant factor.

[14] In considering s.387(f), the Deputy President was satisfied the Appellant is a relatively small business but outlined an expectation for it to have "well established workplace relations policies and procedures",[4] having regard to its 77-year history. As regards s.387(g), the Deputy President noted the absence of dedicated human resource management specialists in the Appellant's enterprise but did not consider this a matter weighing in favour of a finding that the Respondent's dismissal was not unfair due to the long history of the Club, Ms Patrin's 25 years of experience in senior management roles in the Clubs industry and the involvement of the Appellant's HR Consultant and Clubs NSW. In considering ss.387(f) and (g), the Deputy President outlined at [136] – [142] of the Decision what she considered to be serious deficiencies in the procedures of the Appellant which led to the Respondent's dismissal.

[15] The Deputy President considered the submissions of the parties in evaluating whether there were any other relevant matters (s.387(h)) and firstly concluded:

a) Contrary to the Appellant's suggestion that there was nothing unusual, extreme or significant about the Respondent's financial issues, the Respondent's evidence that she had suffered financial loss as a result of the dismissal ought to be taken into account;

b) The Appellant's failure to differentiate the Respondent's conduct from other employees was a matter which weighed in favour of a finding of unfairness;

c) That the Respondent was given the opportunity to resign, was terminated for misconduct rather than serious misconduct, and held the position of Duty Manager, was not relevant to determining whether the termination was unfair, having regard to the finding that that there was no valid reason for the dismissal; and

d) There was no evidence to support the Appellant's submissions that the Respondent failed to understand the seriousness of her conduct.

[16] The Deputy President also determined that the use of the words 'fraud' and 'theft' by the Appellant in relation to the Respondent was intimidatory, particularly so because the Appellant was in the early stages of her career. The Deputy President opined that the intention of the Appellant in using these words was to suggest that the Respondent had engaged in criminal behaviour and proffered that because these words have specific legal meanings, great caution should be exercised before a finding that an employee has engaged in criminal conduct is made. The Deputy President expressed the opinion that because intent is required and the conduct must be established to the criminal standard of proof, it was unconscionable for the Appellant to have claimed that the Respondent had engaged in criminal behaviour. This was because the Respondent had explained that her conduct was unintentional and there was evidence which corroborated this, including her prior favourable employment record and the evidence from Mr Dunbar-Reid that the Respondent had not requested a free drink, which the Deputy President considered Ms Patrin had deliberately withheld from the Respondent. While the Deputy President considered that while it was open to the Appellant to investigate the Respondent's conduct on the basis that she breached the Club's policies, it had instead made "baseless conclusions" that the Respondent had engaged in criminal conduct in circumstances where the Respondent was studying nursing, and such serious findings may have an adverse impact on her ability to commence a career in that profession.[5]

[17] The Deputy President therefore concluded that the financial impact of the dismissal on the Respondent, the incorrect and inappropriate characterisation of her conduct as criminal and the adverse impact on her employment prospects caused by the dismissal were all matters which weighed in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.

[18] Having considered the matters in s.387 of the Act, the Deputy President was satisfied that the Respondent's dismissal was harsh, unjust and unreasonable and therefore unfair. The Deputy President also determined that an order for compensation was appropriate. This was determined after a further hearing. In a decision made on 1 December 2023 (Compensation Decision),[6] the Deputy President determined to award the Respondent $24,376.42 gross plus superannuation, less taxation as required by law, and issued an Order giving effect to the Compensation Decision.[7] An appeal lodged against the Compensation Decision on 16 February 2024[8] has also been allocated to us.

Appeal grounds and submissions

[19] The grounds of appeal set out in the *Form F7 - Notice of Appeal* comprise 8 grounds with some overlap. The grounds were characterised as either errors or significant errors of fact, and were set out as follows:

Grounds of appeal - errors

1. The Deputy President erred in finding that the dismissal was harsh, unjust or unreasonable;

2. The Deputy President erred in finding that the Appellant did not have a valid reason for dismissal, relating to the Respondent's conduct;

3. The Deputy President erred by distinguishing, for the purposes of deciding whether misconduct had occurred, between:

    a. a premeditated arrangement involving the acceptance of a drink without paying; and
    b. an opportunistic acceptance of a drink without paying;

4. The Deputy President erred in finding that the Appellant was required to establish misconduct, which involved allegations of criminal conduct, to the criminal standard of proof;

5. The Deputy President erred in not considering whether, having found that the Respondent had not paid for the drink, the Appellant had a valid reason for dismissal based on breach of the Appellant's published policies; and

6. The Deputy President erred in finding that the Respondent's alcohol consumption prior to a staff meeting was not misconduct, on the basis of evidence other employees had previously done so.

Grounds of appeal — significant errors of fact

7. The Deputy President erred in finding, against the evidence, that the Respondent genuinely believed she paid for the drink, when she had not done so; and

8. The Deputy President erred in finding that the use of the words 'fraud' and 'theft' when framing a misconduct allegation was intimidatory, and intended to be so.

[20] The Appellant addressed Ground 7 first, giving it the descriptor of 'accepting the Respondent's evidence as to her intent' and characterising it as the most significant issue in the appeal. The Appellant focussed on the Deputy President's finding that the Respondent did not deliberately take the drink and submitted this finding was unsafe because "it substantially hangs on the notion that in the world of bar service drinks are ordered, prepared and delivered in stages and customers pay depending on when the bar person rings up the order."[9]

[21] The Appellant noted that the Deputy President accepted the explanation of the Respondent that she thought she had paid for the drink and had noted the following matters:

a) the Respondent's evidence that she would not have 'purposely not paid';[10]

b) the evidence of Mr Dunbar-Reid, whose evidence was said to 'partially corroborate' the Respondent's evidence, that the Respondent had not requested a free drink;[11]

c) CCTV footage[12] which indicated the Respondent moved to pay for the drink after it was served;[13]

d) the Respondent's evidence that drinks might be rung up by bar staff before or after the drink is produced;[14]

e) the Respondent's statement in evidence that she had exercised 'poor judgment' and made a 'terrible decision' at the time, but she (the Deputy President) did not accept this constituted an admission;[15]

f) the absence of any history of wrongdoing;[16]

g) that it would have been implausible for the Respondent to 'act so quickly and decisively to cover up not paying for an unexpected free drink';[17] and

h) that the Respondent's conduct was not pre-planned, in contrast with other employees obtaining free drinks.[18]

[22] The Appellant submits that the CCTV footage makes the Respondent's contention that she thought she had paid for the drink untenable. The Appellant submitted the CCTV footage was important because it was the only direct evidence of what happened on the day. The Appellant argued that when the CCTV footage was viewed, any distinction as to when the drink may have been rung up became academic because the CCTV footage revealed:

(a) The drink was ordered at approximately the 10 second mark;

(b) The Respondent then moved approximately two feet to the right where the payment machine was located;

(c) At this point, the Respondent focussed on the payment machine ready to pay but did not pay because nothing had been rung up;

(d) There was a 20 second gap, during which the Respondent was doing nothing beyond standing at the payment machine waiting to pay; and

(e) The drink arrived at approximately the 30 second mark.

[23] The Appellant submitted that any speculation about whether it is possible a person had forgotten they had paid, or that someone could have been distracted and forgotten whether they had paid during the 20-second gap between when the drink was ordered and the drink was delivered was irrelevant because the CCTV footage did not leave those opportunities open. The Appellant submitted that in any event, there was no evidence that this is what happened and absent positive evidence of what was being thought at the time, it was almost inconceivable that someone could have thought in the 20 second gap that they had already paid because there were no distractions.

[24] To develop this submission, the Appellant relied upon the Respondent's evidence that she had no recollection of the incident, contending that the case the Respondent had put as to what may have happened on the day was speculation based on what she had seen in the CCTV footage. The Appellant highlighted the following evidence from the Respondent:

> "Was there anything on the screen when you ordered?---Well, as I stated before, I didn't remember the incident. I didn't remember not paying for it so -well, in that footage, no, it's not there.
>
> Then after you received the drink do you walk away?---Yes, I do.
>
> Do you walk away straight away?---No.
>
> You move your phone, don't you?---Well, yes, I hold it. So I would say I was holding it - I waited to pay and then I assumed that I must have paid before. I did not remember the incident."[19]

[25] The Appellant submitted that this evidence of the Respondent was a distraction because she was just interpreting the CCTV footage. Submitting that the Respondent's evidence was not that she recalled the drink or that she must have forgotten to pay, the Appellant emphasised that the CCTV footage revealed that upon ordering, the Respondent had gone straight to the machine to pay and that is where the drink was delivered. The Appellant submitted that the CCTV footage clearly showed that there had been no previous attempt to pay and provided no basis to conclude that the Respondent must have forgotten.

[26] The Appellant also argued it is unnecessary to resolve what the Respondent was doing with her phone in the CCTV footage or whether she was participating in a scam that had been operating whereby employees who were getting free drinks would wave their phone over the pay machine when the drink arrived so as to represent to CCTV footage that they were paying. The Respondent submitted that the only question, even on the Deputy President's view of the evidence, was what was the Respondent's state of mind when she took the drink?

[27] The Appellant characterised the Deputy President's assessment of the evidence as being that the drink was ordered, the Respondent waited to pay, the barman turned up with the drink but never rung it up, the Respondent must have assumed she paid earlier and so left with the drink. The Appellant submitted that whether one takes its view of the CCTV footage (i.e. the Respondent was part of the 'routine' for not paying but making it look like they were) or that of the Respondent and the Deputy President (i.e. that the Respondent legitimately went to pay because she had not, and when the drink was not rung up on the machine, she must have formed the view that she had already paid and took the drink), the key question is what was the Respondent's state of mind about whether she had paid when she took the drink, and not what she was actually doing with her phone.

[28] The Appellant submitted that the Deputy President's finding in this regard was based on speculation as opposed to direct evidence and was inconsistent with the CCTV footage. The Appellant submitted that it is almost impossible to conceive the idea that in the time that lapsed and in the absence of any distraction, the Respondent could have formed the view that she had already paid. The Appellant relied on what it characterised as contextual matters, namely that it had policies in place outlawing the consumption of its drinks and food without charge and there had been a staff meeting immediately before the incident at which these policies were emphasised, the issue of stock wastage had been discussed and the point made that whatever may have happened in the past, it was not to continue. The Appellant posed the question that if a person in such circumstances had ordered a drink, thought that they had not paid for it, went

to pay (which, it contends, the Deputy President found) saw no sale had been rung up, how could they conclude they must have paid and walked away with the drink?

[29] The Appellant submitted that error is appealable if the Deputy President's conclusion was unreasonable or plainly unjust or contrary to the overwhelming weight of evidence,[20] which is to be contrasted with a matter in relation to which a decision-maker may have come to a different conclusion, and on which reasonable minds may differ.[21] The Appellant submitted the evidence the Deputy President relied upon was based on speculation and the Full Bench was in as good a position as anyone to interpret the CCTV footage. Further, the Appellant argues that if the Respondent is found to have intentionally taken the drink without paying, her position during the investigation was misleading and was, of itself, capable of constituting misconduct.[22]

[30] As to Ground 3, it is noted that the Appellant submitted that the Deputy President's approach appears to have aligned with the narrative of the Respondent that, not having requested the free drink, she could not have knowingly taken it without paying. The Appellant outlined that the Deputy President referred, on a number of occasions, to a distinction between conduct which could be described as pre-planned, and that which was spontaneous.[23] The Appellant submitted that the Deputy President was not drawing that distinction to determine the gravity of misconduct but was doing so as part of establishing the Respondent's state of mind, in order to assess whether there was misconduct. The Appellant submitted that the evidence of Mr Dunbar-Reid said to have 'partially corroborated' the Respondent's evidence that her action in not paying for the drink was unintentional, rose no higher than perhaps corroborating that there was no prior arrangement for the non-payment of the drink. The Appellant argued that the absence of evidence of a prior arrangement for the non-payment is not exculpatory of intentionally taking a drink without paying. The Appellant argued that while a preplanned arrangement would be strong evidence of misconduct, the absence of such evidence does not mean that a person would not have engaged in misconduct by taking a drink they knew they had not paid for.

[31] As to Ground 6, the Appellant submitted that whatever policy is driving a prohibition against staff drinking before or during a shift or a break would seem to hold even in relation to drinking before or during a staff meeting, particularly a staff meeting on a matter of importance. As regards the Deputy President's reliance on the Respondent's evidence that staff and management had previously consumed alcohol before staff meetings without sanction to find the Respondent did not engage in misconduct when consuming alcohol prior to the staff meeting, the Appellant submitted that this has to be known to the employer and effectively sanctioned and the evidence did not establish this. The Appellant states that this was the extent of the evidence, and the matter was resolved without considering what must be demonstrated before finding the employer has knowingly tolerated what otherwise would constitute misconduct.[24] Citing the wording of the policy, the Appellant relied on its reference to *"break period"* in *"Alcohol must not be consumed prior to a shift, during a shift or break period"* to submit the policy did not just have application to periods when an employee would be undertaking work tasks or being 'on the tools.'

[32] Through Ground 8, the Appellant challenged the Deputy President's opinion that the use of the words 'fraud' and 'theft' was intimidatory and intended to be so, by arguing that there was no evidence of an attempt to intimidate and proffering that the history of the proceedings demonstrated that the Respondent was not intimidated. The Appellant asserted that

if the conduct which is being alleged constitutes criminal conduct, it cannot be improper to put the allegation in those terms. The Appellant noted that Regulation 1.07 of the *Fair Work Regulations 2009* uses that specific language (among other examples) of conduct which is 'serious misconduct' for the purposes of section 12 of the Act. Through Ground 4, the Appellant submitted that when the employer is relying on criminal behaviour as the conduct founding a valid reason, the *Briginshaw* test may apply, such that it is difficult to see how the criminal standard has any role to play, either in an employer's assessment of conduct when investigating, or the Commission's assessment when evaluating the evidence. The Appellant rejected any proposition that it is unconscionable to allege criminal misconduct if you cannot establish it beyond reasonable doubt. The correct approach, the Appellant asserted, is to the effect that regard must be had to the seriousness of the alleged conduct, to ensure there is a 'proper degree of satisfaction.'

[33] In pressing Ground 5, the Appellant made reference to the Deputy President's finding that it was open to the Appellant to investigate the Respondent's conduct on the basis that she had breached its policies and submitted the Deputy President should have done this in order to determine whether the conduct established a valid reason. The Appellant submitted that even if the view was taken that the conduct was unintentional, the Respondent was still in breach of the policies in circumstances where there had just been a staff meeting on the issue and sensitivity should have been heightened. The Appellant also argued that the ease with which the Respondent could have verified, at the time of receiving the drink, whether payment had been made and that fact that Mr Dunbar-Reid, who could have verified whether the Respondent had paid, reported to her, were relevant contextual factors. Further, the Appellant submitted that it is unclear how the Commission thought that dealing with the matter by way of a verbal warning would be an effective response if, having just been at the staff meeting, that was not enough to prompt the Respondent (even on the Deputy President's own findings) to adopt a level of diligence around paying for the drink. The Appellant argued that a warning was not much different to simply holding another staff meeting to discuss the expectations again.

[34] The Appellant did not expand upon Grounds 1 or 2 in its written submissions. In the Notice of Appeal, these grounds contend the Deputy President erred in finding that the Appellant did not have a valid reason for dismissal and that the dismissal was harsh, unjust or unreasonable.

[35] The Appellant submitted that the grant of permission to appeal would be in the public interest because the Decision is counter intuitive and led to an unjust outcome. More particularly, the Appellant contends:

a) the issue of stock wastage in the industry (and in the retail sector) is one of increasing significance, incurring significant cost through stock losses and various measures to monitor and protect against theft;

b) conduct involving dishonesty, leading to the Commission's intervention, is a serious matter where contested findings are made;

c) the Decision makes a number of observations about investigating alleged misconduct which constitutes criminal conduct, including the use, and weighing, of direct and indirect evidence to establish facts and the requisite standard of proof.

[36] The Respondent largely relied on the case she put at first instance. The Respondent submitted that, consistent with her submissions at first instance, she was unaware she had received a drink without paying as she had paid for drinks prior to and after the drink in question, which, she asserts is substantiated by invoice and payment history evidence tendered by the Appellant. The Respondent maintained that there was no dishonesty involved in the incident because she had paid for other drinks on the night in question and only one drink was unknowingly not paid for. The Respondent submitted the incident was a mistake and unbeknownst to her. She asserted it was unintentional, as opposed to being premediated or opportunistic.

[37] The Respondent submitted that the meeting on 18 April 2023 was neither a shift nor a staff training session. The Respondent highlighted that she was not rostered on 'ClubsHR' and was not paid for the minimum engagement under the relevant Award, uniforms were not required and in any event, senior management was aware of management and staff drinking prior to meetings before this matter. The Respondent maintained there was an intimidatory use of terms before all of the facts and responses to the incident were considered and that her apology had not been taken into account by the Appellant. The Respondent submitted that the Appellant did not follow procedural fairness throughout the process of her termination because she was not shown the CCTV footage before being advised she could resign or be terminated. The Respondent also complained that Ms Patrin only telephoned Mr Dunbar-Reid after the Respondent had emailed Ms Patrin to advise she would not be resigning because she thought the decision was unfair and argued the making of this call was an attempt to gather evidence of misconduct after the assumption that she was guilty had been made.

Applicable appeal principles

[38] An appeal under s.604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[25] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[39] This appeal is one to which s.400 of the Act applies. Section 400 provides:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[40] In the Federal Court Full Court decision in *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [43], Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s 400 as "a stringent one". The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[26] A Full

Bench of the Commission, in *GlaxoSmithKline Australia Pty Ltd v Makin,* identified some of the considerations that may attract the public interest:

> "… the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."[27]

[41] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[28] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[29]

[42] An application for permission to appeal is not a de facto or preliminary hearing of the appeal. In determining whether permission to appeal should be granted, it is unnecessary and inappropriate for the Full Bench to conduct a detailed examination of the grounds of appeal.[30] However it is necessary to engage with those grounds to consider whether they raise an arguable case of appealable error.

Consideration

[43] We are satisfied that the grant of permission to appeal would be in the public interest. We consider that the appeal raises an issue of general application in respect of dismissals involving allegations of conduct of a criminal nature. Permission to appeal is therefore granted in accordance with s 604(2) of the FW Act.

[44] Commencing with Ground 7, the Appellant has submitted that the Deputy President erred in finding, against the evidence, that the Respondent genuinely believed she had paid for the drink when she had not done so. The Deputy President viewed the CCTV footage and observed the testimony of the Respondent.

[45] In *Fox v Percy*[31] Gleeson CJ, Gummow and Kirby JJ said:

> "[An appellate court] must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceedings wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court reading the transcript, cannot always fully share."[32] (footnotes omitted)

[46] In *Robinson Helicopter v McDermott* (*Robinson Helicopter*)[33] the High Court, citing *Fox v Percy,* outlined:

> "A court of appeal conducting an appeal by way of rehearing is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes

> that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or 'contrary to compelling inferences'"[34] (footnotes omitted)

[47] These principles have consistently been applied to appeals in the Commission. On appeal, the factual findings made by a member at first instance should generally stand, unless it can be shown that the member has failed to use the advantage of the hearing of the evidence or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was "glaringly improbable".[35] An appeal to a Full Bench exists for the correction of error. It is not a hearing *de novo*. There are natural limitations that apply to the hearing of an appeal by a Full Bench and the member at first instance is usually in a better position than the appeal bench to make findings of fact.[36]

[48] Central to the determination of whether there was a valid reason for the termination of the Respondent's employment was the Deputy President's finding that the CCTV footage did not establish that the Respondent's actions in taking the drink without paying were intentional. The primary contention of the Appellant was that it was inconceivable, upon viewing the CCTV footage, that the Respondent could have formed the view she had already paid for the drink before she took it without paying.

[49] We have viewed the CCTV footage. The Appellant has not persuaded us that the Deputy President's factual finding that the Respondent did not deliberately take the free drink, was 'glaringly improbable.' While other conclusions could be formed upon viewing the CCTV footage, this does not mean the Deputy President's conclusion was not open to her. The Respondent did not recall the incident but maintained throughout the investigation process and the hearing that she did not intend to take the drink without paying. She testified that she had not asked for the free drink. The Deputy President found the Respondent to be honest and credible. We have taken these matters into account and also consider the fact that all the other drinks consumed by the Respondent on the evening in question were paid for is a matter that weighs in favour of a finding that the Respondent genuinely believed she had paid for the drink in question and did not deliberately take it.

[50] Ground 3 is something of a sub-set of Ground 7. While the actions of the barman, Mr Dunbar-Reid, were not at all to his credit, the Appellant appears to have accepted that his evidence of the Respondent not having asked him for the free drink supports the Respondent's account that there was no pre-planning on the Respondent's part. We agree with the Appellant's contention in support of Ground 3 that the absence of evidence of a prior arrangement for the non-payment of a drink is not exculpatory of intentionally taking a drink without paying but, for the reasons stated above, we have found no error in the Deputy President's conclusion that the CCTV footage did not establish that the Respondent's actions in taking the drink without paying were intentional. We reject the contention that the Respondent's acceptance of the drink was opportunistic misconduct.

[51] We are therefore not persuaded that the Appellant has established the errors contended for in Grounds 7 and 3.

[52] In submitting it was not open to the Deputy President to find the prohibition of alcohol did not extend to staff meetings on the basis of evidence that other employees had previously done so, we consider Ground 6 has been prosecuted on the assumption that the consumption of alcohol prior to a staff meeting constitutes misconduct. As to this assumption, it cannot be said that this is clearly the case in the circumstances of this case. The Appellant's staff handbook and contract of employment were by no means definitive in this regard and the Respondent gave unchallenged evidence that the question of consuming alcohol before a meeting had never been discussed.[37] We consider that if the Respondent wanted to rely on the consumption of alcohol prior to a team meeting as a valid reason, it was obliged to make clear to its employees that such behaviour was prohibited and a failure to adhere to this condition may be regarded as misconduct. As it did not do so, we reject the premise of Ground 6.

[53] Through Ground 8, the Appellant submitted the Deputy President erred in finding that the use of the words 'fraud' and 'theft' when framing a misconduct allegation was intimidatory and intended to be so. Certainly, the Deputy President expressed the opinion that the use of the words 'fraud' and 'theft' by Appellant had been intimidatory and that the Appellant's intention in using these words was to suggest the Respondent engaged in criminal behaviour.[38] We observe that the 'show cause' letter dated 28 April 2023 that was sent to the Respondent alleged the Respondent engaged in both 'theft and fraud' but the 'fraud' allegation was not referred to in the termination letter dated 5 May 2023. Further, we observe that when it was suggested by the Respondent's support person during the 1 May 2023 meeting that these words were used to intimidate, Ms Patrin's notes of the meeting outlined that she gave the explanation that ClubsNSW had written the letter.[39]

[54] We consider the Deputy President reached the conclusion that the Appellant's use of the words 'fraud' and 'theft' in relation to the Respondent was intimidatory without an evidentiary basis for doing so. While it is clear that the Respondent disputed the allegations of 'fraud' and 'theft', the Respondent gave no evidence that suggests she was intimidated by the Appellant's use of them. Notwithstanding this finding of error, we do not consider it was significant. We observe it was made amongst other findings made in relation to s.387(h) and, having regard to the Deputy President's ultimate conclusions at [157] of the Decision (set out below) and in [169] – [173], do not consider it determinative of the final result:

> "Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of Ms Giblin was harsh, unjust and unreasonable because there was no valid reason related to Ms Giblin's conduct, there were procedural deficiencies in the Club's investigation and because of the harsh consequences of the dismissal due to the financial impact of the dismissal on Ms Giblin and the adverse impact on her employment prospects."[40]

[55] However, in considering s.387(h), the Deputy President appeared to suggest in [152] of the Decision that before an employer dismisses an employee for theft and asserts there is a valid reason for the termination, they are required to establish beyond reasonable doubt that the theft occurred. We disagree. Moreover, we do not agree the Appellant acted in an unconscionable manner. It had a genuine concern about the conduct of the Respondent based on the CCTV footage. While it is the case that an employer, unless they able to rely upon the Small Business Fair Dismissal Code in s.388 of the Act, cannot simply rely upon holding a reasonable belief that the alleged conduct occurred, the balance of probabilities remains the required standard of

proof and, as was established in *Briginshaw v Briginshaw* (***Briginshaw***),[41] the nature of the relevant issue (in this case, theft) necessarily affects the "process by which reasonable satisfaction is attained."[42]

[56] The Full Bench relevantly addressed the *Briginshaw* test in *Phillip Parker v Garry Crick's (Nambour) Pty Ltd as The Trustee for Crick Unit trust T/A Cricks Volkswagen*[43] at [125], as follows:

> "This is an approach which recognises that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved. In *Neat Holdings Pty Ltd v Karajan Holdings* the High Court explained the approach as follows:
>
>> 'The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves **criminal conduct or fraud**. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage **in fraudulent or criminal conduct** and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.'"
>>
>> [Our emphasis, Footnotes omitted].

[57] It is well settled that *Briginshaw* has long established that where serious allegations involving criminal conduct are made, such reasonable satisfaction "should not be produced by inexact proofs, indefinite testimony, or indirect inferences" or "circumstances pointing with a wavering finger to an affirmative conclusion."[44]

[58] As regards Ground 4 however, we are not persuaded that the Deputy President in fact found that the Appellant was required to establish misconduct to the criminal standard of proof. As we have mentioned, the discussion regarding criminal conduct referred to above, arose when the Deputy President was considering s.387(h). References the Deputy President made when considering s.387(a) satisfy us that she applied the correct standard of proof when considering whether there was a valid reason for the dismissal related to the Respondent's conduct.[45]

[59] The Appellant's contention in Ground 5 that Deputy President erred in not considering whether, having found that the Respondent had not paid for the drink, the Appellant had a valid reason for dismissal based on breach of the Appellant's published policies, arises out of another statement of the Deputy President at [152] of the Decision:

> "It was open to the Club to investigate Ms Giblin's conduct on the basis that she breached the Club's policies but instead the Club made baseless conclusions that Ms Giblin engaged in criminal conduct."

[60] This statement was made as part of the Deputy President's broader consideration of the use of the terms 'fraud' and 'theft' and 'criminal behaviour'. A fair reading of that paragraph, and those preceding and following it, indicates that the Deputy President was suggesting that the Appellant could have described the allegations it put to the Respondent regarding the incident on 18 April 2023 as a breach of its policies, as opposed to criminal conduct. It is clear that when the Deputy President outlined her consideration of s.387(a), she did so in reference to the Appellants policies.[46] Moreover, when making her findings in relation to s.387(a), the Deputy President outlined her conclusion that the Respondent did not deliberately take the free drink, adding that this could have been dealt with by way of a verbal warning, as opposed to dismissal.[47] We reject Ground 5.

[61] We conclude by rejecting any suggestion arising from the Decision that an allegation of theft cannot be put unless it is established beyond reasonable doubt. If an employee knows property of their employer is to be paid for and yet knowingly appropriates it without paying, that is theft. If, based on material before it and applying the *Briginshaw* standard, the employer conscientiously believes the property has been taken by the employee, there is nothing untoward in alleging the employee's conduct constitutes theft.

[62] It follows from our conclusions above that we reject Grounds 1 and 2.

Conclusion and orders

[63] We have affirmed the Deputy President's conclusions that there was no valid reason for the Respondent's dismissal and that it was harsh, unjust and unreasonable. We consider therefore that the appropriate course is to dismiss the appeal in C2023/6965. There remains for consideration the appeal in C2024/936 against the Compensation Decision. We consider it appropriate to seek confirmation from the Appellant as to its intentions in relation to the appeal in C2024/936. We order as follows:

(1) Permission to appeal in C2023/6965 is granted.

(2) The appeal in C2023/6965 is dismissed.

(3) Within fourteen days the Appellant is to advise the Full Bench as to its intentions in relation to the appeal in C2024/936.

DEPUTY PRESIDENT

Appearances:
J Wells, for the Appellant.
D Giblin, Respondent.

Hearing details:
2024.
Sydney:
12 February.

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[1] [2023] FWC 2785.

[2] [2023] FWC 2785 at [123].

[3] Ibid at [117].

[4] Ibid at [135].

[5] Ibid at [152].

[6] [2023] FWC 3178.

[7] PR768893.

[8] C2024/936.

[9] Transcript 12 February 2024 at PN29.

[10] Decision, [111] (Appeal Book, p23).

[11] Decision at [113] (Appeal Book, p24).

[12] Exhibit 6, Annexure G.

[13] Decision, [117] (Appeal Book, p24).

[14] Decision, [116] (Appeal Book, p24).

[15] Decision, [118]-[120] (Appeal Book, p25).

[16] Decision, [122] (Appeal Book, p25).

[17] Decision, [123] (Appeal Book, p25).

[18] Ibid.

[19] Transcript 11 August 2023 PN 265-268.

[20] *Blackburn v Virgin Australia* [2022] FWCFB 232 at [65].

[21] *Blackburn v Virgin Australia* [2022] FWCFB 232 at [64]-[65].

[22] *Telstra v Streeter* [2008] AIRCFB 15 at [19]-[20], and [23].

[23] Decision, [113] (Appeal Book, p24); and [123] (Appeal Book, p25).

[24] *Cannan v Nyrstar Hobart* [2014] FWC 5072 at [255]-[256]; on appeal in *Nyrstar Hobart v Cannan* [2015] FWCFB 888 at [53] (cited in *Toll Holdings v Johnpulle* [2016] FWCFB 108 at [15]).

[25] This is so because on appeal the Commission has power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* [2000] HCA 47, 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[26] *O'Sullivan v Farrer* [1989], HCA 61, 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* [2011] HCA 4, 243 CLR 506, 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177 at [44]-[46].

[27] [2010] FWAFB 5343, 197 IR 266 at [24] – [27].

[28] *Wan v AIRC* [2001] FCA 1803, 116 FCR 481 at [30].

[29] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089, 202 IR 388 at [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, 192 FCR 78, 207 IR 177; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28].

[30] *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140 at [82].

[31] [2003] HCA 22; 214 CLR 118.

[32] Ibid at [23].

[33] [2016] HCA 22; 331 ALR 550.

[34] Ibid at [43].

[35] See *Blagojevic v AGL Macquarie Pty Ltd* [2018] FWCFB 4174 at [48] and the decisions at footnote 45 and *Australian Education Union v Bendigo Kangan Institute of TAFE* [2021] FWCFB 2152 at [38].

[36] *Australian Education Union v Bendigo Kangan Institute of TAFE* [2021] FWCFB 2152 at [38].

[37] Transcript 11 August 2023 PN 341.

[38] [2023] FWC 2785 at [152].

[39] Appeal Book at p.239.

[40] [2023] FWC 2785 at [157].

[41] *Briginshaw* v *Briginshaw* (1938) 60 CLR 336.

[42] Ibid at p.363.

[43] [2018] FWCFB 279.

[44] *Briginshaw* v *Briginshaw* (1938) 60 CLR 336, per Dixon J at p.362, and Rich J at p.350.

[45] [2023] FWC 2785 at [79], [121] and [124].

[46] Ibid at [108].

[47] Ibid at [124].