DECISION

Fair Work Act 2009
s.604—Appeal of decision

Sydney Trains

v

Reece Goodsell
(C2023/8091)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BEAUMONT
DEPUTY PRESIDENT ROBERTS

BRISBANE, 21 OCTOBER 2024

Appeal against decision [2023] FWC 3209 of Deputy President Easton at Sydney on 4 December 2023 in matter number U2022/9973 – Breach of drug and alcohol policy valid reason for dismissal – significance of drug and alcohol policies as method of managing risk of impairment at the workplace – Relevance to unfairness of dismissal of impairment or risk of impairment of employee who tests positive for prohibited substance – Where impairment or risk of impairment at work is not reason for dismissal mitigating factors to be considered as other relevant matters under s. 387(h) – Erroneous finding that employer must show risk of impairment to establish that dismissal was not unfair – Error did not vitiate other findings – Appeal dismissed.

Introduction and factual background

[1] Sydney Trains has lodged an appeal under s. 604 of the *Fair Work Act 2009* (the Act), for which permission is required, against a Decision[1] of Deputy President Easton issued on 4 December 2023 (Decision). The Decision concerned an application made pursuant to s. 394 of the Act by Mr Reece Goodsell (Respondent) for an unfair dismissal remedy in respect of the termination of his employment with Sydney Trains.

[2] Mr Goodsell was employed by Sydney Trains and its predecessors for 26 years. At the time of his dismissal, Mr Goodsell was employed in the role of Work Group Leader (Traction), a Category 1 Rail Safety Worker role. In that role his duties involved identification of hazards and risk control for various works including in rail corridors where liaison with rail safety officers to gain access was required.

[3] Sydney Trains has a Drug and Alcohol Policy (Policy) requiring employees to be *"drug free"* by passing a drug or alcohol test prescribing cut off limits for drugs specified in the Australian Standard AS/NZS 4308:2008 "*Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine*" (Australian Standard).[2] The Policy provides for random testing. A breach of the Policy constitutes a breach of the Transport for NSW *Our Code of Conduct* (Code of Conduct), which will result in disciplinary action, up to and including dismissal.

[4] Mr Goodsell was absent from work on a period of leave and a rostered day off, from 25 May to 3 June 2022. On 4 June 2022, Mr Goodsell returned to work and while on duty at the Auburn Stabling Yard, undertook a random drug and alcohol test requiring him to give a urine sample. An initial test of Mr Goodsell's urine sample returned a positive result for cocaine metabolites over the cut off limit specified by the Policy. A further test of Mr Goodsell's sample returned a positive reading for benzoylecgonine (a cocaine metabolite) at a concentration of 264μg/L (micrograms per litre). The cut off limit for benzoylecgonine under the Australian Standard is 150μg/L. It is not disputed that cocaine metabolites are inactive and indicate that a person has consumed cocaine rather than indicating that the person is impaired. It is also not disputed that by returning a non-negative test result, Mr Goodsell breached the Policy.

[5] Mr Goodsell was formally suspended on 8 June 2022 and was notified on 17 June 2022 that an investigation would be undertaken into an allegation that he had breached the Code of Conduct and the Policy. Mr Goodsell participated in the investigation process. His explanation of events that led to the positive test, and mitigating factors he raised were not accepted by Sydney Trains. Mr Goodsell's explanation included that four days before returning from leave he had accepted an offer from friends to try cocaine, it was a "*one-off*" incident, he did not feel in any way impaired when he attended for work and did not realise that there would still be traces in his system. Following a show cause and review process outlined in the Decision, Mr Goodsell was dismissed on 23 September 2022.

[6] In the Decision, the Deputy President determined that there was a valid reason for Mr Goodsell's dismissal, but that the dismissal was harsh, unjust and unreasonable based on mitigating factors. By way of remedy, the Deputy President ordered that Sydney Trains reinstate Mr Goodsell to his former employment and pay him an amount for lost earnings, less notice paid on termination of employment, amounts received by Mr Goodsell from other employment since his dismissal and a 20% deduction for conduct that led to the dismissal.[3]

The appeal

[7] Sydney Trains lodged a Form F7 Notice of Appeal on 22 December 2023. By consent of the parties, an Order[4] was issued by the President on 22 December 2023 staying the Decision and Orders of the Deputy President on agreed terms, pending the determination of the appeal or until further order of the Commission. The appeal was listed for hearing before us on 12 March 2024 in relation to permission to appeal and the merits of the appeal.

[8] At the hearing, Sydney Trains was represented by Mr J Darams of counsel and Mr Goodsell was represented by Mr L Saunders of counsel. We granted permission for the parties to be legally represented as we were satisfied that the appeal raised complex issues around the correctness of the application of legal principles concerning unfair dismissal and drug and alcohol policies in the workplace. We were also satisfied that legal representation would enable the appeal to be dealt with more efficiently having regard to its complexity.

The Decision

[9] After setting out the factual background the Deputy President commenced his consideration of the evidence by setting out the terms of the Policy, noting that it states that Sydney Trains has a vision of a drug and alcohol-free workplace and is committed to providing a safe environment for all workers and customers through reducing the risks created in the workplace by the use of drugs and alcohol. The Deputy President noted that the Policy defines "*drug free*" by reference to passing or failing a drug test and not by reference to actual impairment. Further, the Deputy President noted that the pass or fail testing limits for drugs are those specified in the Australian Standard. The Deputy President then set out provisions of the Code of Conduct which provides *inter alia* that returning a positive drug or alcohol test may result in disciplinary action and that employees are encouraged to disclose if they have a drug or alcohol dependency so that appropriate action can be taken to provide relevant support and maintain a safe workplace.[5]

[10] The Deputy President next considered the evidence of Mr Goodsell, noting his assertion that contrary to the submission of Sydney Trains, he understood the safety aspects of his role. Mr Goodsell's evidence in relation to the events that led to his dismissal was that on Tuesday 31 May 2022, Mr Goodsell had a night out with friends he had not seen for a long time and accepted an offer to try some cocaine. The Deputy President noted that Mr Goodsell said: "*given I was on annual leave and not due back to work until Saturday, 4 June 2022, I believed by that time it would have been out of my system. This was a mistake in judgement and one which has had heavy consequences*." The Deputy President also noted that Mr Goodsell said that had he perceived he was impaired he would not have attended work and that he genuinely held the belief that he was not impaired or intoxicated with the effects of cocaine on 4 June 2022.

[11] After recording that Mr Goodsell was suspended from work on 8 June 2022, the Deputy President reviewed the process by which Sydney Trains put the allegation to Mr Goodsell. That process included a Notification of Disciplinary Investigation and Request to Respond to Allegation sent to Mr Goodsell on 17 June 2022, which the Deputy President noted referred only to the taking of a drug test and a positive reading. The Deputy President extracted Mr Goodsell's response stating that his decision to try cocaine was a "*one off*" and expressing his remorse, devastation at the prospect of losing his employment, and the impact that this would have on his family.

[12] The process also included a show cause letter sent to Mr Goodsell on 21 July 2022, inviting him to respond to Sydney Trains' finding that the allegation was established, and its preliminary view that Mr Goodsell should be dismissed. In his response, Mr Goodsell pointed to the assessment by Dr Armand Casolin (Sydney Trains' Chief Health Officer) that his claim of ingesting the cocaine on 31 May 2022, while he was on annual leave and not required to work, was consistent with the results of the testing, and that the person who administered the test had stated that Mr Goodsell did not appear to be impaired. Mr Goodsell also emphasised his preparedness to participate in rehabilitation and education programs on drug and alcohol related issues as outlined in the Policy and *Sydney Trains Enterprise Agreement 2018* and asked that the Panel review the preliminary outcomes and look more favourably on the matter based on his early admissions and truthful and honest accounts of his conduct.

[13] At paragraphs [27] – [43], the Deputy President summarised the expert evidence given at the hearing. Prof Robert Weatherby (Adjunct Professor at Southern Cross University with expertise in Pharmacology) gave evidence on behalf of Mr Goodsell. Dr Casolin and Dr John Lewis (Consultant Toxicology) gave evidence on behalf of Sydney Trains. The expert evidence

of Prof Weatherby comprised of two reports and oral evidence given at the hearing. The Deputy President noted aspects of Prof Weatherby's evidence in the first report, as follows:

> "(a) cocaine has a very short half-life in the human body, approximately 0.5-1 hour. That means it disappears from the body rapidly (about 2-3 hours). Therefore for a positive cocaine sample to be obtained, the cocaine would have been ingested in the immediate past i.e. within 2 hours;
> (b) the duration of action of cocaine is relatively brief and can last for up to 90 minutes;
> (c) while it is active in the body, cocaine impairs normal functioning by increasing the production of a neurotransmitter known as dopamine…
> (d) adverse effects of cocaine can be irritability and paranoia. Being tired and restless can also occur for a day or two after cocaine use;
> (e) if Mr Goodsell consumed cocaine on 31 May 2022 there would be no intoxication or impairment due to cocaine on 4 June 2022. However the cocaine metabolites would have stayed in Mr Goodsell's system a lot longer, mainly the cocaine metabolite benzoylecgonine;
> (f) benzoylecgonine is pharmacologically inactive and has no impairing effects. Benzoylecgonine is not considered a drug;
> (g) the test that Mr Goodsell was given has no utility to determine impairment; and
> (h) the benzoylecgonine detected in the test was present at a low concentration."[6]

[14] In relation to his second report which the Deputy President noted was primarily a response to the expert evidence of Dr Lewis, Prof Weatherby said:

> "(a) benzoylecgonine has half-life of approximately 12 hours, however it can be longer;
> (b) benzoylecgonine is detectable at least up to 4 days after use, and there is evidence that it can be detected after a longer period, even up to 21 days after use; and
> (c) he does not agree with Dr Lewis that all traces of benzoylecgonine would be expected to be eliminated well prior to 48 hours after consumption of cocaine. The reference relied upon by Dr Lewis is quite old and is not scientifically valid because it is only a single reference."[7]

[15] The evidence given by Prof Weatherby under cross-examination was summarised by the Deputy President at paragraph [30] as follows:

> "(a) the time that cocaine remains active in the body does not depend on the amount of cocaine taken;
> (b) the standard testing process does not look for cocaine because cocaine disappears so quickly that the likelihood of finding cocaine is not high;
> (c) 2-3 days is the usual period that benzoylecgonine remains in a person's system but low amounts could still be found later; concentration found in Mr Goodsell's system (264 ug/L) was a low concentration.
> (d) The concentrations seen after a normal dose of cocaine is in the many thousands and so Mr Goodsell's body was at the very end of the process of eliminating the benzoylecgonine. Testing normally finds concentrations of around 9,000 ug/L and on some occasions 70,000 ug/L or more. Concentrations of up to 90,000 ug/L of benzoylecgonine could be detected after a single dose of cocaine;
> (e) the low concentration for Mr Goodsell is consistent with his account of events;
> (f) (when asked whether a concentration of 264ug/L is consistent with having consumed cocaine 12 hours before a test) it was possibly consistent but the cocaine dose would have been very low, in fact probably so low that Mr Goodsell would not have realised that he had consumed cocaine; and
> (g) the testing cut-offs in the Australian Standard have nothing to do with the effects of the drug on performance or what that the drug might do but are set to ensure scientific confidence that the answer is correct. Testing can detect concentrations lower than the cut-offs but below the cut-offs the result might not be the correct result or there might be an error."[8]

[16] Dr Casolin explained that the screening tests utilised by Sydney Trains for the detection of cocaine involve testing for two metabolites: benzoylecgonine and ecgonine methyl ester. Where a cocaine metabolite is detected, a confirmatory test using chromatography and mass spectrometry is performed. The cut offs prescribed by the Australian Standard are minimum limits for the detection of certain substances and are designed to avoid measurement errors so

that minute concentration levels can reliably be detected.[9] The Deputy President noted that "*importantly, Dr Casolin explained that Sydney Trains does not test for impairment*."[10] In this regard, Dr Casolin's evidence was that testing for impairment in a manner that is objective, reliable and sensitive, would require neurocognitive testing which is not practical to organise in the workplace in a timely manner, and for the purposes of Sydney Trains' policies (including the Policy and Section 10 of the Code of Conduct), the question of impairment is irrelevant.[11] Dr Casolin speculated that Mr Goodsell's account of events might not be correct because his test results suggested a possibility that he had consumed a "*large*" amount of cocaine on 31 May 2022 or alternatively, any quantity of cocaine but at a date and time after 31 May 2022 and before 4 June 2022.[12]

[17] Dr Lewis, who is the Chairman of a committee that prepared the Australian Standard, said in his evidence that cocaine may only be detected in the first few hours of use and the Australian Standard is not an impairment measuring document but is designed to measure the competence of a laboratory by ensuring a correct testing result. In relation to impairment from cocaine, the Deputy President's summary of Dr Lewis' evidence included that the results of a drug test cannot be correlated with impairment but can indicate a risk of impairment by the fact that drugs included in the Australian Standard cause impairment. Dr Lewis' evidence that cocaine use can lead to severe withdrawal effects including sadness, fatigue, insomnia, an inability to stay awake and social withdrawal, with these symptoms tending to peak 2 – 4 days from abstinence was also noted by the Deputy President in his summary. The Deputy President further noted Dr Lewis' opinion that if Mr Goodsell had ingested cocaine 4 days – approximately 96 hours – prior to testing as he had claimed, Mr Goodsell's body should have eliminated all traces of benzoylecgonine, and none should have been present 4 days after a one-off use.[13]

[18] At paragraph [43] of the Decision, the Deputy President recorded that Dr Lewis' evidence under cross-examination was that a benzoylecgonine concentration of 264 μg/L in Mr Goodsell's urine at testing time cannot be correlated with any hangover effect; that the study cited in his evidence referring to withdrawal effects from cocaine was concerned with cessation of cocaine after several days of heavy use which was a different scenario; and that his opinion that no traces of benzoylecgonine should have been present 4 days after use was based on a 20-year old study concerning only 6 subjects who were regular cocaine users.[14]

[19] Next, the Deputy President summarised the evidence of Mr Paul Bugeja, Deputy Executive Director of Sydney Trains. Mr Bugeja was required to sit on each disciplinary review panel related to Network Maintenance employees, such as Mr Goodsell. After setting out Mr Bugeja's explanations of the disciplinary process at Sydney Trains,[15] the Deputy President observed at paragraph [49] that Mr Bugeja did not know Mr Goodsell personally, there was no evidence of Mr Bugeja meeting with or even speaking to Mr Goodsell and his evidence about Mr Goodsell's employment history was presumably based on information in Mr Goodsell's employment files or information provided to him by others.

[20] The Deputy President recorded at paragraph [53] that Mr Bugeja had said, "*for him the default position is that anyone who tests positive for drugs is likely to be terminated*". Mr Bugeja explained that his primary consideration is the safety of, and the duty of care owed to, other employees, emphasising that the work performed by Network Maintenance employees and the environment in which they work is dangerous and unforgiving. Mr Bugeja's evidence before the Deputy President was that he believed:

> "…if a worker is a rail safety worker then, if they have come back with a positive drug test, then in the absence of any compelling evidence to persuade me otherwise, my view is that their employment should be terminated, irrespective of their length of service."[16]

[21] Mr Bugeja also said that the Policy did not require Sydney Trains to consider the question of impairment[17] and his view was that the expectations of Sydney Trains regarding drugs and alcohol are clear, Mr Goodsell took a gamble when he chose to take cocaine, one-off or otherwise, and jeopardised his job.[18] At paragraph [56], the Deputy President summarised Mr Bugeja's evidence given in cross-examination, including that: Mr Bugeja was the only operations person on the disciplinary review panel that considered Mr Goodsell's employment; the other panel members were from the People and Culture or the Workplace Conduct Unit; the panel made a preliminary decision that dismissal was appropriate in less than 16 minutes and without knowing Mr Goodsell's disciplinary history; in the show cause letter, the panel did not raise any concern that Mr Goodsell might have previously taken cocaine, nor any concern that he might repeat the behaviour, nor the fact that Mr Goodsell's 26-year service counted against him because of the training he had received; Mr Bugeja was not aware of any training provided to employees on how long a metabolite of a prohibited drug might remain in a person's system; and aside from failing a drug test, one of the reasons Mr Bugeja recommended Mr Goodsell's dismissal was the fact that he took cocaine.[19]

[22] Mr Jamie McDonald – Sydney Trains' Director Network Stands, Systems and Quality Safety, Environment, Quality and Risk – gave evidence that Sydney Trains is required to comply with the *Rail Safety National Law (NSW) No 82a* (Rail Safety National Law (NSW)) and its corresponding regulations (RSNL) as a rail transport operator in NSW. Mr McDonald's evidence was that the reason Sydney Trains undertakes testing based on the presence of substances in accordance with the Australian Standard, rather than impairment, is because of statutory obligations under the RSNL. In cross examination, Mr McDonald accepted that to understand the full definition of "*drug-free*" under the Policy, employees would have to access a range of background documents available on Sydney Trains' intranet; are not provided with access to the Australian Standard, nor a list of drugs that are tested for in the Australian Standard, nor any information on how long those drugs and their metabolites last in the body; and are not advised that testing is concerned with the presence of metabolites rather than impairment.[20]

[23] After summarising the submissions of Mr Goodsell[21] and Sydney Trains,[22] the Deputy President identified what he described as the three most significant Full Bench authorities on workplace drug and alcohol testing – *Harbour City Ferries Pty Ltd v Toms*[23] (*Toms*), *Sharp v BCS Infrastructure Support Pty Limited*[24] (*Sharp*) and *Sydney Trains v Hilder*[25] (*Hilder*) and considered those authorities in detail at paragraphs [80] – [94]. After considering the facts and the reasoning of the Full Benches in those cases, the Deputy President then examined the expert evidence in his consideration of the Australian Standard and test readings in Mr Goodsell's case. After referring to cut-off levels, and that the testing process can detect minute levels, the Deputy President expressed the view that for drug testing, and particularly in relation to cocaine metabolites, there is no utility in comparing a particular positive reading to the cut off level. In Mr Goodsell's case, the Deputy President found that the fact that Mr Goodsell's result was almost double the testing limits merely means that his concentration was very low compared to an even lower cut-off limit. The Deputy President observed that all that the test revealed was that Mr Goodsell consumed cocaine at some point in the days prior to the test and none of the expert evidence suggested that Mr Goodsell's positive result meant any more than that.[26]

[24] At paragraph [102] , the Deputy President cited a passage from the decision of the AIRC in *Rose v Telstra*[27] to the effect that employees are entitled to a private life and the circumstances in which their employment can be validly terminated because of their conduct outside work are limited[28], and said that "*the taking of drugs by an employee away from work is only relevant to the employment if it has a connection to the performance of work*."[29] The Deputy President described this issue as the "*connection to risk of impairment*" and made the following observations about the Policy:

> "[103] …The D&A Policy properly focuses on conduct and attendance at the workplace but nonetheless recognises that out of hours conduct can affect the state in which an employee attends for work.
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> [104] In workplaces the fundamental link between consumption of alcohol or drugs out-of-hours and the employer's testing regime is the *risk* that the employee might be impaired when they attend for work. The conduct that breaches these kinds of policies is the attendance at work and testing positive to certain substances. In a safety critical environment the testing regime authorised by the policy is a fair and reasonable measure to address this risk.
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> [105] As can be seen from *Toms, Sharp* and *Hilder*, policies that rely on testing may be lawful and reasonable when the employer is not otherwise able to assess whether employees are impaired by drugs or alcohol when they attend the workplace. Testing for use rather than impairment is a blunt instrument however, as the authorities say, may nonetheless be fair and reasonable if there is not an effective way to test for impairment."

[25] Noting at paragraph [107] that Sydney Trains did not allege that Mr Goodsell was impaired in any way when he attended work on 4 June 2022, the Deputy President said that this was a necessary concession by Sydney Trains as he found no evidence of any actual impairment. The Deputy President went on to express the following view:

> "[108] I accept, as I must, the Full Bench approaches in *Toms, Sharp* and *Hilder* to be correct. The dilemma in relation to cocaine is that the connection between the testing regime and the risk of impairment is significantly weaker. The experts agree that the time after consumption during which an employee might be impaired by cocaine is quite short. However, the testing process under the Australian Standard, particularly the low cut-off level for cocaine metabolites under the standard, can detect use several days later."

[26] At paragraphs [109] – [118], the Deputy President considered whether there was a risk that Mr Goodsell attended work under an impairment from his consumption of cocaine. The Deputy President gave a hypothetical example to illustrate his concern that if there were a test that could detect the use of alcohol 5 days after the effects of alcohol had worn off, the test results could only have been used by employers with extreme caution. In this regard, the Deputy President said that Sydney Trains, without exercising any apparent caution, "*blindly*" accepted the positive test result as a risk that Mr Goodsell attended work under an impairment. The Deputy President considered that it was extraordinary that Sydney Trains did not consult Dr Casolin, given his expertise in the 2022 review of the Policy and even more extraordinary after the *Hilder* proceedings.[30] Further, the Deputy President said:

> "[114] In the hearing Sydney Trains did not accept that there was no risk that Mr Goodsell was impaired when he attended work on the day he was tested. Conversely Sydney Trains did not establish that there was any risk that Mr Goodsell was impaired and/or that there was any link between Mr Goodsell's positive test result and the risk that he attended work in an impaired state.
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> [115] To be clear, by the reasoning in *Toms, Sharp* and *Hilder* Sydney Trains does not have to prove that Mr Goodsell was in fact impaired when he attended work. Those decisions recognise the inherent difficulty for employers in testing for or otherwise proving impairment. However the employer must establish that there was a risk that Mr Goodsell was impaired at work." (Emphasis added)

[27] The Deputy President concluded at paragraph [117] that there was no proper basis for a finding that there was a risk that Mr Goodsell attended work on 4 June under any impairment from the use of cocaine whilst he was on leave. Central to the Deputy President's conclusion was:

> "[118] …the relatively low concentration of benzoylecgonine detected, and Professor Weatherby's assessment that if cocaine had been consumed only 12 hours before testing then the dosage would have been so low that Mr Goodsell probably would not have realised that he had done so. Even if the cocaine had been consumed 12 hours before the test, and even if that consumption had caused some noticeable impairment 10-12 hours before testing, the very small effects caused by such a low dosage would have long passed before Mr Goodsell attended work and was tested."[31]

[28] After setting out the provisions in s. 387 of the Act, the Deputy President indicated his acceptance of Mr Goodsell's version of events in relation to how he came to test positive on 4 June 2022 and made the following findings:

> "(a) during a period of leave and several days before he was due to return to work, he consumed some cocaine;
> (b) on the day he returned to work he did not feel any kind of impairment, nor did anyone else identify that Mr Goodsell was suffering from any kind of impairment when he attended for work on 4 May 2022;
> (c) Mr Goodsell was genuinely remorseful about his actions;
> (d) there is nothing to indicate any likelihood that Mr Goodsell will fail another drug test;
> (e) there is no greater risk that that Mr Goodsell might attend for work under the influence of drugs or alcohol than any other employee; and
> (f) Mr Goodsell fully co-operated with Sydney Trains' investigation.[32]

[29] In relation to the consideration in s. 387(a) – whether there was a valid reason for Mr Goodsell's dismissal – the Deputy President found that Mr Goodsell breached the Policy and, consistent with the decisions in *Toms*, *Sharp* and *Hilder*, this was a valid reason for his dismissal. The Deputy President also took into account that safety was critical to Sydney Trains' operations and that Sydney Trains is entitled to regulate conduct outside of the workplace, such as drug and alcohol consumption, if the conduct compromises safety in the workplace.[33]

[30] In relation to the consideration in s. 387(b), the Deputy President found that both parties accepted that Mr Goodsell was notified of the reason for his dismissal in plain and clear terms.[34] As to whether Mr Goodsell was given an opportunity to respond to the reason for his dismissal – the consideration in s. 387(c) – the Deputy President observed that the disciplinary process adopted by Sydney Trains had the appearance of affording Mr Goodsell procedural fairness and Mr Goodsell accepted that he was given an opportunity to respond. Whilst noting Mr Goodsell's submissions that the disciplinary process was in substance procedurally unfair because there was nothing he could have said that would change Sydney Trains' mind, and a zero tolerance approach was taken to his breach, the Deputy President was of the view that s. 387(c) was concerned with the *opportunity* to respond rather than the adequacy, fairness or reasonableness of the employer's consideration of the response. The matters raised by Mr Goodsell were more relevant to the consideration in s. 387(h) dealing with any other relevant matters. The Deputy President was satisfied that "*Mr Goodsell was in fact given the opportunity to respond to the reason for dismissal.*"[35]

[31] The Deputy President determined that the factor in s. 387(d) relating to whether Mr Goodsell was refused a support person to assist in discussions about his dismissal was irrelevant in the circumstances and that s. 387(e) was also irrelevant because the dismissal did

not relate to Mr Goodsell's performance. As to ss. 387(f) and 387(g), the Deputy President found that the size of Sydney Trains' enterprise had no impact on the procedures followed by Sydney Trains in effecting the dismissal and that Sydney Trains did not lack dedicated human resources management specialists.[36]

[32] In relation to s. 387(h), the Deputy President considered the following matters to be relevant:

> "(a) Mr Goodsell's lengthy and unblemished employment history;
> (b) Mr Goodsell's cooperation with Sydney Trains' investigation, his remorse and that he unconditionally accepted responsibility for his actions;
> (c) the absence of any risk that Mr Goodsell was impaired when he attended work in the circumstances;
> (d) the employer's mind was closed in the disciplinary process to Mr Goodsell continuing in his employment;
> (e) the information available to employees about the D&A Policy; and
> (f) Sydney Trains' failure to consider options other than dismissal."[37]

[33] The Deputy President reviewed the evidence and made factual findings in relation to each of these matters. In relation to the absence of any risk that Mr Goodsell was impaired when he attended work, the Deputy President set out the following reasoning said to be derived from *Toms, Sharp* and *Hilder*:

> "[141] The reasoning in *Toms*, *Sharp* and *Hilder* is compelling: If there is a risk that a worker might attend the workplace impaired by drugs, and there is a difficulty identifying and proving that impairment, then testing for usage rather than impairment is likely to be fair and reasonable. If a worker fails a test, and the possibility or risk that the worker was impaired when they took the test cannot be eliminated, it is prima facie fair and reasonable that the employer takes strong action including dismissal."

[34] The Deputy President reiterated that he was not satisfied that there was any risk that Mr Goodsell attended work on 4 June 2022 impaired by cocaine, referring to his earlier analysis in relation to the connection between testing and risk of impairment[38] and the actual risk of impairment in Mr Goodsell's circumstances.[39] The Deputy President considered that even if Mr Goodsell was impaired from cocaine use, the impairment would have occurred while he was on leave, away from the workplace. It was observed that the very low concentration of benzoylecgonine was considered by Dr Casolin to be consistent with Mr Goodsell's account that cocaine was consumed almost 4 days prior to his attendance at work. As to the proposition that the testing result was also consistent with Mr Goodsell's evidence about when he consumed cocaine, the Deputy President referred to Prof Weatherby's evidence that the low level of concentration meant that, even if cocaine had been consumed 12 hours prior to testing, the impairment at the time of consumption would have been so low that Mr Goodsell would probably not even have noticed. The Deputy President concluded at paragraph [145] that "*the absence of a risk of impairment supported the conclusion that his dismissal was harsh, unjust and unreasonable*."[40]

[35] As to whether the mind of Sydney Trains' decision maker in relation to Mr Goodsell's dismissal was closed to the possibility of continuing Mr Goodsell's employment, the Deputy President observed that Sydney Trains led no direct evidence from the decision maker and Mr Bugeja's evidence was the closest Sydney Trains came to such evidence. Mr Bugeja's default position was that anyone who tests positive for drugs should be dismissed irrespective of their length of service, absent any compelling evidence otherwise. The Deputy President said that "*none of the evidence in this case gave hope to the possibility that Mr Bugeja would or could be persuaded otherwise*."[41]

[36] Referring to the Full Bench's observations in *Hilder* that there was an inconsistency between Sydney Trains' "*zero tolerance*" approach whereby employees are dismissed for any breach of the Policy, and the consideration of mitigating factors in decision-making concerning disciplinary action, the Deputy President said:

> "[149] The failings identified in *Hilder* by and large related to Sydney Trains' lack of proper consideration of the individual employee's circumstances. Recognising that the breach of the D&A Policy was a valid reason for dismissal, what made Mr Hilder's dismissal unfair were the other mitigating factors that applied to him that were either ignored or disregarded by Sydney Trains.
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> [150] Most of the same mitigating factors in Mr Hilder's case apply to Mr Goodsell: a long employment history without blemish, the absence of any evidence of impairment at the time of testing, the apparent zero tolerance/one size fits all dismissal policy, remorse, the lack of a clear information provided to employees about the policy, and so on."

[37] At paragraphs [151] – [156], the Deputy President considered the evidence relating to the disciplinary process adopted by Sydney Trains with respect to Mr Goodsell, noting that all information provided to the decision-maker was tendered. In relation to the investigation report, the Deputy President said that it "*does no more than record the details of the testing process, the test results and Mr Goodsell's response*" with only one paragraph that "*came close to any 'analysis.*"[42] As to the disciplinary review panel, the Deputy President said that the panel formed a preliminary view that dismissal was appropriate in a 16-minute meeting and after receiving Mr Goodsell's response, prepared a recommendation in email form that was two pages long when printed, at a shorter second meeting. The Deputy President observed that:

> "[154] … Most of the email/recommendation described the procedure applied to Mr Goodsell. The email/recommendation attached Mr Goodsell's response but did not otherwise refer to it or refer to any matter that could be described as a mitigating factor.
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> [155] Despite every member of Mr Goodsell's disciplinary review panel other than Mr Bugeja being either a lawyer or a "People and Culture" specialist, no information or recommendation provided to the decision maker suggests that Sydney Trains has learnt anything from the *Hilder* litigation or paid any attention to the Commission's findings about the unfairness and inadequacies of Sydney Trains' approach to the D&A Policy. If any of the panel members recognised that there were mitigating factors in Mr Goodsell's favour, they stayed quiet about it and chose not to include any such acknowledgement in their email/recommendation to the decision maker."

[38] As to the evidence of Mr Bugeja, the Deputy President said at paragraph [156] that Mr Bugeja referred to four particular matters which "*a reasonable person would regard as points in Mr Goodsell's favour*" but "*found a way to see each point as a positive reason to dismiss Mr Goodsell*". Those matters were, *firstly*, 26 years of unblemished service counted against Mr Goodsell because his length of service meant that he had spent a significant amount of time working on the track and being inducted to the relevant sites. *Secondly,* Mr Goodsell's belief that he was not impaired when he attended for work counted against him because he was not in a position to judge whether or not he was impaired. *Thirdly*, failing a random drug test meant that Mr Bugeja could not be certain that Mr Goodsell would not fail to comply with policies in the future. *Fourthly,* Mr Goodsell took a gamble and put in his job in jeopardy when he took cocaine, notwithstanding the financial hardship that may result from the dismissal.

[39] The Deputy President was of the view that it was very difficult to prove whether "*Sydney Trains' mind was closed*" to the possibility of continuing Mr Goodsell's employment, that whether Mr Bugeja considered the mitigating factors would not ultimately decide the outcome

of the case and that no evidence was led from Mr Bugeja about the possibility that Mr Bugeja might have a more informed understanding of fairness than other members on the disciplinary review panel. At paragraph [158], the Deputy President said that he was satisfied that Sydney Trains' approach to Mr Goodsell's breach was procedurally unfair and, while Mr Goodsell was given an opportunity to respond, there was "*no evidence at all to suggest that anyone involved in the process fairly considered the Applicant's response or was open to the possibility that Mr Goodsell could remain in employment*."[43] The Deputy President concluded that the dismissal was unjust and unreasonable and Sydney Trains' conduct in administering its own policy, the subject of criticism in *Hilder*, was repeated.[44]

[40] As to the information provided by Sydney Trains to its employees about the Policy, the Deputy President noted that the Full Bench in *Hilder* emphasised the need "*to explain to its workforce what it means by drug free in a way that is comprehensible to the average rail worker*" and that Sydney Trains criticised Mr Goodsell for attending work without "*sure knowledge that he was drug free.*"[45] In this regard, the Deputy President said:

> "[162] In the circumstances, Sydney Trains' criticism was unreasonable. The information Sydney Trains made available to its workforce is not clear on how the Australian Standards apply, or that in reality the random testing program tests for use rather than impairment, and so on.
>
> [163] As referred to earlier, the information obtained from the testing regime under the Australian Standard, being evidence of use of a drug at some time prior to testing, might be sufficient for screening athletes in a sport that bans all use of certain drugs. If Sydney Trains applies its D&A Policy in the same way as a sports administrator and brings sanction upon anyone who consumes certain drugs at any time (inside or outside of work), the material supplied to employees should unambiguously state Sydney Trains' expectations.
>
> [164] The lack of clarity in the information Sydney Trains makes available to its employees supports the conclusion that Mr Goodsell's dismissal was harsh and unreasonable."

[41] The Deputy President expressed the view that while Sydney Trains was entitled to adopt a "*zero tolerance*" approach to breaches of its Code of Conduct it did not mean that every transgression must result in dismissal.[46] The Deputy President concluded that the harshness and unreasonableness of Mr Goodsell's dismissal was supported by Sydney Trains' failure to consider and implement alterative arrangements[47]. In this regard, the Deputy President reasoned as follows:

> "[168] Even if one was to accept that after Mr Goodsell failed a random test the employer's assessment of the risk that Mr Goodsell might attend work impaired by drugs is heightened, it was reasonably open for Sydney Trains to put measures in place that recognise and reflect this risk. I note in this regard that Mr Goodsell indicated during the disciplinary process that he was prepared to 'partake in recommended courses or further assistance relevant to my incident' and also in any targeting testing regime."

[42] In conclusion, the Deputy President found that overall, Mr Goodsell's dismissal was harsh and unreasonable, and while there was a valid reason for dismissal, when the mitigating factors he identified were taken into account, the dismissal was unfair.[48] In relation to remedy, the Deputy President found that it was appropriate in the circumstances to order that Mr Goodsell be reinstated to his former position and that the continuity of Mr Goodsell's service be maintained for the intervening period between the dismissal and reinstatement. The Deputy President further exercised his discretion under s. 391(3) to order that Mr Goodsell's lost remuneration be restored, with a 20% reduction in recognition that Mr Goodsell failed a drug test.

Grounds of Appeal and permission to appeal

[43] Sydney Trains advances the following grounds of appeal:

> "1. The Deputy President erred [at paragraph [115] of the Decision] in finding that Sydney Trains was required to establish that there was a risk that [Mr Goodsell] was impaired at work.
>
> 2. The Deputy President erred [at paragraph [117] of the Decision] in finding that there was no proper basis to find that there was a risk that [Mr Goodsell] attended for work under any impairment arising from his consumption of cocaine when Sydney Trains adduced evidence that supported such a finding, and the Deputy President did not reject that evidence.
>
> 3. The Deputy President's finding [at paragraph [142] of the Decision] that he could not be satisfied there was any risk that [Mr Goodsell] attended for work impaired by cocaine was wrong because:
>
> (a) the relevant question was whether there was a risk arising from [Mr Goodsell's] prior use of cocaine; and
>
> (b) the unrejected evidence before the Deputy President demonstrated that there were risks of impairment associated with the use of cocaine.
>
> 4. The Deputy President erred [at paragraph [158] of the Decision] in finding that there was no evidence that suggested that anyone involved in the process fairly considered [Mr Goodsell's] response or was open to the possibility that [Mr Goodsell] could remain in employment when there was such evidence before the Deputy President and that evidence was not rejected by the Deputy President.
>
> 5. The matters relied upon by the Deputy President in [at paragraphs [161] – [164] of the Decision] were irrelevant in the circumstances of the case because even if correct, they did not explain [Mr Goodsell's] conduct in breaching the Drug and Alcohol Policy.
>
> 6. By reason of the errors identified above, the Deputy President erred [at paragraph [172] of the Decision] in finding that there were mitigating factors that rendered the dismissal unfair."

[44] Sydney Trains submitted that the Deputy President found there was a valid reason for Mr Goodsell's dismissal under s. 387(a) of the Act,[49] it complied with ss. 387(b) and (c)[50] and that the matters in ss 387(d) – (g) were essentially neutral or not relevant. Accordingly, the finding that the dismissal was unfair, turned on the matters considered by the Deputy President under s 387(h). Whilst accepting the Deputy President had a degree of discretion Sydney Trains contended that the errors he made were of the kind that attract appellate intervention in accordance with the principles in *House v R*[51] as it is manifest that the errors were significant because they were "*foundational*"[52] to the ultimate finding of unfairness (at paragraph [172] of the Decision).

[45] Sydney Trains also submitted that permission to appeal should be granted on the basis that it is a notorious fact that many employers have implemented drug and alcohol policies and the questions raised, and the issues subject of the appeal, are matters of importance and general application to employers throughout Australia including in determining impairment or risk of impairment, in circumstances where there is no test for impairment from the use of cocaine. Sydney Trains contends that the principles applied by the Deputy President are disharmonious when compared to the reasoning of appellate decisions of the Commission and that the misapplication of those principles and other errors made by the Deputy President also manifests an injustice to Sydney Trains. These are all orthodox circumstances that attract the public interest[53] and it is appropriate to grant permission to appeal.[54]

Submissions in the appeal

Sydney Trains

[46] Appeal grounds 1, 2 and 3 challenge findings of the Deputy President relating to the issue of the *risk* that the Respondent was impaired at work from his use of cocaine. By appeal ground 1, Sydney Trains challenges the Deputy President's finding at paragraph [115] that it had to establish that there was a risk that the Mr Goodsell was impaired at work. By appeal ground 2, Sydney Trains challenges the finding at paragraph [117] that there was no proper basis upon which the Deputy President could find that there was no risk that Mr Goodsell attended work while impaired because of cocaine use.

[47] According to Sydney Trains these findings were foundational or significant in the Deputy President's finding at paragraphs [136](c)], [142] and [145] that the absence of a risk of impairment supported the decision that the dismissal was harsh, unjust and unreasonable. It is further contended by Sydney Trains that the Deputy President's conclusions were inconsistent with express and implicit findings at paragraphs [121]-[122] that Sydney Trains had a valid reason for dismissal arising from Mr Goodsell's breach of the Policy.

[48] In relation to appeal ground 1, Sydney Trains contends that the finding in paragraph [115] was wrong as a matter of law. It submitted that the finding misunderstands or misapplies the decisions in *Toms*,[55] *Sharp*[56] and *Hilder*.[57] Neither those authorities, nor any other authority cited by the Deputy President or presently known to Sydney Trains, stand for the proposition that "*an employer must establish that there was a risk that an employee was impaired at work from their consumption of drugs and/or alcohol*" (emphasis original).

[49] Sydney Trains also contends that properly understood, *Toms*, *Sharp* and *Hilder* all rely, to varying degrees, on the fact that there is currently a lack of appropriate tests for impairment arising from the use of drugs.[58] There was no evidence before the Deputy President that there is now a contrary position established by science. Accordingly, to require an employer "*to establish a risk of a matter that cannot be scientifically or reliably tested imposes an insurmountable and impracticable obligation on an employer*".[59] Sydney Trains submitted that the proposition is not supported by authority, nor does it accord an employer a "*fair go all around*", particularly in the circumstances where the Policy the employer has implemented is found to have been fair and reasonable. Further, Sydney Trains submitted that the Full Bench in *Toms*[60] found that the "*lack of any impairment arising from drug use*" was "*not relevant to the misconduct identified as a breach of the applicable policy*" and contended that if lack of impairment is not relevant, it can hardly be reasoned that an employer "*must positively establish that there was a risk of impairment*". Accordingly the Deputy President acted on a wrong principle.

[50] In relation to appeal ground 2, Sydney Trains contends that the Deputy President's finding at paragraph [117] that, in Mr Goodsell's particular circumstances, there was "*no proper basis [to] find that there was a risk that he attended for work under any impairment from his consumption of the cocaine*" (emphasis in original) is wrong, based on the evidence before the Deputy President. In this regard, in paragraph [118], the Deputy President refers to some of the evidence of Prof Weatherby that was "*central*" to the conclusion he reached in paragraph [117]. However, it was also the evidence of Prof Weatherby that:

> "[The Applicant's test result was low] so the interpretation of that is that cocaine use had been sometime in the previous four days. You don't know whether it was one day, two days, three days, but that's all you can say. And my only other comment then is, well it's consistent with what Mr Goodsell had said, which I'm told he said, in terms of when it was taken. (underline added)" [61]

[51] Reference was also made to Prof Weatherby's evidence that impairment in terms of restlessness and tiredness could be felt by someone up to 2 days after they had consumed cocaine, and that there is variability between individuals.[62] The evidence of Dr Lewis was to similar effect.[63] Moreover, Dr Lewis also gave evidence that whilst the results of a drug test (in accordance with the Australian Standard) cannot be correlated with impairment, they can indicate a *risk* of impairment by the fact that the drugs do cause impairment.[64] Further, the symptoms of the withdrawal effects of consuming cocaine including sadness, fatigue, insomnia and an ability to stay awake and social withdrawal, often tend to peak 2 – 4 days from the last consumption of cocaine.[65]

[52] Sydney Trains also submitted that the finding is inconsistent with the express and implicit findings arising from the fact that the Deputy President found that Sydney Trains "*had a valid reason for dismissal*" (at paragraphs [121]-[122]). That is, the rationale that underpins the reasoning in cases such as *Toms, Sharp* and *Hilder* and the reasonableness of the employer's drug and alcohol policies that test for presence rather than impairment, is that a *risk* of impairment cannot be eliminated when the presence of drugs is detected in accordance with the Australian Standard. Sydney Trains said that the Deputy President appears to have accepted that proposition[66] finding that Sydney Trains' Policy was reasonable and that Mr Goodsell's breach of it gave Sydney Trains a valid reason to dismiss him. It must follow, therefore, that there was a *risk* of impairment, or at the very least, there was a proper basis to conclude that there was such a *risk.* Related to the two matters above, there was a risk inherent in Mr Goodsell's explanation as to his conduct as expressly recognised by the Full Bench in *Sharp*.[67] The Deputy President has accordingly mistaken the facts and/or has failed to take into account a relevant consideration in coming to that finding. Appeal ground 3 is related to appeal grounds 1 and 2 and if Sydney Trains succeeds on either of those grounds, the finding at [142] cannot stand.

[53] By appeal ground 4, Sydney Trains challenges the Deputy President's finding at paragraph [158] that there was "*no evidence at all*" that anyone involved in the process fairly considered Mr Goodsell's response to his breach of the Policy or was open to him remaining in employment. That finding, Sydney Trains submitted, was simply not open in light of the evidence of Mr Bugeja. Firstly, Mr Bugeja was "*involved in the process*" of considering Mr Goodsell's breach of the Policy, having sat as a member of Sydney Trains' Disciplinary Review Panel (DRP) that considered Mr Goodsell's conduct.[68]

[54] Secondly, Mr Bugeja gave evidence that he considered the responses that Mr Goodsell provided to the DRP[69] and that he understood that "*mitigating factors*" relied upon by Mr Goodsell were to be taken into account.[70] Whilst Mr Bugeja was asked numerous questions in cross-examination, Sydney Trains said it was never put to him that he *did not* consider the matters Mr Goodsell raised in mitigation, or that he had not fairly considered those matters or that he (and/or others on the DRP) had closed their mind to Mr Goodsell continuing in employment.

[55] The mere fact that the "*mitigating factors*" were not accepted by Mr Bugeja (or the DRP) does not mean that they were not "*fairly considered*". The matters were not, as held by the Deputy President at paragraph [156], found by Mr Bugeja to be "*positive reasons to*

dismiss". In respect of the matters set out by the Deputy President at paragraph [156], Sydney Trains said:

(a) It has been previously held by the Commission that a long and unblemished period of service can be held against an employee because they might be expected to "*know better*", particularly where their conduct breaches safety critical policies.[71]

(b) Mr Bugeja's view that Mr Goodsell was not in a position to determine whether he was impaired was available to him - there was no evidence or information provided by Mr Goodsell, other than the self-assessment, that he was not impaired. Mr Bugeja's view that Mr Goodsell attended work and completed safety critical work with an illicit drug in his system above the cut off level was correct in the context of the Australian Standard.[72]

(c) Mr Goodsell tested positive by chance and Mr Bugeja had no way of telling whether Mr Goodsell would not fail a test or breach the policy in the future.

(d) It is self-evident Mr Goodsell took a risk regarding the consequences of his consumption of cocaine. There were no extenuating factors present in respect of his cocaine use. The circumstances of Mr Goodsell taking cocaine was inherently risky; he did not know how much he consumed.[73] Mr Goodsell did not undertake any research or ask anyone, including a doctor, about how long the cocaine might have remained in his system.[74]

[56] Sydney Trains further contends that the finding in paragraph [158] is inconsistent with the Deputy President's earlier finding that it complied with s. 387(c) of the Act (at paragraphs [126]-[131]). The earlier finding, must come with the acceptance that Sydney Trains was not simply paying "*lip service*" to the things that Mr Goodsell advanced as reasons why his employment should not be terminated; Mr Goodsell was given the opportunity to advance matters that might result in Sydney Trains not terminating his employment.[75] Section 387(c) (along with subsection (b)) is concerned with the observance of fair decision making procedures.[76] The finding that Sydney Trains' approach to Mr Goodsell's breach of the Policy was "*procedurally unfair*" cannot be correct in light of those earlier findings. Accordingly, Sydney Trains submitted that the Deputy President's finding is not correct and was not open, considering the evidence, and appeal ground 4 is made out. The Deputy President has mistaken the facts and/or failed to take into account a material consideration.

[57] Appeal ground 5 challenges the relevance of the matters relied upon by the Deputy President in paragraphs [161]-[164]. Sydney Trains' submission in this regard is that the matters, even if correct (which is not accepted),[77] were not relevant in respect of Mr Goodsell's dismissal. Sydney Trains contends that it is to Mr Goodsell's dismissal that the *"relevant"* matters in s 387(h) of the Act are to be directed.[78] The crux of Sydney Trains' contention in that regard is that it was no part of the Mr Goodsell's case before the Deputy President that his conduct, being the breach of the Policy, occurred because he did not know or understand what was expected of him. According to Sydney Trains, Mr Goodsell did not give any evidence to support such a case. The Deputy President's findings, and criticisms, of Sydney Trains appear to be directed to the circumstances of *other* employees more generally[79] and this says nothing of the circumstances of Mr Goodsell or the case he ran. The Deputy President had regard to the comments made in other cases, involving Sydney Trains[80] which were irrelevant, and allowed extraneous or irrelevant matters to guide him.

[58] By appeal ground 6, Sydney Trains challenges the Deputy President's finding at paragraph [172] that the dismissal was unfair. Sydney Trains accepts that the success of this ground of appeal is dependent on it establishing one or more of appeal grounds 1 - 5. In that regard, Sydney Trains contends that any of those errors go to vitiate the overall finding of "*unfairness*" because the Deputy President took all the findings into account in the evaluative exercise undertaken in order to determine that Sydney Trains' decision to dismiss Mr Goodsell was unfair.

[59] In conclusion, Sydney Trains submitted that permission to appeal should be granted, the appeal be upheld and the decision quashed. The matter should be reheard and upon rehearing, Mr Goodsell's application should be dismissed.

Mr Goodsell

[60] Mr Goodsell said that Sydney Trains' submissions in the appeal focus on the fact that he "*willingly and knowingly consum[ed] cocaine on a night out with friends*" and suggest that he had "*an illicit drug"* in his system. It was submitted that the first is not why he was dismissed and the second is incorrect: he returned a non-negative test sample containing benzoylecgonine, a non-active metabolite that indicates that a person has *previously* consumed cocaine. This is a completely different proposition. The latter is a breach of the policy, which tests for past use. This has been found to be, in the circumstances of Sydney Trains' operations, a breach of a lawful policy which is capable of constituting a valid reason for dismissal.[81]

[61] Consistent with the limitations on the control of private employee conduct, the misconduct is the at-work conduct of returning a non-negative test, not the fact of the out of work drug use.[82] While it is conceptually possible that an employer could impose a policy prohibiting employees from consuming illegal drugs outside of work at all, it would need to justify this in accordance with the *Rose v Telstra* tests. There is no contest that Sydney Trains has not done this. The repeated reference to the *out of work* conduct in the submissions blurs this line in what is a fairly obvious attempt to scandalise and Sydney Trains cannot be permitted to have it both ways. If Sydney Trains wants to rely on out of work conduct (which, it should be noted, it appears in truth it did),[83] it has to make good that case; if it wants to rely on the narrower limb it is confined to that narrower conduct.

[62] In relation to appeal ground 1, paragraph [115] of the Decision has to be read in context. It sits within, at paragraph [109] to [118], the Deputy President's general consideration of a contested issue in the proceedings: whether or not there was a risk that *Mr Goodsell* was in fact impaired while at work. This would, as a matter of rationality, increase the seriousness of the misconduct. It is not, as Sydney Trains' submissions seem to suggest, a finding that a risk of this kind needs to be established before a drug and alcohol policy requiring a non-negative result is lawful or reasonable, or that a breach of such a policy constitutes a valid reason for dismissal. So much is obvious from the fact that:

- the Deputy President found on the evidence before him that there was no risk that Mr Goodsell was impaired (at paragraph [117]); yet
- nevertheless found that his at-work conduct, i.e. returning a non-negative sample, constituted a valid reason for his dismissal (at paragraph [121]).

[63] Read in that light, the statement by the Deputy President at paragraph [115] is an orthodox statement of principle. To the extent that Sydney Trains was relying on a risk that Mr Goodsell was impaired as a *further* factor militating against a finding that the dismissal was unfair,[84] it was required to prove this. In relation to appeal ground 2 challenging the Deputy President's finding that, in the circumstances of this case, he could not find that there was a risk that Mr Goodsell was impaired, Mr Goodsell said this is a factual finding. The question on appeal is not whether it was necessarily right or wrong but whether it was reasonably open to the Deputy President,[85] and his findings of fact should be accepted unless it can be shown he palpably failed to use, or misused his advantage, or acted on evidence inconsistent with incontrovertibly established facts.[86]

[64] *"Impairment"* occurs directly via the impact of an active drug on the body, and potentially indirectly through a *"hangover effect"*. The point is that a person's normal functioning is impeded. The evidence before the Deputy President was that:

(a) Mr Goodsell consumed the cocaine four days before attending for work;
(b) the active drug would have been excreted from his system within hours;[87]
(c) while active drugs have an impact on a persons' functioning, the inactive metabolite they leave behind does not;[88]
(d) the metabolite level was, although above the detection threshold, extremely low and consistent with it being at the very end of the elimination process;[89]
(e) Mr Goodsell's test could not be correlated with any "*hangover effect*";[90]
(f) Mr Goodsell, who has been trained by Sydney Trains pursuant to this very Policy to self-assess his fitness for work in respect of being free from the effects of drug and alcohol, [91] did not feel at all impaired;[92] and
(g) the testing officer who took Mr Goodsell's sample at the time considered that he did not show any signs of impairment.[93]

[65] In these circumstances, Mr Goodsell submitted that it was open to the Deputy President to reach the conclusion he did: that there was no risk that Mr Goodsell was impaired. It was not a finding in relation to the Policy, and its justification, at large. The submissions by Sydney Trains in that regard[94] are accordingly misdirected. It was about the particular circumstances of this particular employee, based on the evidence in this particular case, concerning a very different drug to that considered in *Toms*,[95] *Sharp* and *Hilder*.

[66] Sydney Trains' submissions about the risk inherent in an employee's explanation as to their own conduct and the unreliability and unverifiability of an employee's own assessment,[96] was said to illustrate the difficulty with Sydney Trains' case in that it talks of the risk arising from the difficulty in verifying an individual employee's account. To the extent that this was recognised in *Sharp*, it was as a global statement justifying the imposition of a blanket *policy*; that case is not authority for the proposition that employees ought always to be disbelieved. In this matter, Mr Goodsell gave sworn testimony as to his use of cocaine. He was challenged in cross-examination, unsuccessfully. His story was always accepted by Sydney Trains' doctor as "*plausible and consistent with the result,*"[97] noting that where Dr Casolin disagrees with an employee's self-report he raises this.[98] There is no reason the Deputy President ought to have rejected this evidence.

[67] Finally, in relation to Sydney Trains' submission[99] that the Deputy President has failed to take into account a relevant consideration in finding that there was no proper basis to find that there was a risk that Mr Goodsell attended work under any impairment,[100] it is unclear what

"*relevant consideration*" the Deputy President *failed* to take into account. The lack of impairment, or risk of same, is relevant under s. 387(h).

[68] In relation to appeal ground 3, Mr Goodsell submitted that Sydney Trains again challenges the factual finding made by the Deputy President that there was no risk that Mr Goodsell was impaired, and the Deputy President's findings of fact should be accepted. Appeal ground 4 is also a challenge to a finding of fact and the same approach should be taken. At first instance, Sydney Trains relied wholly on the evidence of Mr Bugeja, a cog in the decision-making process, rather than the decision-maker himself.[101] Given the Deputy President's findings involved an assessment of this witness's oral evidence, even further caution should be taken before disturbing the finding on appeal.[102] The Deputy President considered Mr Bugeja's evidence in detail including his cross-examination,[103] which Sydney Trains ignores. What emerged was:

(a) the preliminary (i.e. show cause) decision was made without knowing, let alone considering, Mr Goodsell's disciplinary history, in a 16-minute meeting attended by lawyers;
(b) Mr Goodsell, when asked to show cause, was not asked about the matters purportedly troubling Mr Bugeja (i.e. the fact of his long service or the fact that he had taken cocaine at all);
(c) there is no evidence at all as to what was discussed in the meeting in which it was decided to recommend that Mr Goodsell be dismissed;
(d) for Mr Bugeja's part, the default position was that a positive test result would lead to dismissal;
(e) again at least as far as Mr Bugeja was concerned, there was no identifiable factor that mitigated *against* dismissal – notably, *whatever* his period of service was would have counted against him; and
(f) there is similarly no evidence as to what the actual decision-maker took into account, or his reasoning process.

[69] It was open on this evidence, for the Deputy President to find that the procedure adopted by Sydney Trains was substantively procedurally unfair, and to consider that this weighed in favour of a finding that the dismissal was unfair.[104] This is a conventional approach to procedural fairness, both in general and specifically in respect of Sydney Trains' approach to this particular policy.[105] Sydney Trains' submissions in this respect are really about matters of weight and do not engage in the appropriate appellate exercise. Further, there are errors in the various propositions advanced in the appeal by Sydney Trains in its written submissions:

(a) the idea that certain propositions were not put to Mr Bugeja in cross-examination is wrong;[106]
(b) the point about Mr Goodsell's unblemished employment history[107] is not the weight that ought to be given to Mr Goodsell's 26 years of service, instead, the issue is that as the Deputy President found, it was not considered by Sydney Trains at all;
(c) Mr Goodsell did *not* attend work with an "*illicit drug in his system.*"[108] He attended work with an inactive metabolite in his system that indicated that he had consumed an illicit drug outside of work some days earlier – a critical distinction in matters of this kind;
(d) there is no way of knowing whether an employee will breach a policy in future but the fact that there is no suggestion that in 26 years they have ever done so before rationally suggests otherwise, if fairly considered; and

(e) the suggestion that Mr Goodsell took a risk when consuming cocaine[109] has nothing to do with Mr Bugeja's evidence and strays into impermissible direct regulation of out of work conduct.

[70] Finally, Sydney Trains raises (in truth as an alternative appeal ground) that the Deputy President erred in considering these matters under s. 387(h) in circumstances where his Honour had found that Sydney Trains had met the minimal procedural requirements of s. 387(b) and (c). It is further advanced that the Deputy President's findings in this respect involved a tacit acceptance that Sydney Trains had provided procedural fairness in substance, rather than form. Three things may be said about this:

(a) first, as paragraphs [129]-[130] make clear, the Deputy President approached s. 387(c) as contemplating only the question of whether there was an opportunity to respond rather than "*the adequacy, fairness or reasonableness of the employer's response*" – that is, the asserted acceptance of procedural fairness that Sydney Trains relies on was expressly rejected and the submission is unsustainable;
(b) second, this is consistent with the approach urged by Sydney Trains below, such that it should not be permitted to agitate an alternative interpretation now;[110]
(c) third, in any event the highest this takes the matter is that the paragraphs are in the wrong part of the decision; there is no suggestion that considering them under a different heading would have made a discernible difference.

[71] In relation to appeal ground 5 which relates to a finding that Sydney Trains' failure to explain its policy in terms "*intelligible to the average Sydney Trains employee*",[111] in dismissals concerning breach of policy, the question of whether the employee has been trained, or adequately trained, in a policy is a classically relevant factor.[112] Sydney Trains does not appear to contest the proposition that it has not provided its employees with comprehensible training on (a) what it means by the obligation to be "*drug free*"; or (b) how this is achievable. The situation might be different if the policy was on its face explicable or dealt with propositions so obvious as to be self-evident. It is not and does not. The Deputy President's finding that the policy obligations, and how to comply with them, were inadequately explained was open to him, and a relevant consideration in assessing whether it was unfair to dismiss Mr Goodsell for failing to comply.

[72] Contrary to the submission of Sydney Trains,[113] it was clear from the evidence that Mr Goodsell, entirely unsurprisingly, did not understand that consuming cocaine four days before work would risk non-compliance with the Policy; while he understood that there needed to be no *cocaine* in his system[114] he remained confused about how the lingering presence of an inactive metabolite could justify his dismissal.[115] He was never challenged on this, nor was it suggested to him that he could or should have known that this is how the Policy operated.

[73] Appeal ground 6 challenges the Deputy President's finding that the dismissal was unfair, on the basis of appeal grounds 1 – 5, and nothing for actual consideration arises. In conclusion, Mr Goodsell submitted that the appeal does not attract the public interest. It involves no question of general importance or application. It turns on the particular facts affecting a particular employee and has no resonating significance for matters of generality in respect of employees testing positive to an inactive metabolite of cocaine. Fundamentally, the Decision stands for the principle that while Sydney Trains is permitted to have a drug and alcohol policy that tests for past use rather than impairment, and breach of same is capable of being a valid reason for dismissal *absent* impairment, this does not mean that any dismissal for breach is

automatically not unfair. This is entirely unremarkable and functionally identical to the situation in *Hilder*. Unsurprisingly, given the same approach was taken, no error is disclosed.

Consideration

Permission to Appeal and approach to appeals against discretionary decisions

[74] The Decision subject to appeal was made under Part 3-2 – Unfair Dismissal of the Act. Section 400(1) of the Act provides that permission to appeal must not be granted from a decision made under Part 3-2 unless the Commission considers that it is in the public interest to do so. The public interest test in s. 400(1) is not satisfied simply by the identification of error or a preference for a different result. The task of assessing whether the public interest test is met is discretionary and involves a broad value judgment.[116] The public interest might be attracted where:

- a matter raises issues of importance and general application;
- there is a diversity of decisions at first instance so that guidance from an appellate court is required;
- the decision at first instance manifests an injustice;
- the result is counter intuitive; or
- the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[117]

[75] 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.[118] However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal. The decision under appeal is of a discretionary nature. As the majority of the High Court held in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[119] discretion refers to a decision-making process in which no one consideration and no combination of considerations is necessarily determinative of the result. It is well established that the task of deciding whether a dismissal is unfair because it is harsh, unjust and/or unreasonable, is a discretionary judgement in a broad sense.[120] A decision maker charged with making a discretionary decision has some latitude as to the decision to be made, and given this, the correctness of the decision can only be challenged by showing error in the decision-making process.[121]

[76] Such error has also been described as the discretion not being exercised correctly.[122] It is not open to an appeal bench to substitute its view on the matters that fell for determination before the Member at first instance in the absence of appealable error. The classic statement as to the approach to be taken in relation to whether there is error in a discretionary decision, and which is applied in appeals against such decisions under s. 604 of the Act, was stated by the High Court in *House v The King* as follows:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is

> unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."[123]

[77] Further, in unfair dismissal matters, appeals on a question of fact can only be made on the ground that the decision involved a "*significant error of fact.*"[124] To be characterised as significant, a factual error must vitiate the ultimate exercise of discretion.[125] Section 400(2) of the Act manifests an intention that the threshold for a grant of permission to appeal is higher in respect of unfair dismissal appeals than the threshold pertaining to appeals generally. The test has been described as "*a stringent one*".[126] As a Full Bench of the Commission observed in *Dafallah v Melbourne Health*":[127]

> "Section 400(2) modifies the *House v The King* principles by limiting any review based on mistake of fact to a significant error of fact. Section 400 clearly evinces an intention of the legislature that appeals in unfair dismissal matters are more limited than appeals with respect to other matters under the Act."[128]

[78] We are satisfied that the grant of permission to appeal would be in the public interest. For reasons which we articulate below, we consider that the appeal raises issues of general application in respect of the consideration required by s 387(a) and (h) of the Act. The subject matter of the appeal raises issues of general application since it concerns the approach to be followed in considering impairment or the risk of impairment in cases involving dismissal for non-compliance with drug and alcohol policies and the correct application of legal principles articulated by Full Benches of the Commission in determining whether the dismissal of an employee for breach of a drug and alcohol policy is unfair. Permission to appeal is therefore granted in accordance with s 604(2) of the Act.

Appeal grounds 1, 2 and 3

[79] Appeal ground 1 centres on what is described as an erroneous finding made by the Deputy President at paragraph [115] of the decision that "*the employer must establish that there was a risk that Mr Goodsell was impaired at work*". This finding is said to be foundational to other findings in relation to the conclusion that Mr Goodsell's dismissal was unfair, thereby rendering that conclusion erroneous. Appeal grounds 2 and 3 also concern findings the Deputy President made in relation to risk that Mr Goodsell attended for work impaired. To deal with these appeal grounds it is first necessary to consider the cases the Deputy President referred to in support of the impugned finding – *Toms*, *Sharp* and *Hilder* – in some detail. It is then necessary to consider the nature of the finding and the context in which it was made.

Toms

[80] *Toms* concerned an unfair dismissal application made by the Master of a ferry who was involved in an accident where the ferry he was operating collided with a wharf pylon, and thereafter, returned a positive reading for cannabinoids in breach of the employer's drug and alcohol policy. The reasons for the dismissal, drawn from excerpts from the dismissal letter set out in the first instance decision[129] can be summarised as follows:

- the primary reason for dismissal was *"serious breach of the Respondent's 'Code of Conduct' which provides a 'zero tolerance' level for drugs and alcohol"*;[130]

- a passenger was injured and that the matter had been referred to Roads and Maritime Services;[131] and
- the breach of the employer's Code of Conduct was considered to be "*serious, causing considerable danger to the public, your crew and yourself and accordingly, … considered unacceptable*".[132]

[81] The Full Bench in *Toms* set out the dismissal letter in full including the following additional matters:

- Mr Toms confirmed that he had used marijuana at 9.30 – 10 pm on 24 July 2013 and was called in around 12.10 pm on 25 July to replace another Master who was absent from work;
- when he used marijuana on 24 July Mr Toms thought he would not be required for work the next day;
- Mr Toms confirmed that he was a casual user of marijuana; and
- the employer stated that while regretting the dismissal, it was required to ensure the safety of the travelling public, which had been put at considerable risk by the conduct.[133]

[82] At first instance, the Commission found that the breach of the policy was a valid reason for dismissal but noted in the consideration under s. 387(a) that Mr Toms was not impaired. It was also observed that the employer was correct to have stringent standards to protect employees and the travelling public. Notwithstanding that the breach of the employer's policy – returning a positive test for marijuana above a stipulated cut-off level – was a valid reason for dismissal, the dismissal was found to be harsh, unjust and unreasonable because of a range of mitigating factors. The employer successfully appealed to a Full Bench of the Commission which quashed the decision at first instance and on redetermination, found that the dismissal was not unfair. An application for judicial review made by Mr Toms was unsuccessful and the Full Court of the Federal Court confirmed the decision of the Full Bench, finding no jurisdictional error in its decision.

[83] Referring to the Full Bench decision in *Toms* in his decision in the present case, the Deputy President noted that Mr Toms' misconduct was that he attended work in breach of the policy.[134] Relevant to the issue of the risk of impairment, the Deputy President extracted paragraph [27] of the decision of the Full Bench in *Toms* as follows:

> "[27] The lack of any impairment arising from drug use, the absence of a link between drug use and the accident and the absence of substantial damage to the Marjorie Jackson are not factors relevant to the ground of misconduct identified as non-compliance with the Policy. The fact is that Harbour City required its policy complied with without discussion or variation. As an employer charged with public safety it does not want to have a discussion following an accident as to whether or not the level of drug use of one of its captains was a factor. It does not want to listen to the uninformed in the broadcasting or other communications industry talk about drug tests establishing impairment. It does not need to have a discussion with any relevant insurer, litigant or passenger's legal representative about those issues. What it wants is obedience to the policy. Harbour City never wants to have to have the discussion."

[84] At paragraph [28] (also extracted by the Deputy President in his decision) the Full Bench in *Toms* went on to conclude that the mitigating factors considered at first instance, including Mr Toms' 17 years of satisfactory service, previous negative drug tests, and cooperation with the investigation, were countered by the fact that his seniority and level of responsibility demanded a high level of compliance with the policy and did not outweigh the

misconduct. The Full Bench in *Toms* approved a statement in an earlier Full Bench decision in *Parmalat Food Products v Wililo* (*Wililo*) [135] where it was said that:

> **[24]** … Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open. …

[85] The Full Bench in *Toms* also identified the following matters it described as the "*wider context*" relevant to the seriousness of the misconduct of Mr Toms, which it found were not considered by the Commissioner at first instance. This context was that firstly, he was aware of the drug and alcohol policy and its application and that when he boarded the vessel it was likely that he would be in breach of the policy if tested, because he had smoked a marijuana cigarette on the previous night. Secondly, he could have refused the shift without specifying to the employer the reason for his refusal. Thirdly, while he cooperated with an inquiry into the accident, Mr Toms did not immediately reveal that it was likely that he was in breach of the policy. As we have noted, the Full Bench upheld the appeal and found that the dismissal of Mr Toms was not unfair.

[86] Mr Toms applied to the Federal Court for judicial review of the Full Bench decision. In dismissing Mr Toms' application,[136] the Full Court of the Federal Court made clear that it viewed the Full Bench decision in *Toms* as being related to the particular facts in that case, and not as a statement of general principle. In this regard, one of the grounds upon which judicial review was sought was a contention that the Full Bench in *Toms* imposed erroneous limitations on the unfair dismissal jurisdiction of the Commission by requiring that if a valid reason for dismissal is found, there must be significant mitigating factors for a dismissal to be found to be unfair, consistent with the Full Bench decision in *Wililo*. In rejecting this ground, the Court observed that:

> "Statements of principle often serve a useful and legitimate function. They provide a body of appellate guidance against which to test suggestions of error in future cases. They cannot substitute for, or alter, a statutory prescription but they are not jurisdictionally flawed unless they are given (or assume) the status of a "rule" or are general pronouncements not related sufficiently to the facts of the particular case…" [137]

[87] In relation to jurisdictionally flawed statements or general pronouncements made by appeal benches, the Full Court referred to the judgment of Gaudron, Gummow and Hayne JJ in *Wong v R*[138] where their Honours distinguished between "*articulation of applicable principle*" and "*publication of intended or expected results of future cases*".[139] The Full Court observed in relation to the statement of the Full Bench in *Wililo* that it was arguable that it infringed the restriction identified in *Wong* on the basis that it appeared to be a "*dogmatic pronouncement*". The Full Court also observed that if the Full Bench in *Wililo* intended to state a general rule, it could not fetter the broad evaluative task assigned by the Act using the principles of a "*fair go all round*" but concluded that the Full Bench in *Toms* had not erred in this respect. By this statement about the Full Bench decision in *Wililo,* the Court emphasised that notwithstanding a finding that there was a valid reason for a particular dismissal, it may be open for the Commission to find that the dismissal was unfair because of mitigating factors of the kind discussed by the Member at first instance in *Toms*. Implicit in this statement is that *Wililo* does establish a decision rule or principle. In dismissing the application for judicial review, the Court concluded that there was no jurisdictional error of the kind discussed in *Wong* on the part of the Full Bench, and that instead, it had put aside the "*other*" factors regarded by the Member at first instance as relevant (and ultimately decisive) under s. 387(h) and instead

brought into account further matters to which it felt the Member had given insufficient attention.[140]

[88] At no point in the *Toms* litigation was there an assertion by the employer that the Mr Toms was impaired or that impairment was relevant to the accident involving the ferry hitting a wharf pylon. The medical and scientific evidence considered in the first instance decision appears to have been directed at the way that the testing was implemented in relation to Mr Toms' sample rather than the testing process generally or the nature of the substance for which Mr Toms returned a positive test. It is variously recorded in the first instance decision that Mr Toms tested positive for "*cannabis*",[141] was "*non-negative for THC*",[142] and had a reading in the "*relatively low non-negative range*". It is also stated that the expert witness called by the Applicant gave evidence about the Australian Standard for cannabis metabolites in urine and that this is not a measurement of intoxication or impairment and that the effects of cannabis typically last 2 – 5 hours after consumption. The Full Court observed that the employer has statutory obligations towards the public and it is an offence for some employees (including ferry masters) to operate ferries whilst under the influence of alcohol or some drugs. This observation was made in the context of the Court explaining that the employer had a zero-tolerance policy for drugs or alcohol, rather than indicating that Mr Toms was impaired.[143]

Sharp

[89] In *Sharp*, a Full Bench of the Commission was dealing with an appeal against a decision of the Commission at first instance, dismissing an application for an unfair dismissal remedy.[144] The dismissal arose from a drug and alcohol test Mr Sharp was required to undergo at work, in which he tested positive for cannabinoids at a level exceeding the permitted threshold. The facts (drawn from the first instance decision), were that Mr Sharp was employed to perform work under a contract between his employer and an airline operator. The work was performed at Sydney Airport and was Safety Sensitive Aviation Activities (SSAA) for the purpose of the *Civil Aviation Safety Regulations.* Mr Sharp was required to undertake drug and alcohol testing because of a notice given to his employer by the operator of Sydney Airport. There was no indication as to whether Mr Sharp was advised of this in advance of reporting to work on Monday 10 February 2014 and being required to undergo testing. The evidence was that Mr Sharp immediately advised the employer that he had taken marijuana on the Saturday prior. Nonetheless, Mr Sharp was required to undertake the test and did so by providing a urine sample. Mr Sharp tested positive for THC, a cannabinoid, which was noted in the first instance decision to be the primary psychoactive ingredient in cannabis. The tests showed that the Mr Sharp's level was 112μg/L, above the permitted level of 15μg/L in a urine sample.

[90] Mr Sharp contended that he was not a habitual drug user and that the test results did not indicate impairment. The employer contended that Mr Sharp was not dismissed on the basis that he was impaired or may have been impaired at work, but because he returned a positive test in breach of the employer's policy. However, in contrast with this submission, the first instance decision records that it was contended by the employer that the reasons for dismissal included that the level of cannabinoids revealed by Mr Sharp's test was so high that it represented a *prima facie* serious threat to the safety of workers.[145]

[91] At first instance, the Commission found that the dismissal was for a valid reason, procedural fairness was afforded, and the dismissal was not harsh, unjust or unreasonable. The Commission also found that the misconduct for which Mr Sharp was dismissed was that he returned a confirmed positive test while at work and not because he had consumed cannabis

on the weekend prior to the test. That Mr Sharp asserted he was not impaired when he attended for work, was not a habitual cannabis user, smoked a single "*joint*" on the Saturday prior to the test and had never previously returned a non-negative result on a drug test, were not considered by the Commission to be relevant matters for the purpose of deciding whether there was a valid reason for dismissal.

[92] The grounds of appeal included that the Commission erred by failing to have regard to these matters and to the fact that there was no surrounding misconduct (that is the test was not conducted "*for cause*"). In the appeal, the Full Bench in *Sharp* made a general observation that the issue in the case was not the "*out of hours*" conduct of Mr Sharp smoking cannabis, but rather, that he attended for work, which involved the performance of SSAA with a level of cannabinoids in his system that was significantly above the permitted threshold, and that this was "*at work conduct*". The Full Bench also said that while Mr Sharp may think it harsh that he was dismissed when he did not consider himself impaired or to have represented a risk to safety, a critical consideration in assessing whether a dismissal in these types of circumstances is unfair, is the fact that there is no scientific test for impairment.[146]

[93] That employers are not likely to be able to independently ascertain when cannabis was consumed, the quantity consumed and the difficulty of verifying an employee's explanation of these matters, were said by the Full Bench to place employers in the position of not being able to properly assess whether an employee is impaired because of cannabis use, and therefore presents a risk to safety. On that basis, the Full Bench said that employer policies providing for disciplinary action (including dismissal) where an employee tests positive for cannabis *simpliciter*, may in the context of safety critical work, be adjudged to be lawful and reasonable, so that it may be reasonably open to find that a dismissal effected pursuant to such a policy was not unfair.[147]

[94] The Full Bench in *Sharp* went on to conclude that the Commission focused correctly on whether Mr Sharp's admitted conduct in testing positive for cannabinoids above the permitted threshold while at work, constituted a valid reason for dismissal. This did not require consideration at that point, of mitigating circumstances concerning the broader context in which the misconduct occurred or the personal circumstances of the employee. The Full Bench said that mitigating circumstances are not to be brought into account in relation to the specific "*valid reason*" consideration in s. 387(a), but rather in the overall consideration of whether the dismissal was harsh, unjust or unreasonable.[148]

[95] The conclusion of the Full Bench in *Sharp* was that the requirement for compliance with the relevant policy was a reasonable one, having regard to the significance of drug and alcohol issues in a safety-critical work environment, and that a finding that the dismissal was for a valid reason, was reasonably open to the Commission at first instance. In upholding the first instance decision, the Full Bench said that while the outcome was not necessarily the one it would have arrived at had it considered the matter, it was nonetheless not outside the range of outcomes within which a proper exercise of the discretion related to assessing whether the dismissal was harsh, might be expected to reside, particularly having regard to other unfair dismissal remedy decisions concerning drug and alcohol testing, including *Toms*.

Hilder

[96] *Hilder* concerned an appeal by Sydney Trains against a decision of the Commission finding that the dismissal of an employee for returning a positive test for cannabinoids at work

was unfair and ordering reinstatement. The decision at first instance states that Mr Hilder initially recorded a positive reading about 50µg/L and a secondary test confirmed what was described as a "*THCCOOH level of 78µg/L*"[149] which was above the cutoff level of 15µg/L. The appeal grounds included that in finding that there was no valid reason for dismissal, the Commission at first instance did not assess the validity of the reason for dismissal independently of mitigating factors considered under s. 387(h). In relation to this ground of appeal, the Full Bench found that there was no dispute as to the occurrence of the conduct for which Mr Hilder was dismissed, and that an assessment of the validity of the reason for dismissal for the purposes of s. 387(a), should have focused on whether the breach of the policy was a matter of sufficient gravity to constitute a sound, defensible and well founded, and therefore valid reason for dismissal.

[97] According to the Full Bench, this required an assessment of the importance of the policy in the context of the employer's operations, and the work duties of the dismissed employee. The Full Bench found that instead of undertaking this assessment, the Commission at first instance focused on the employer's "*zero tolerance*" approach to breaches of its drug and alcohol policy and an apparent inconsistency between that approach, and the position that it would take mitigating circumstances into account, before deciding on its disciplinary response. The Full Bench said that in the context of the consideration under s. 387(a) as to whether there was a valid reason for dismissal, this matter was irrelevant and a distraction. In concluding that this was an error of a consequential nature, the Full Bench made several observations referred to by the Deputy President in the decision subject of the present appeal.

[98] Firstly, the Full Bench said that if the consequence of Sydney Trains' "*zero tolerance*" was that it would not give any consideration to any mitigating circumstances advanced by any employee found to have breached the policy, that may be relevant to s. 387(c) since it would arguably constitute a denial of a real opportunity to respond to the reason for dismissal.[150] Secondly, it was observed that the Commission at first instance also erred in considering s. 387(a) by taking into account that Mr Hilder was not "*incapable or incoherent*" while at work, in circumstances where he was not dismissed because he was discernibly affected by drugs at work, but rather, because he attended work with a proscribed level of cannabis metabolites in his system.[151] In relation to this error, the Full Bench referred to the decision in *Sharp* and reiterated that because there is no direct scientific test for impairment arising from the substance for which the employee returned a positive test, a policy providing for dismissal of an employee testing positive for such a substance, *simpliciter*, at least in the context of safety critical work, may be adjudged to be lawful and reasonable. The Full Bench in *Hilder* went on to find that considerations of lack of impairment and that the breach was an error of judgement rather than intentional, were potentially relevant matters for consideration under s. 387(h), but were not relevant to the actual reason for dismissal for the purposes of s. 387(a) – the breach by Mr Hilder of the policy by attending for work with a proscribed level of drugs in his system.[152]

[99] Notwithstanding its identification of error in the consideration of valid reason, the Full Bench in *Hilder* upheld the decision at first instance on the alternative finding made by the Commission, that the dismissal was harsh, and that the matters erroneously considered for the purposes of s. 387(a) could be considered under s. 387(h). In this regard, the Full Bench agreed that there was a "*clear inconsistency*" between the zero-tolerance approach characterised by the evidence of witnesses for Sydney Trains as one whereby any breach of the policy would result in the termination of employment, and the consideration of mitigating factors in decision making concerning disciplinary action. As a result, the inference was available that mitigating

factors in Mr Hilder's case were not truly considered when the decision to dismiss him was made. The mitigating factors found not to have been properly taken into account by Sydney Trains in deciding to dismiss Mr Hilder were: his unblemished work record, he was not a habitual drug user having not smoked marijuana for 30 years prior to the drug use that led to his dismissal, he was contrite and remorseful at all times, and was 64 years of age at the time with poor prospects of obtaining other employment and virtually nothing in the way of retirement savings. The Full Bench also considered that employees generally had not been informed of the true nature of the zero-tolerance approach, as a relevant matter under s. 387(h) in relation to the harshness finding.

General observations and principles

[100] The Full Bench decisions in *Toms*, *Sharp* and *Hilder*, do not establish a decision rule, or stand as authority for the principle that in cases involving a dismissal for breach of a drug and alcohol policy, an employer must establish a risk that an employee dismissed for returning a positive drug test in breach of such a policy was impaired at work. To the contrary, those cases all make clear that the fact that an employee attends for work and returns a positive test for a prohibited substance, may of itself, constitute a valid reason for dismissal for the purposes of s. 387(a) of the Act. For reasons explained by the Full Court of the Federal Court in *Toms*, the statement in paragraph [115] of the Deputy President's decision may be seen as an attempt to establish a decision rule that, if accepted by this Full Bench, would – on the basis of the Full Court decision in *Toms* – be inconsistent with principles relevant to the exercise of appellate jurisdiction by a Full Bench of the Commission, and would arguably cross the line between a guideline on a matter of principle to foster consistent decision making, and an impermissible fetter on the broad evaluative task assigned by the Act using the principles of "*a fair go all round*".[153] As the Full Court also made clear in that case, that object enshrined in s. 381(2) of the Act, recognises the importance, but not the inviolability, of an employer's right to manage its business, balanced against the protection the Act affords against unfair dismissal. Accordingly, the task of assessing whether a dismissal is unfair and the selection of remedies, involves broad evaluation.[154] A finding as to whether a particular employee dismissed for breaching a drug and alcohol policy was or was not impaired at work, may be relevant to the question of whether a dismissal is unfair but a conclusion that a dismissal is not unfair does not require a finding that there was a risk of impairment.

[101] *Toms*, *Sharp* and *Hilder*, concerned employees who attended for work and tested positive to cannabinoids, indicating use of cannabis, rather than impairment. In each case, the test showed that the employees had used a prohibited substance and the reason for dismissal was returning a non-negative result in a drug test conducted at work. The test results in each case indicated past use, not present impairment. Significantly, impairment at work was not a reason for dismissal relied on by the employers as constituting a valid reason for dismissal. It is also the case that lack of impairment at work, relevant to the issue of whether the dismissal in each case was unfair, referred to visible or discernible impairment, rather than an assessment of impairment by reference to the levels of cannabinoids recorded in the test results for the employees. While the first instance decision in *Sharp* recorded that the employer's evidence was that the substance for which the employee tested positive was an active ingredient and that his high levels posed a safety risk, none of these cases involved the Commission making an assessment of the likelihood of impairment at work, by reference to the amount by which the dismissed employees' test results exceeded the cut-off levels for substances, either for the purposes of whether there was a valid reason for dismissal under s. 387(a) or as a matter considered to be relevant under s. 387(h).

[102] In *Toms* and *Sharp*, there was a finding at first instance, confirmed on appeal, that a breach of a drug and alcohol policy *simpliciter* by the employees attending for work and returning a non-negative test for a proscribed substance, was a valid reason for dismissal. These findings were endorsed by the Full Benches that considered each appeal. In *Hilder* the Full Bench held that the finding at first instance that the dismissal was not for a valid reason, was erroneous and that Mr Hilder attending for work with a proscribed level of drugs in his system, was a valid reason for dismissal. In this regard, the Full Bench in *Hilder* distinguished between a policy requirement pertaining to a matter which is trivial in nature or inessential to the fundamental requirements of the employee's employment, where a breach on a single occasion is unlikely to constitute a valid reason for dismissal, and compliance with a policy that is a fundamental element of employment. In relation to the drug and alcohol policy in that case, the Full Bench noted that it is designed to ensure that employees do not perform safety-critical functions with drugs or alcohol in their system.

[103] It is also significant that the fact that each employee had used cannabis outside of work was not a reason for dismissal. Breach of the employer's policy by attending for work and returning a non-negative test for a proscribed substance, was viewed by the Full Benches in *Sharp* and *Hilder* to be "*at work*" conduct and it was made clear that the out of hours conduct of using cannabis was not the reason for dismissal. It is also notable that in *Toms* and *Sharp* where the dismissals were held not to be unfair, the employees concerned were found to have known that they were likely in breach of the relevant policy when they attended for work. Those cases can be contrasted with *Hilder*, where the Full Bench accepted the findings at first instance that the dismissal was harsh, based on mitigating factors, including the failure of the employer to explain the terms of the policy and their effect. In this regard the Full Bench said:

> "[39] We would add that we do not cavil per se with a decision by an employer to recalibrate its response to breaches of drug and alcohol policies and impose a zero-tolerance approach. However, if such a course of action is undertaken, it is desirable that the employer clearly communicates the terms of the new policy to employees, ensures they are trained in it, and gives adequate warning regarding the date upon which the new policy will be implemented and relied upon. Clarity of communication is also highly desirable as to the actual terms of an employer's drug and alcohol policy. We note in this respect that the Policy here, which we have earlier summarised, simply cross-refers to the Standard in respect of the cut-off levels for drug use without either incorporating the relevant parts of the Standard or summarising their effect in terms intelligible to the average Sydney Trains employee."[155]

[104] It was observed by the Full Bench in *Sharp* (cited in *Hilder*) that it was relevant to the consideration of whether a drug and alcohol policy is lawful and reasonable (and by extension to the validity of the reason for dismissal), that cannabis is a substance in respect of which there is currently no direct scientific test for impairment. The policy the Full Bench in those cases was discussing, was a blanket policy involving testing which establishes use of a substance rather than impairment. The reasonableness of the policy was said to be based on factors such as the nature of the work that employees are performing and that there is no reliable scientific test for impairment. Such policies are directed at managing a *general* risk associated with the attendance at work by employees who have used prohibited substances outside of work and have traces of such substances in their systems when they report for work. This risk can exist regardless of whether an employee who tests positive, is impaired. This is the point that was made by the Full Bench in *Toms* in paragraph [27] of their decision, extracted by the Deputy President in the decision subject of the present appeal.

[105] Sydney Trains submitted that in *Toms* (at paragraph [27]), the Full Bench when assessing the matters under s. 387(h) relied on by the Member at first instance, found that lack

of impairment from drug use was not relevant to the misconduct identified as a breach of the relevant policy. While we generally accept this proposition, it needs to be understood in the context of the type of risk that the Full Bench in *Toms* identified. It is significant that Mr Toms was involved in an incident, albeit relatively minor, and was tested for cause. The risk that the Full Bench identified in paragraph [27] was not an actual risk that Mr Toms was impaired by a proscribed substance when the incident occurred. Rather, the Full Bench was referring to broader reputational and legal risk to Harbour City Ferries, if the incident had been more serious and the media or person injured had discovered that the Master of its vessel at the time of the incident, had returned a positive test for a prohibited substance, in breach of the Company's policy. The reputational and legal risk identified by the Full Bench existed, regardless of whether Mr Toms was impaired, at the time an incident occurred. The discussions identified by the Full Bench that Habour City Ferries would be exposed to, were discussions with the media, members of the public who may have been injured or their legal representatives, about whether the use of drugs by the Master of a ferry involved in the incident, contributed to the incident.

[106] On a proper reading of *Toms*, at paragraphs [27] – [28] this was the core issue that the Full Bench found the Commission at first instance had not addressed and had given insufficient attention to. The Full Bench also thought that the mitigating factors referred to in the first instance decision, were not relevant to misconduct, related to the exposure to the risk it identified, caused by failure to follow, and disobedience of, the policy. The view of the Full Bench was that the only mitigating factor relevant to the non-compliance was that Mr Toms had used marijuana for shoulder pain. Because the Full Bench identified *"misconduct"* which it felt had not been addressed, or had been given insufficient attention, it found that the that other factors identified by the Commission at first instance, did not mitigate that misconduct and therefore did not outweigh it. The Full Bench in Toms did not say that the mitigating factors identified by the Commissioner were entirely irrelevant to the overall conclusion about the fairness of the dismissal, but rather that an element of the misconduct of the dismissed employee weighing against those mitigating factors, had not been considered in the weighing exercise.

[107] Because the Full Bench concluded that the Member at first instance did not consider the matter it identified, but nonetheless found that returning a positive test for a prohibited substance was a valid reason for dismissal, it follows that the failure to consider that matter, either under s. 387(a) or (h), was found by the Full Bench to be an error of the kind described in *House v The King* – that the decision-maker acted on a wrong principle, mistook the facts, took into account an irrelevant consideration or failed to take into account a relevant consideration, or made a decision which is unreasonable or manifestly unjust – that should be corrected on appeal. To the extent that the Full Bench found that the Member at first instance did not give sufficient weight to a relevant consideration, it could only have disturbed the decision if it concluded that the exercise of the Member's discretion miscarried or it was wrongly exercised.[156] That this is the relevant error found by the Full Bench is apparent from the decision of the Full Court, which said that the Full Bench put more weight on matters that the Member at first instance put to one side, and less weight on other matters the Member at first instance thought relevant under s. 387(h), and brought into account further matters it felt had been given insufficient attention by the Member.[157]

[108] It should also be noted that the Full Bench in *Toms* cited in support of its approach, the 2011 Full Bench decision in *Wililo* to the effect that where a valid reason for dismissal amounting to serious misconduct is found to exist, and there is compliance with the requirements for procedural fairness, it would only be if significant mitigating factors were

present that a conclusion of harshness would be open.[158] While not expressly disapproving *Wililo* the Full Court expressed reservations about the extent to which the statement endorsed by the *Toms* Full Bench could generally be applied and said that it should not be viewed as a fetter on the overall evaluative task assigned by the Act of affording "*a fair go all round*". We would observe that *Wililo* should be read in the light of more recent decisions considering the weighing exercise to be conducted with respect to the matters in s. 387.[159] Those decisions emphasise that while the question of whether there is a valid reason for dismissal is important, it is not necessarily determinative of the ultimate question of whether a dismissal is unfair because it is harsh, unjust and/or unreasonable. The answer to that question is to be found in each case and is the task of the decision maker. An example of this approach is found in *B, C and D v Australian Postal Corporation T/A Australia Post*,[160] where the majority of a Full Bench of the Commission identified the range of circumstances in which it may be held that while there is a valid reason for a dismissal, a dismissal may nonetheless be found to be unfair on the basis of the broader context in a workplace or the personal or private circumstances of the employee, which are brought to account in the overall evaluation of whether the dismissal was harsh, unjust or unreasonable.[161]

[109] It is trite that employers cannot control out of hours conduct engaged in by employees, unless that conduct is of such gravity or importance as to indicate a rejection of the employment contract and is sufficiently connected to employment by touching on it, or the duties and abilities of the employee in relation to the duties. Consistent with this principle, employers cannot regulate out of hours conduct of employees in relation to using prohibited or illegal substances, other than where such conduct has a necessary connection to employment. Cases considering the extent to which such private conduct touches on employment, include *Toms*, *Sharp* and *Hilder*. As we have discussed, in each of those cases, the employee was not dismissed for using a prohibited substance outside of work or because they were impaired, or there was a risk they were impaired at work. The reason for dismissal, found in each case to be a valid reason under s. 387(a) of the Act, was breach of the relevant policy.

[110] The Full Benches in *Sharp* and *Hilder* identified that blanket policies may be lawful and reasonable because employers do not have a direct scientific test which can reasonably be administered to measure impairment at work caused by drugs, or to independently ascertain when, and how much, of a prohibited substance was consumed outside of work, by employees who test positive at work. This is a risk that may justify the implementation of a generally applicable or blanket policy providing for disciplinary action up to dismissal for a breach, *simpliciter*, and result in that policy being lawful and reasonable, at least with respect to employees performing safety critical work, notwithstanding that such a policy indirectly impacts on out of hours conduct involving the use or consumption of prohibited substances.

[111] A "*zero-tolerance*" approach, may involve an assumption that an employee who reports for work and returns a positive test for a prohibited substance above stipulated levels, poses a present and future risk of attending work impaired, regardless of the fact that the employee may not be exhibiting symptoms of impairment at the time the positive result is returned, and has not used a prohibited substance at work. There will be cases where this is sufficient for a dismissal to be found not to be unfair. However, it may also be open for the Commission to find that a dismissal in such circumstances is unfair when all the matters encompassed in s. 387 are considered.

[112] To the extent that the principles relevant to the present case can be derived from the decisions in *Toms, Sharp* and *Hilder*, they may be stated as follows. *First*, the decisions concern

cases where the reason for dismissal is breach of a drug and alcohol policy *simpliciter* because an employee attends work with a prohibited substance in their system, at a level which exceeds a permitted threshold, where there is no dispute as to the lawfulness and reasonableness of the policy. *Second,* a drug and alcohol policy which provides for disciplinary action, including dismissal for a breach *simpliciter*, may be lawful and reasonable, notwithstanding that it indirectly regulates the consumption of prohibited drugs by employees outside of working hours, by providing that employees who attend work with levels of prohibited substances in their systems, above a stipulated threshold for the particular substance may be subjected to disciplinary action up to and including dismissal.

[113] *Third,* it is relevant to the lawfulness and reasonableness of policies providing for disciplinary action up to and including dismissal for employees who test positive for prohibited substances at work, that there is no reliable scientific test for establishing impairment, or that other methods such a cognitive testing cannot be efficiently administered in a workplace. The difficulty faced by an employer in determining whether a person who attends for work and tests positive for a prohibited substance is impaired, is also relevant, on the basis that it is unlikely that an employer will be able to independently ascertain the timing of an employee consuming a prohibited substance and the quantity consumed. Further, it is relevant to the lawfulness and reasonableness of such a policy that employees are performing safety critical work, or where impaired performance may jeopardise their own health and safety and that of others, including those working with the employee and persons external to the business.

[114] *Fourth*, such policies are a tool by which an employer, in appropriate circumstances, may manage risk at a macro level. Such policies are lawful and reasonable because the possibility of employees attending for work and testing positive for a prohibited substance may pose a risk to the employer's business by potentially damaging its reputation (*Toms*) or its relationship with clients or customers (*Sharp*) or placing the employer at risk of litigation for injuries caused to employees or external parties or for breach of legislative requirements relating to the fitness for work of its employees performing high risk work or work involving a duty to the public (*Toms and Hilder*). Depending on the nature of the employer's enterprise, the risk may exist simply because an employee has breached a drug and alcohol policy by returning a positive test result, regardless of whether the employee was impaired at the time. A drug and alcohol policy manages macro level risk by acting as a deterrent to employees attending work with levels of prohibited substances in their systems. The deterrent is that breaching a drug and alcohol policy, if an employee is tested either randomly or for cause, may expose the employee to the prospect of disciplinary action including dismissal. While policies of this kind do not override the rights of employees to protection from unfair dismissal, affording a fair go all around requires that those rights are balanced against the rights of employers to manage their businesses and risks associated with such conduct and its impact on workplace safety and health, for which they are ultimately responsible.

[115] *Fifth*, cases where an employer asserts that the reason for a dismissal included that an employee was impaired at work, or there was a risk that the employee was impaired at work or that there was a risk that the employee would attend work under an impairment at a future time, will generally fall for consideration under s. 387(a) in relation to whether impairment or present or future risk of impairment, is a valid reason for dismissal. In such cases the Commission will be required to determine whether the conduct occurred or the belief that it would occur in the future, is sound, defensible, well-founded, and therefore a valid reason for dismissal.

[116] *Sixth*, where breach of a lawful and reasonable drug and alcohol policy is the reason for dismissal, the Commission must consider whether the breach *simpliciter* is of sufficient gravity to constitute a sound, defensible, well-founded, and therefore valid reason for dismissal under s. 387(a). In considering this question, circumstances raised in mitigation relating to the general context in which the breach occurred, or personal to the dismissed employee, are not to be considered for the purposes of mitigating or derogating from the analysis and conclusion in relation to s. 387(a). Personal context may include that the dismissed employee did not display visible signs of impairment, or that there was no intention on the part of the employee to breach the policy, or that the dismissed employee was dealing with personal issues at the relevant time or matters such as the age and employment record of the dismissed employee. General context may include inconsistencies in the application of the policy or its terms, or a lack of understanding at the workplace about an important aspect of the policy, or whether the employer has properly explained the implications of the policy.

[117] Contextual matters cannot derogate from the validity of a reason for dismissal based on a breach *simpliciter* of a lawful and reasonable policy. This involves a decision making process whereby the validity of a reason for dismissal under s. 387(a) is considered separately from mitigating factors found to be relevant under s. 387(h). All the matters in s. 387 – substantive, procedural and contextual – are then required to be considered and weighed in the overall assessment of whether a dismissal is harsh, unjust or unreasonable. Notwithstanding a finding under s. 387(a) that there was a valid reason for dismissal related to breach of a drug and alcohol policy, it may be reasonably open to the Commission to find that in all the circumstances of a particular case, the dismissal was unfair, when other matters in s. 387 are considered and weighed, including mitigating factors in s. 387(h).

Appeal ground 1

[118] Before considering appeal ground 1, it is necessary to examine the finding at paragraph [115] of the Deputy President's decision, which is the subject of appeal ground 1. The "*finding*" appears to be stated as a principle or decision rule. As our analysis indicates, the reasoning in the Full Bench decisions in *Toms, Sharp* and *Hilder* does not support a principle to the effect that Sydney Trains must establish that there was a risk that Mr Goodsell was impaired at work. Nor is such a principle established by any case of which we are aware.

[119] By appeal ground 1, Sydney Trains asserts that the statement of principle in the last sentence of paragraph [115] of the Deputy President's decision is wrong as a matter of law and misapplies the decisions upon which it purports to be based. We agree with that submission. The Deputy President's decision discloses an error in his formulation in paragraph [115] of what appears to be a principle or decision rule. Consistent with *House v The King*, if the Deputy President acted on a wrong principle, a Full Bench may review his decision, and substitute its own discretion for the Deputy President's, if it has the materials for doing so. However, a finding that the purported statement of principle is wrong at law, does not necessarily result in a finding that the decision is affected by error of the kind described in *House v The King.*

[120] Appeal ground 1 appears to simply invite us to conclude that the disputed principle is wrong at law, without considering what, if any, effect this error had on other findings in the decision. However, other grounds of appeal make it necessary to consider whether the Deputy President has applied the erroneous principle to other findings in the decision so that the discretion to decide whether Mr Goodsell's dismissal was harsh, unjust or unreasonable, miscarried, or was not exercised correctly, or upon the facts, the outcome is unreasonable or

plainly unjust. It is convenient to undertake this analysis as part of considering appeal ground 1.

[121] We commence our consideration by observing that it is not immediately apparent whether the erroneous principle was applied by the Deputy President in relation to his findings under s. 387(a) with respect to the validity of the reason for dismissal or to other matters considered by the Deputy President to be relevant under s. 387(h). To understand what, if any, findings were underpinned by the erroneous principle, and to determine whether it has infected those findings or other related findings, made by the Deputy President, it is necessary to consider the context in which the principle was stated, including the evidence and submissions of the parties at first instance, in relation to impairment. The evidence and submissions can be summarised as follows:

- In his form F2 Application, Mr Goodsell asserted that his dismissal was unfair because: the incident leading to his dismissal occurred in his own time, mitigating circumstances including his 26 year unblemished career were not considered, he had never failed a drug or alcohol test, other employees had been treated differently in similar circumstances, alternatives to dismissal were not considered, and he was not provided with counselling or a rehabilitation program as contemplated by the Policy.[162]
- Sydney Trains maintained that the reason for the dismissal was Mr Goodsell's non-compliance with the policy *simpliciter* by returning a non-negative sample in a drug test and that this was a valid reason for dismissal.
- In this regard, Sydney Trains said in its submissions that:

  > "The Applicant was not dismissed because he was impaired at work, not able to perform his duties safely or a risk to the public, his co-workers or Sydney Trains, although they are all debatable in any event. He was dismissed because he breached Sydney Trains' lawful and reasonable policy *simpliciter*. That provides a valid reason… [citing *Sharp* and *Hilder*]… Like the employer in Harbour City Ferries, Sydney Trains as an employer charged with public safety does not want to have a discussion following an accident as to whether the level of drug use of its employees was a factor. It does not want to listen to the uninformed in the broadcasting or other communications industry talk about drug tests establishing impairment. What it wants is obedience to the policy…[citing the Full Bench decision in *Toms*]."[163] (emphasis added)
- Initially, while accepting that he had breached the Policy, Mr Goodsell contended that this was not a valid reason for his dismissal because, *inter alia*, he was not impaired at work, he did not pose a risk to the public, his co-workers or Sydney Trains and the testing officer confirmed that he did not appear to be impaired.
- Mr Goodsell tendered his written response to the investigation, which stated that he had tried cocaine on a one-off basis and pointed out that he has never tested positive in over 40 drug and alcohol tests he had taken previously during his 26-year career.[164]
- Notwithstanding its submissions that Mr Goodsell's breach of the policy was itself a valid reason for his dismissal, Sydney Trains (in response to Mr Goodsell's submissions) put in issue his contention that he was not impaired at work, and matters related to his out of hours conduct involving his use of cocaine, submitting that Mr Goodsell deliberately took cocaine, intentionally broke the law while doing so and that his assertion that he was not impaired at work was "*merely conjecture and was debatable.*"[165]
- In his reply submissions Mr Goodsell acknowledged that functionally identical conduct had been found to be a valid reason for dismissal in *Hilder* but urged the Commission to consider that objectively, his breach of the Policy involved an honest mistake and was less serious than a case where an employee attends for work actually intoxicated,

knowing of their impairment, performs safety critical work and returns a test demonstrating the presence of active metabolites in their system.[166]

- Notwithstanding this submission, Mr Goodsell also maintained that Sydney Trains should not be permitted to allow matters related to out of work conduct to justify his dismissal on a broader basis than the policy breach *simpliciter.*

[122] In the context of the case as it was conducted at first instance, and the decision read as a whole, it is apparent that the erroneous principle did not affect the Deputy President's consideration of whether there was a valid reason for Mr Goodsell's dismissal under s. 387(a) of the Act. As we have noted, Mr Goodsell attempted at first instance to argue that his dismissal for breach of the Policy was not for a valid reason, because he was not impaired at work, posed no risk of injuring himself or others and the breach was unintentional, albeit he also acknowledged that functionally the same conduct had been found by a Full Bench to be a valid reason for dismissal in *Hilder*.

[123] At paragraphs [104] and [105] of the decision, the Deputy President applied the principles in *Toms*, *Sharp* and *Hilder* and rejected Mr Goodsell's contention, correctly concluding that Mr Goodsell's breach of the policy *simpliciter* was a valid reason for his dismissal and noted that Sydney Trains' operation is safety-critical and the employer is entitled to place significant demands on its employees in relation to safety. The Deputy President also correctly disregarded other matters raised by Mr Goodsell to mitigate his conduct, in his consideration for the purposes of s. 387(a). In contrast with the first instance decision in *Toms*, the Deputy President's consideration in relation to valid reason did not include a reference to whether Mr Goodsell was impaired.[167] Instead, the finding that there was no risk that Mr Goodsell was impaired at work, was made in relation to s. 387(h).

[124] The erroneous principle is stated at paragraph [115] and the findings that there was no risk that Mr Goodsell attended work under any impairment and that his at-work conduct – i.e. returning a non-negative sample – constituted a valid reason for dismissal under s. 387(a), were made at paragraphs [117] and [121] respectively, after the erroneous principle was stated. Had the Deputy President considered that a finding that there was a risk of impairment at work was required before, or as part of any finding as to the validity of the reason for dismissal, on his own principle and given his finding about that matter on the evidence, the Deputy President could not have concluded (as he did) that Mr Goodsell's dismissal was for a valid reason. Further, the Deputy President found that the Policy itself was reasonable. Had the Deputy President considered that Sydney Trains was required to establish that there was a risk that Mr Goodsell was impaired at work for the Policy to be found to be reasonable (there being no dispute that it was not lawful), he would not have concluded that the Policy was reasonable.

[125] We accept the submissions for Mr Goodsell in the appeal, that the finding at paragraph [115] must be read in the context of the Deputy President's general consideration at paragraphs [109] – [118] of a contested issue in the proceedings – whether there was a risk that Mr Goodsell was impaired while at work. As our analysis of the cases advanced by the parties at first instance shows, Mr Goodsell asserted that he was not impaired at work both as a basis for a finding that there was no valid reason for his dismissal and in mitigation of his conduct, and Sydney Trains responded by asserting that the breach of the policy *simpliciter* was a valid reason for dismissal and the lack of impairment asserted by Mr Goodsell was debatable and a matter of conjecture. The Deputy President correctly disregarded the question of whether Mr Goodsell was impaired at work or there was a risk that Mr Goodsell was impaired at work, in his consideration of valid reason under s. 387(a), consistent with the Full Bench decision in *Hilder*, and instead had regard

to lack of impairment in his consideration under s. 387(h). The Deputy President's finding that there was an absence of risk of impairment is not a finding that impairment or a risk of impairment at work *needs* to be established before a breach of a drug and alcohol policy requiring a non-negative result constitutes a valid reason for dismissal. Had Sydney Trains contended that Mr Goodsell was impaired at work, or that there was a risk that he was impaired at work, those matters would have fallen for consideration under s. 387(a).

[126] Mr Goodsell placed evidence before the Commission supporting his assertion that he was not impaired, and that there was no risk that he was impaired, when he attended for work on 4 June 2022. This matter, while not relevant to the question of whether there was a valid reason for dismissal under s. 387(a), was, in our view, relevant to mitigation and properly fell for consideration under s. 387(h). Mr Goodsell, having put the matter of impairment in issue raised a form of evidential "*onus*" (to the extent that onus applies in unfair dismissal proceedings) to the extent that if Sydney Trains did not rebut the assertion by adducing evidence to the contrary, it ran a risk that Mr Goodsell's assertion would be accepted by the Deputy President. Sydney Trains sought to rebut the assertion by Mr Goodsell in relation to risk of impairment, by calling evidence from witnesses about the "*hangover effects*" of taking cocaine and the likely time at which Mr Goodsell had done so and by submitting that Mr Goodsell's assertion that there was no risk he was impaired was "*a matter of conjecture and debatable*".

[127] The issue having been raised by the parties, the Deputy President was required to make a finding on the evidence and submissions as to whether there was a risk that Mr Goodsell was impaired at work and it was open to the Deputy President to consider that matter as relevant for the purposes of s. 387(h). It was not open to the Deputy President to impose a decision rule in the form of an erroneous principle to the effect that Sydney Trains was required to negative Mr Goodsell's assertion, to succeed on the ultimate question of whether Mr Goodsell's dismissal was unfair. However, when the decision as a whole is read fairly and the finding in relation to impairment is considered in context, the Deputy President did not apply the erroneous principle to reach his conclusion that Mr Goodsell's dismissal was unfair.

[128] Relevantly, it is implicit in the Deputy President's finding that there was "*no risk that Mr Goodsell was impaired at work*" that he found on the balance of probabilities Mr Goodsell was not actually impaired on the day he returned a positive test for a prohibited substance. It is also clear that this finding was not determinative of the Deputy President's conclusion on the ultimate issue of whether Mr Goodsell had been unfairly dismissed. Instead, the Deputy President considered risk of impairment as one of several matters that were relevant under s. 387(h), and weighed all of those matters in his overall assessment, to find that Mr Goodsell's dismissal was unfair. The Deputy President did not apply the erroneous principle to this task. Accordingly, while the principle stated by the Deputy President in paragraph [115] is erroneous, it did not infect the Deputy President's approach to considering the matters in ss. 387(a) and (h). We uphold appeal ground 1 on the limited basis that the principle stated in paragraph [115] is erroneous, while accepting that it did not infect other findings made by the Deputy President and for reasons that follow, did not vitiate those findings, or the ultimate conclusion that the dismissal of Mr Goodsell was unfair.

Appeal grounds 2 and 3

[129] In relation to appeal ground 2 we do not accept that the Deputy President erred by concluding at paragraph [117] that there was no proper basis for a finding that there was no

risk that Mr Goodsell attended work on 4 June 2022 under any impairment arising from his consumption of cocaine during approved leave. As we have stated, implicit in this finding is a finding that Mr Goodsell was not impaired when he attended work on that date. In our view, it was reasonably open to the Deputy President to make this finding based on the evidence before him. In this regard, Mr Goodsell's evidence was that he tried cocaine on a one-off basis during a period when he was absent on leave, four days before his leave concluded. Mr Goodsell also gave evidence that he did not feel impaired when he attended work. While Mr Goodsell's evidence about his belief that he was not impaired is not a matter to which any significant weight can be attributed, that Mr Goodsell did not appear to be impaired was confirmed by the testing officer who carried out the test. Mr Goodsell also gave uncontested evidence that in his 26 years of unblemished service, he had undertaken some 40 random drug and alcohol tests and had never returned a positive result.

[130] In relation to the part of the cross-examination of Prof Weatherby referred to in Sydney Trains' submissions that Mr Goodsell could have taken cocaine one, two, three or four days prior to the test being administered, we note that in the same exchange with counsel for Sydney Trains, Prof Weatherby said:

- The person who took the sample from Mr Goodsell was required to determine, and in this case, said that Mr Goodsell did not show any signs of impairment;
- Benzoylecgonine can be detected for up to four days in urine;
- When somebody uses cocaine it is gone in a couple of hours but Benzoylecgonine which is pharmacologically inactive can be around for three or four days;
- At that time there is no way you are looking for someone under the influence of a drug and the only thing you can conclude is that the person has used the drug at some time previously.

[131] Prof Weatherby went on to say:

> "So essentially if I look at this, you know, the laboratory result we've got that there were no signs of influence of drugs, but the Benzoylecgonine was present at 264 micrograms per litre. That's low, so the interpretation of that is that cocaine use had been sometime in the previous four days. You don't know whether it was one day, two days, three days, but that's all you can say. And my only other comment then is, well it's consistent with what Mr Goodsell had said, which I'm told he said, in terms of when it was taken. I hope that helps you." [168]

[132] Further, Prof Weatherby said in relation to the hangover effect of cocaine, that such effect is unlikely to persist for more than one or two days and that some people experience no effect and may feel tired. Prof Weatherby also said that cocaine effects are over in 90 minutes and the drug is quickly eliminated from the body and that some people take several hours and others several days, to recover from the stimulation caused by the drug.[169]

[133] The risk referred to in the submissions of Sydney Trains, based on the medical and scientific evidence at first instance about when Mr Goodsell likely took cocaine, and the possibility of impairment occurring 2 – 4 days from the last consumption of cocaine, because of restlessness, tiredness, sadness, fatigue and insomnia, was countered by the concessions made by Dr Lewis under cross-examination, and taken into account by the Deputy President. Those concessions were to the effect that Mr Goodsell's urine sample did not indicate levels of any substance that could be correlated with a hangover effect and that the study cited in his evidence was old and concerned with several days of heavy cocaine use and regular cocaine users. It was reasonably open for the Deputy President to make the finding in paragraph [117]

of the Decision based on evidence that there was no active drug in Mr Goodsell's system at the time he was tested, the test results were consistent with his evidence about when he used cocaine, he showed no signs of impairment when tested, and he was not impaired by a hangover effect. It was also reasonably open to the Deputy President to find that Mr Goodsell is not a habitual or regular user of cocaine and that his ingestion of cocaine was a one-off event, on the basis that of his uncontested evidence that he has undertaken some 40 drug tests in his 26-year unblemished career and has not returned a positive result on any other occasion and (as conceded by Mr Bugeja in cross-examination)[170] that he had been provided with training about self-assessing his own fitness for work.[171] Further, Mr Bugeja agreed in cross-examination that he was aware that Mr Goodsell had performed a pre-start briefing self-assessment consistent with that training, to reach the conclusion that he was not impaired.[172]

[134] We do not accept that the finding in paragraph [117] is inconsistent with the finding that Sydney Trains had a valid reason for dismissing Mr Goodsell. For the reasons we have set out above, the Deputy President's conclusion that there was no proper basis for finding that there was a risk that Mr Goodsell attended work on 4 June 2022 impaired by cocaine, was relevant only for the purposes of s. 387(h) while the finding that breaching the policy was a valid reason for dismissal was relevant for the purposes of s. 387(a). The way that the Deputy President approached the questions posed by s. 387(a) and s. 387(h) was consistent with the case advanced by Sydney Trains which expressly eschewed the proposition that Mr Goodsell was dismissed because he was impaired at work. Accordingly, no inconsistency arises.

[135] We are also of the view that Sydney Trains' submission in relation to the rationale that underpins *Toms*, *Sharp* and *Hilder*, conflates the reasonableness of a blanket drug and alcohol policy that tests for past use of proscribed substances rather than present impairment, with the application of that policy to a particular employee, in the context of whether the dismissal of that employee for breach, was harsh, unjust or unreasonable, when all relevant circumstances, are considered. Applying the principles in those cases to the present case, it was not necessary for the Deputy President to accept that there was a risk of impairment or a proper basis to conclude that there was such a risk, to make a finding that there was a valid reason for the dismissal and no inconsistency arises on this basis.

[136] We do not accept that the general risk of an employee downplaying their conduct to minimise what they perceive as risks arising from it and the difficulty verifying an employee's self-assessment of impairment, applies in the present case. On the basis of Mr Goodsell's evidence that his ingestion of cocaine was a one-off incident and that he was not impaired, his employment history including that he had returned negative test results on 40 previous occasions, the medical and scientific evidence that was before the Deputy President, and the consistency between Mr Goodsell's version of events and that evidence, it was reasonably open for the Deputy President to accept that evidence and to weigh it against the generic risk identified by Sydney Trains, to make the finding that there was no risk that Mr Goodsell was impaired when he attended for work on 4 June 2022. We also note the evidence at first instance, which was accepted by the Deputy President, of Mr Goodsell's remorse, acknowledgement of his mistaken views about the ongoing presence of cocaine metabolites in his system and that the possible outcome of attending for work on 4 June 2022, some four days after he had taken cocaine while on a period of leave, would be a breach of the policy. Further, we note Mr Goodsell's preparedness at the point he was dismissed, to engage in any testing regime that Sydney Trains thought appropriate to manage future risk it perceived and his reference to provisions of an enterprise agreement to that effect.

[137] We discern no basis for setting aside the Deputy President's findings of fact based on the evidence before him. The findings are based on the Deputy President having directly seen and heard the evidence of Mr Goodsell and the other witnesses and are not inconsistent with facts incontrovertibly established by the evidence nor "*glaringly improbable*".[173] Nor has Sydney Trains established any errors of fact in the Deputy President's consideration of the evidence, much less significant errors of fact that vitiate the conclusion. We reject appeal ground 2.

[138] Appeal ground 3 again challenges the factual finding made by the Deputy President that there was no risk that Mr Goodsell was impaired at work, reiterated at paragraph [142] of his decision. As Sydney Trains submitted, appeal ground 3 is related to grounds 1 and 2 and the finding in paragraph [142] of the decision cannot stand if Sydney Trains succeeds on either of grounds 1 or 2. It follows that if Sydney Trains does not succeed on either of those grounds, it cannot succeed on ground 3. For the reasons set out above, the Deputy President's findings of fact relevant to the conclusion that there was no risk that Mr Goodsell was impaired when he attended for work on 4 June 2024, were reasonably open to him and there is no basis for us to find error in relation to the conclusion the Deputy President reached or to reach a different conclusion. Accordingly, we reject appeal ground 3.

Appeal ground 4

[139] By appeal ground 4 Sydney Trains challenges the conclusion of the Deputy President in paragraph [158] of the decision, that there was no evidence to suggest that anyone involved in the process of dismissing Mr Goodsell fairly considered his response to the allegations or was open to the possibility that he could remain in employment and contends that there was evidence to the contrary before the Deputy President which was not rejected. Sydney Trains also contends that the finding was not open to the Deputy President on the evidence of Mr Bugeja.

[140] We do not accept these contentions. The Deputy President's conclusion in paragraph [158] followed his identification of relevant matters for the purposes of s. 387(h) which were set out at paragraph [136] and included that "*the employer's mind was closed in the disciplinary process to Mr Goodsell continuing in his employment*". The Deputy President considered the evidence and submissions relevant to this proposition in detail from paragraphs [146] – [157].

[141] We accept Sydney Trains' submission that Mr Bugeja was involved in the process of dismissing Mr Goodsell. However, it is not disputed that the decision was made by Mr Burge, who was not called to give evidence. While it was not necessary for Sydney Trains to call the actual decision maker, it was necessary for Sydney Trains to establish that the decision maker fairly considered Mr Goodsell's response. The Deputy President's analysis of Mr Bugeja's evidence included that his default position is that anyone who tests positive for drugs is likely to be terminated and that he said in his oral evidence that in the absence of compelling evidence to the contrary, his view was that their employment should be terminated, regardless of length of service. The Deputy President concluded that this evidence did not "*give hope*" to the possibility that Mr Bugeja would or could be persuaded otherwise and in our view this conclusion was reasonably open to him on the evidence.

[142] In the absence of evidence from the decision maker, the Deputy President was left with the evidence of Mr Bugeja, the Investigation Report and the Recommendation that was sent to the decision maker, Mr Burge. We have reviewed the evidence that was before the Deputy

President and there is no error in his observations about that evidence. We note that Mr Bugeja's evidence was that when he sat on the final Disciplinary Review Panel, he "*would have*" read any material provided by Mr Goodsell. Mr Bugeja also said that in preparing his witness statement he had again reviewed the submission made by Mr Goodsell in that process and made comments about "*what are recall* (sic) *to be my thoughts on those matters at the time*", and reached the conclusions outlined by the Deputy President at [156] of the Decision. Our review of the transcript confirms that Mr Bugeja made the concessions in cross-examination outlined by the Deputy President at paragraph [56] (a) – (m) of the Decision. We also note that there is no issue taken with the correctness of the matters set out in those paragraphs.

[143] We agree with the Deputy President's assessment that the evidence before him established, that little if any consideration was given to the detailed responses to the allegations provided by Mr Goodsell and the mitigating circumstances outlined in those responses. As Counsel for Mr Goodsell pointed out in the appeal hearing, after Mr Goodsell provided his initial response to the allegations, the letter of 21 July sent by Mr Bugeja advising that the allegations had been substantiated and requesting further information as to why Mr Goodsell should not be dismissed, did not alert Mr Goodsell to the negative views that Mr Bugeja had taken in relation to some of the mitigating factors Mr Goodsell had raised in his initial response. Notably, Mr Bugeja did not indicate to Mr Goodsell his view that because Mr Goodsell had tested positive "*by chance*" there was no way for Mr Bugeja to be sure that he would not do so again in the future, or that it was not considered relevant that taking cocaine was a one off incident, or that Mr Goodsell was not in a position to judge whether or not he was impaired for reasons including that Mr Goodsell had an "*illicit drug…present in his sample above the cut off limits for that drug*". Rather, the letter simply requested that Mr Goodsell provide particulars as to why Sydney Trains should not consider his behaviours to give rise to a loss of trust and confidence in the employment relationship.[174]

[144] As the Deputy President noted, Mr Bugeja put a negative spin on matters that reasonably could have been viewed as weighing in favour of Mr Goodsell, including his unblemished 26 years of service and his uncontested evidence that he had undertaken some 40 drug and alcohol tests in that time without returning a positive result. We agree with the submission for Mr Goodsell in the appeal, that rationally this should have been considered as a matter weighing against a conclusion that Mr Goodsell would repeat the conduct. Consideration should also have been given to the statement of Dr Casolin that Mr Goodsell's test result was consistent with his version of events, as highlighted in Mr Goodsell's response to that letter.

[145] Also relevant was the remorse expressed by Mr Goodsell and the reference in his response to the provisions in the *Sydney Trains Enterprise Agreement 2018* providing for Sydney Trains to conduct employer-initiated drug and alcohol testing and associated programs (e.g. rehabilitation) to help employees to remain drug and alcohol free while at work. There is no evidence that this matter was considered by Sydney Trains in the decision making process and the conclusion that Mr Goodsell's request that he be allowed to participate in such a process instead of being dismissed was ignored, despite Mr Goodsell maintaining that other than on one occasion, he had not used cocaine in the past and would not do so in future. It is counterintuitive that Mr Goodsell's request was ignored in circumstances where Mr Bugeja believed that there was a likelihood that he would repeat his drug use in future. This suggestion made by Mr Goodsell should have at least been considered as a means of reducing the concern in this respect held by Mr Bugeja. It is also counterintuitive that Mr Bugeja formed a view that the risk of Mr

Goodsell repeating the offence, outweighed an otherwise unblemished 26-year career during which Mr Goodsell had undergone some 40 drug and alcohol tests without returning a positive result. Further, the dire financial consequences for Mr Goodsell and his family if he lost his job, which were outlined in his response, should also have weighed in Mr Goodsell's favour as a strong deterrent to any repetition of his conduct. We consider that the Deputy President's conclusion that a reasonable person would regard Mr Goodsell's financial hardship as a point in Mr Goodsell's favour, was entirely open on the evidence and that the failure of Sydney Trains to establish that this matter was considered is a further indication that the approach adopted by Sydney Trains resulted in Mr Goodsell's response not being given fair consideration.

[146] On any view of the evidence before the Deputy President, it was reasonably open to him to reach the view that the only outcome from Mr Bugeja's perspective was Mr Goodsell's dismissal, regardless of any mitigating matters raised in his response. We also note that the Deputy President's assessment of the emailed *"Summary"* sent to the decision maker Mr Burge, setting out the final recommendation, is accurate. The Summary is comprised of an email of less than two pages, setting out the background, actions taken, and the investigation and decision-making process and noting that a preliminary outcome of dismissal had been determined. The Recommendation is that: "…*PSC are now seeking your endorsement as to the final disciplinary outcome being dismissal or any other disciplinary outcome as considered appropriate by the delegate.*" While Mr Goodsell's response to the show cause letter is attached to the email Summary, there is not a single reference in the summary to any of the mitigating factors set out in Mr Goodsell's response. For the decision maker to have acted on the summary, he would not have been necessary for him to read Mr Goodsell's response and there is no evidence that it was read or considered before the final decision was taken. Finally, the Deputy President's findings involved an assessment of Mr Bugeja's oral evidence which he had the benefit of hearing and evaluating the credibility of witnesses and of the "*feeling*" of the case. [175] There is no finding of fact made by the Deputy President demonstrated to be wrong by "*incontrovertible facts or uncontested testimony*" and nor are the findings "*glaringly improbable*" or "*contrary to compelling inferences*".[176]

[147] Contrary to the submissions of Sydney Trains in the appeal, the matters set out by the Deputy President at paragraph [156] of the Decision do provide a reasonable basis for the conclusion in paragraph [158] that the approach to the dismissal of Mr Goodsell was procedurally unfair and that the decision making process did not include a fair consideration of his response or of the possibility that he would remain in employment. Mr Goodsell's long and unblemished employment record could not have resulted in him "*knowing better*" that his one-off conduct four days before returning from a period of leave, would result in the termination of his employment, because inactive cocaine metabolites might be detected in a drug test, in circumstances where there is no evidence that Sydney Trains had explained this to him or to employees generally.

[148] The attempt by Sydney Trains to characterise Mr Goodsell's conduct as taking a risk regarding his consumption of cocaine, or not being attended by extenuating factors, is unhelpful in circumstances where this conduct occurred outside the workplace and was not the reason for Mr Goodsell's dismissal. On Sydney Trains' own case Mr Goodsell taking cocaine and his reasons for doing so were not relevant to his dismissal, and negative inferences should not have been drawn about whether he broke the law, much less whether his out of work conduct was deliberate or intentional. Further, the evidence establishes that Mr Goodsell did not have an illicit drug present in his sample and Mr Bugja's statement in this regard is inconsistent with Sydney Trains' case. The substance present in Mr Goodsell's sample was a

pharmacologically inactive metabolite. The mere fact that Mr Bugeja described Mr Goodsell's conduct in those terms, is itself, capable of supporting an inference that the only possible outcome in Mr Bugeja's mind, was dismissal.

[149] Finally, in relation to appeal ground 4, we do not accept that there is an inconsistency between the Deputy President's finding that Mr Goodsell's dismissal was procedurally unfair and the finding in relation to s. 387(c) that he was notified of the reason for his dismissal and given an opportunity to respond to that reason. If the Deputy President's finding in relation to s. 387(c) is correct, the dismissal may still be found to be unfair, because while an opportunity to respond was provided, the response was not fairly considered. As we have stated, the latter finding was reasonably open to the Deputy President under s. 387(h) on the evidence. Alternatively, if there is an inconsistency between those findings, it does not assist Sydney Trains. As the Full Bench in *Hilder* said:

> "If the consequence of Sydney Trains' "zero tolerance" was that it would not give any consideration to any mitigating circumstances advanced by any employee who has been found to have breached the Policy, that may be relevant to s 387(c) since it would arguably constitute a denial of a real opportunity to respond to the reason for the putative dismissal."[177]

[150] If there is an error in the finding with respect to s. 387(c) it is arguable that a finding should have been made that, for the reasons set out in *Hilder*, the zero-tolerance policy denied Mr Goodsell a real opportunity to respond to the reason for his dismissal. We reject appeal ground 4.

Appeal ground 5

[151] We also reject appeal ground 5. We do not accept Sydney Trains' submission that it was no part of Mr Goodsell's case that his conduct occurred because he did not know or understand what was expected of him. We agree with the submissions on behalf of Mr Goodsell that the evidence before the Deputy President established that he did not understand that consuming cocaine four days before work would risk non-compliance with the Policy and that while he understood that the Policy required that he have no cocaine in his system, he did not know that the implications of testing for use were that the test could indicate the presence of inactive metabolites remaining in his system, which would cause him to be in breach of the policy. It follows that Mr Goodsell did not understand that zero tolerance in relation to cocaine, meant that the presence of an inactive metabolite indicating his use of cocaine, could result in his dismissal. There was no evidence that Sydney Trains had provided training to Mr Goodsell or any of its employees about the Policy and its implications for drug use, whether casual or habitual, in terms that would be intelligible to the average Sydney Trains employee.

[152] Mr Goodsell asserted that he had an honest but mistaken belief that all traces of the cocaine he ingested four days before his return to work had been eliminated from his system, and that he was not impaired when he attended for work, and his evidence in relation to these matters was accepted by the Deputy President. In circumstances where Mr Goodsell put in issue his understanding of the effect of the Policy, to the extent that the Appellant did not rebut the assertion by adducing evidence to the contrary, it ran a risk that it would be accepted by the Deputy President. This is what occurred. The Appellant did not seek to rebut the assertion by Mr Goodsell in relation to his lack of understanding of the effect of the Policy by calling evidence to establish that it had undertaken communication and training about these matters in a manner discussed by the Full Bench in *Hilder*. Deficiencies in the training provided by Sydney

Trains about the Policy were put to Mr Bugeja in cross-examination. Mr Bugeja agreed that the training provides relatively detailed information about what conduct might lead to a person breaching its obligation to have a zero-blood alcohol level, and that standard drinks are explained, and that there is no discussion at all of the Australian New Zealand Standard that the drug and alcohol policy relies on in respect of drugs. Mr Bugeja also agreed that there is no discussion of the concept of metabolites as opposed to active drugs nor as to how long a metabolite of any prohibited drug may remain in an employee's system.[178]

[153] At the very least, an intelligible explanation of the kind discussed by the Full Bench in *Hilder* would include details of the prohibited drugs covered by the Policy and minimum cutoff levels, that the testing shows drug use rather than impairment, the existence of and measurement for inactive metabolites of prohibited drugs and the length of time that measurable traces of drugs or metabolites at or around cutoff levels may remain in a persons' system even after the effect of the drug has worn off. It should also have been made clear that a zero-tolerance policy means that if employees attending for work were found to have traces of proscribed substances exceeding cutoff levels in their systems, Sydney Trains would assume that they pose an unacceptable risk to fellow workers and customers because of those results. Further, it should have been explained that Sydney Trains would have this view, regardless of whether the employee concerned was demonstrating obvious impairment at work or whether the drug was consumed at work or in the employees' own time outside work. Deputy President was entitled to have regard to the statement of the Full Bench in *Hilder* in his consideration of Mr Goodsell's contention about his lack of understanding in relation to the effect of the Policy in his circumstances and no error arises in this respect.

Appeal ground 6

[154] We do not accept that the errors asserted in appeal grounds 1 – 5 resulted in the Deputy President erring in paragraph [172] of the Decision by finding that there were mitigating factors that rendered Mr Goodsell's dismissal unfair. For our reasons given in relation to appeal grounds 1 – 5 we conclude that it was reasonably open to the Deputy President to conclude as he did, that notwithstanding that there was a valid reason for Mr Goodsell's dismissal, when mitigating factors were taken into account, the dismissal was harsh, unjust and unreasonable. We reject appeal ground 6.

[155] We would add that in rejecting the appeal grounds advanced by Sydney Trains, we entirely accept that employees using prohibited drugs and attending for work in circumstances where they produce a non-negative drug test and/or a confirmatory drug test result, is a serious issue that is fraught with difficulty for employers. As we have said, while employers generally do not have the right to control out of hours conduct engaged in by their employees, including conduct involving the use of prohibited drugs, they do have the right to implement lawful and reasonable policies and procedures to control the risks associated with access to workplaces of employees who are, or who are at risk of attending for work, impaired by drugs. Those risks are not limited to possibility of injury to the impaired employee or to other employees but may extend to the risk of legal liability of the employer to other employees, clients, customers or third parties and reputational damage to the employer.[179]

[156] As a Full Bench of the Commission identified in *Sharp* and reiterated in *Hilder*, and as this case illustrates, there is no direct scientific test for impairment arising from the use of drugs including cannabinoids and cocaine and doubtless, any number of prohibited drugs which may be used by employees in their own time. Testing, either "*for cause*" or randomly, will likely

indicate past use rather than present impairment, by establishing that an employee who returns, for example a positive result for a prohibited drug such as cocaine, has an inactive metabolite in their system as a result of the person's body processing the drug. Since *Sharp* was decided in 2015 the problem faced by employers of how to properly assess whether an employee is impaired, as identified in that case, continues.

[157] It also remains the case that while a breach of a lawful and reasonable drug and alcohol policy may of itself provide a valid reason for dismissal, there will be cases where other relevant circumstances mitigate the misconduct of an individual employee who returns a positive test. Those circumstances may be personal to the employee or involve a general lack of understanding of the policy in the workplace. However, where a drug and alcohol policy is clear and intelligible to the relevant employees, promulgated in the workplace, and informs them in practical terms about the testing process and the substances being tested for, including where testing is to identify use rather than impairment, the potential for incidents of unfairness arising from a lack of understanding by an individual employee is likely to be reduced, notwithstanding that no amount of clarity can derogate from the right of an employee not to be subjected to dismissal for breach in a manner that is unfair, because it is harsh, unjust or unreasonable.

[158] Conversely, the Commission should not lightly interfere with the operation of a lawful and reasonable policy, rendering it ineffective by finding dismissals to be unfair, simply because of the personal circumstances of the dismissed employee such as a lengthy period of service or because dismissal will have a detrimental effect on the employee's financial situation. A dismissal of a person with a lengthy period of service is not *prima facie* unfair, and most dismissals have a detrimental financial impact. However, in the present case, in addition to Mr Goodsell having a lengthy and unblemished period of service, his uncontested evidence was that he had undertaken some 40 random drug tests in that time, without testing positive for any prohibited substance and there were additional mitigating circumstances which were general to the workplace and not particular to Mr Goodsell which also provided a reasonable basis for a conclusion that his dismissal was unfair.[180]

[159] We would also add that our decision in this case should not be viewed as an acceptance that in dealing with an unfair dismissal application concerning a breach of a drug and alcohol policy, it will be generally appropriate for the Commission to undertake an analysis and make a finding about the level of impairment, or whether there was a risk that a dismissed employee was impaired. As we have stated, the risks associated with employees who have consumed proscribed drugs attending for work with traces of those drugs in their systems, go beyond the risk of an individual employee being impaired at work. There is an overarching risk identified by the Full Bench in *Toms* that an employee with a prohibited substance in their system creates a reputational and legal risk for the employer regardless of whether the employee is impaired. In the present case, the general risk at which the Policy was directed, was recognised by the finding that Mr Goodsell's dismissal was for a valid reason. In relation to mitigation, there was medical and scientific evidence to support a finding that Mr Goodsell was not impaired at work. That will not be so in every case and given the serious implications of breaches of drug and alcohol policies, and the responsibilities of employers in providing and maintaining safe workplaces and systems of work, findings about whether an employee was impaired at work should be made by the Commission with caution and based on clear and cogent evidence.

Conclusion and disposition

[160] While there is an error of law in the Deputy President's decision with respect to the principle posited in paragraph [115], we are satisfied that this did not vitiate the findings made by the Deputy President and the conclusion that Mr Goodsell's dismissal was harsh and unreasonable. Nor are we satisfied that the discretion exercised by the Deputy President miscarried or that the result is manifestly unjust. We also do not consider that Sydney Trains has identified any error of fact in the Decision, much less a significant error of fact that vitiates the outcome. We consider that the outcome is not outside the range of outcomes within which a proper exercise of the discretion might be expected to reside, particularly having regard to other unfair dismissal remedy decisions concerning drug and alcohol testing, including those we have considered in this decision.

[161] Accordingly, we affirm the Deputy President's conclusion that Mr Goodsell's dismissal was harsh and unjust. We note that there is no challenge to the Deputy President's consideration of the remedy to be awarded to Mr Goodsell and we therefore see no basis to disturb the orders made by the Deputy President in relation to remedy. We consider that it is appropriate that we dismiss the appeal. We order as follows:

(1) Permission to appeal is granted.

(2) The appeal is dismissed.

(3) The stay granted in PR769828 is set aside.

VICE PRESIDENT

Appearances:

Mr J Darams of Counsel instructed by Maddocks Lawyers, for the Appellant.
Mr L Saunders of Counsel instructed by the Rail, Tram, and Bus Union, for the Respondent.

Hearing details:

2024.
Sydney:
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<PR780435>

[1] [2023] FWC 3209 (Decision).
[2] Decision at [11].
[3] PR768967.
[4] PR769828.
[5] Decision at [10].
[6] Decision at [29].
[7] Decision at [30].
[8] Decision at [31].
[9] Decision at [97].
[10] Decision at [37].
[11] Decision at [37].
[12] Decision at [38].
[13] Decision at [42].
[14] Decision at [43].
[15] Decision at [47] – [48].
[16] Decision at [53].
[17] Decision at [54].
[18] Decision at [54].
[19] Decision at [56].
[20] Decision at [63].
[21] Decision at [64] – [70].
[22] Decision at [71] – [79].
[23] [2014] FWCFB 6249.
[24] [2015] FWCFB 1033.
[25] [2020] FWCFB 1373.
[26] Decision at [100].
[27] Q9292 [1998] AIRC 1592.
[28] Ibid.
[29] Decision at [102].
[30] Decision at [111].
[31] Decision at [118].
[32] Decision at [120].
[33] Decision at [121] – [122].
[34] Decision at [123] – [125].
[35] Decision at [131].
[36] Decision at [132] – [135].
[37] Decision at [136].
[38] Decision at [100] – [109].
[39] Decision at [110] – [118].
[40] Decision at [145].
[41] Decision at [147].
[42] Decision at [153].
[43] Decision at [157].
[44] Decision at [159] – [160].
[45] Decision at [161].
[46] Decision at [165].

[47] Decision at [169].

[48] Decision at [171] – [172].

[49] Decision at [121] – [122].

[50] Decision at [125] and [131].

[51] (1936) 55 CLR 499 at 504 – 5.

[52] *Gelagotis v Esso Australia Pty Ltd T/A Esso* [2018] FWCFB 6092 at [43].

[53] *GlaxoSmithKline Australia v Colin Makin* (2010) 197 IR 266 at [27].

[54] *Simon Parris v Trustees of Edmund Rice Education Australia T/A St Kevin's College* [2021] FWCFB 6026 at [222].

[55] *Harbour City Ferries Pty Ltd v Toms* [2014] FWCFB 6249 (*Toms*).

[56] *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033 (*Sharp*).

[57] *Sydney Trains v Gary Hilder* [2020] FWCFB 1373 (*Hilder*).

[58] *Toms* at [27]; Sharp at [24]; *Hilder* at [31].

[59] Dr Casolin's Witness Statement at [18] – Appeal Book (AB) 171-172; Transcript of first instance hearing at PN703 – AB 1393; Mr McDonald's Witness Statement at [13] – AB 630.

[60] *Toms* at [27].

[61] Transcript of first instance hearing at PN219 – AB 1351.

[62] Transcript of first instance hearing at PN206 – PN211 – AB 1348-1349.

[63] Dr Lewis' report at 1(g) – AB 393; Dr Lewis' report at 2 – AB 393-394.

[64] Dr Lewis' report at 1(e) – AB 392.

[65] Decision at [42(i)].

[66] Decision at [105] and [141].

[67] *Sharp* at [24] (and referred to in *Hilder* at [31]).

[68] Mr Bugeja's witness statement at [8], [9] and [27] – AB 243, 248.

[69] Mr Bugeja's witness statement at [28] - [30] – AB 248-249; Transcript of first instance hearing at PN344 - PN347 – AB 1362.

[70] Transcript of first instance hearing at PN285 - PN286 – AB 1357.

[71] *Singh v Sydney Trains* [2019] FWC 182 at [345].

[72] Australian Standards at 1.3.11, 1.3.20, 4.1(d), 4.2, 4.10, Table 2 – AB 397.

[73] Transcript of first instance hearing at PN82 - PN90 – AB 1336.

[74] Transcript of first instance hearing at PN98 - PN111 – AB 1337.

[75] *Federation Training v Sheehan* [2018] FWCFB 1679 at [53] (citing *Wadey v YMCA* [1996] IRCA 568).

[76] *Bartlett v Ingleburn Bus Services Pty Limited* [2020] FWCFB 6429 at [25].

[77] For example, the Full Bench in Hilder did not emphasise any need for Sydney Trains to do as the Deputy President found.

[78] See s 387 of the Act; *Toms* at [27].

[79] Decision at [164].

[80] Decision at [160] – [161].

[81] *Sydney Trains v Hilder* [2020] FWCFB 1373.

[82] *Sharp v BCS Infrastructure Support* [2015] FWCFB 1033.

[83] Transcript of first instance hearing at PN431-431 – AB1368.

[84] *Miroslav Blagojevic v AGL Macquarie St* [2018] FWCFB 4174.

[85] *Fox v Percy* (2003) 214 CLR 118.

[86] *Blagojevic v AGL Macquarie Pty Ltd; Seears* [2018] FWCFB 4174 at [48].

[87] Dr Lewis' report at 1.(B) – AB391.

[88] Transcript of first instance hearing at PN708-710 – AB1393.

[89] Transcript of first instance hearing at PN186 – AB617.

[90] Transcript of first instance hearing at PN479-480 – AB1438-1439.

[91] Transcript of first instance hearing at PN450-456 – AB1370.

[92] Statement of Goodsell, [12] – AB73.

[93] Statement, Laverty Pathology Collector, [8] – AB77.

[94] Sydney Trains' outline of submissions in the appeal at [17]-[18].

[95] *Harbour City Ferries v Toms* [2014] FWCFB 6249.

[96] Sydney Trains' outline of submissions in the appeal at [18].

[97] Attachment A to Mr Goodsell's statement: Email from Dr Casolin to Mesaglio – AB 89.

[98] Transcript of first instance hearing at PN765, PN766-772 – AB 1398.

[99] Sydney Trains' outline of submissions in the appeal at [19].

[100] Decision at [117].

[101] Decision at [151]-[157].

[102] *Fox v Percy* (2003) 214 CLR 118.

[103] Decision at [44] – [56].

[104] Decision at [158] – [159].

[105] *Hilder* at [38].

[106] Sydney Trains' outline of submissions in the appeal at [23]; Transcript of first instance hearing at PN402-403 – AB1366.

[107] Sydney Trains' outline of submissions in the appeal at [24].

[108] Sydney Trains' outline of submissions in the appeal at [24](a).

[109] Sydney Trains' outline of submissions in the appeal at [24](d).

[110] Submissions at [18](c), AB 164.

[111] *Hilder* at [39].

[112] *B, C & D v Australia Post* (2013) 238 IR 1 at [106]; *Ventia Australia v Martin Pelly* [2023] FWCFB 201 at [108].

[113] Sydney Trains' outline of submissions in the appeal at [28].

[114] Statement of Goodsell, [6], AB72; RXE Goodsell, PN133-135 AB1339.

[115] Statement of Goodsell, [12], AB73.

[116] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 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].

[117] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24] – [27].

[118] *Wan v Australian Industrial Relations Commission and Another* (2001) 116 FCR 481 at [30].

[119] (2000) 203 CLR 194.

[120] Ibid at [20].

[121] Ibid at [21].

[122] *House v The King* (1936) 55 CLR 499 at [504]-[505] per Dixon, Evatt and McTiernan JJ.

[123] Ibid.

[124] *Fair Work Act 2009* (Cth) s.400(2).

[125] *Gelagotis v Esso Australia Pty Ltd T/A Esso* [2018] FWCFB 6092 at [43].

[126] *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177 at [43] per Buchanan J (with whom Marshall and Cowdroy JJ agreed).

[127] [2012] FWAFB 3540.

[128] Ibid at [25].

[129] [2014] FWC 2327.

[130] [2014] FWCFB 2327 at [13].

[131] Ibid at [11].

[132] Ibid at [42].

[133] [2014] FWCFB 6249 at [6].

[134] Ibid at [9].

[135] [2011] FWAFB 1166.

[136] *Toms v Harbour City Ferries* [2015] FCAFC 35 (Allsop CJ and Siopsis J agreed with the judgement and orders of Buchanan J).

[137] [2015] FCAFC 35 at [100].

[138] (2001) 207 CLR 584.

[139] Ibid at [83].

[140] [2015] FCAFC 35 at [101].

[141] [2014] FWC 2327.

[142] Ibid at [14](h).

[143] Op. cit. at [63].

[144] *Owen Sharp v BCS Infrastructure Support Pty Limited* [2014] FWC 7310.

[145] Ibid at [28].

[146] [2015] FWCFB 1033.

[147] Ibid at [24].

[148] *Sharp* at [26] – [27] citing *B, C and D* at [42] – [43].

[149] An inactive cannabinoid metabolite.

[150] *Hilder* op. cit. at [30].

[151] Ibid at [31].

[152] Ibid at [32] and [34].

[153] *Toms v Harbour City Ferries* [2015] FCAFC 35 at [99].

[154] Ibid at [7], 30], [36] and [40].

[155] *Hilder* op. cit. at [39].

[156] *Lovell v Lovell* (1950) 81 CLR 513 at 533; *Australian Coal and Shale Employees' Federation v Commonwealth* (1953) 94 CLR 621 at 627, per Kitto J; *Waters v Commonwealth (Australian Taxation Office)* (2015) 108 ACSR 445; [2015] FCAFC 46 at [60] per Katzman J with whom North J agreed.

[157] *Toms v Harbour City Ferries Pty Limited and Fair Work Commission* [2015] FCAFC 35 at [101].

[158] [2021] FWAFB 1166 at [18] – [19].

[159] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191; *BlueScope Steel Ltd (t/a BlueScope Steel Ltd Springhill Works) v Habak* [2019] FWCFB 5702; *Qantas Airways Ltd v Dawson* [2017] FWCFB 41; *DP World Sydney Ltd v Lambley* [2013] FWCFB 9230.

[160] [2013] FWCFB 6191.

[161] Ibid at 42 – 43.

[162] Appeal Book 0058 – 0059.

[163] Appeal Book 0163.

[164] Appeal Book 0072 – 0101.

[165] Appeal Book 0164.

[166] Appeal Book 0128.

[167] *Toms v Harbour City Ferries Pty Ltd* [2014] FWC 2327 at [62].

[168] Transcript PN219 Appeal Book 1351.

[169] Transcript PN210 Appeal Book 1349.

[170] Transcript of first instance proceedings PN450 – 456, Appeal book p. 1370.

[171] Witness statement of Mr Goodsell [12] Appeal book p. 73.

[172] Transcript of first instance proceedings PN556 – 557, Appeal book p. 1381.

[173] *Blagojevic v AGL Macquarie Pty Ltd* [2018] FWCFB 4174 at [48].

[174] Appeal Book 0143.

[175] *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [23] per Gleeson CJ, Gummow and Kirby JJ.

[176] *Robinson Helicopter v McDermott* [2016] HCA 22; 331 ALR 550 at [43].

[177] Op. cit. at [30].

[178] Transcript of first instance proceedings PN532 – 537, Appeal book p. 1381.

[179] *B, C and D v Australia Post* op cit at [37]

[180] See the discussion in *B, C and D* op. cit. at 42 where the Full Bench categorised circumstances bearing on whether a dismissal for misconduct is harsh, unjust or unreasonable.