# DECISION

*Fair Work Act 2009*
s.394—Unfair dismissal

**Adam Mills**
**v**
**Glamorgan Spring Bay Council**
(U2024/7491)

DEPUTY PRESIDENT CLANCY MELBOURNE, 15 JANUARY 2025

*Application for an unfair dismissal remedy – use of prescribed medicinal cannabis considered – applicant dismissed following a positive test result for Delta-9-tetrahydrocannabinol (THC) on the basis that he was impaired and therefore unfit for work or unable to perform his work safely – no current globally accepted definition of impairment or agreement as to how to accurately measure it – authority that findings about whether an employee was impaired at work should be made by the Commission with caution and based on clear and cogent evidence considered– no such finding made in this case – valid reason for dismissal because the applicant failed to disclose use of prescription medicinal cannabis containing THC – dismissal nonetheless unfair because Commission satisfied the non-disclosure was unintentional and the respondent failed to consider other options available under its applicable Alcohol and Other Drugs Policy – reinstatement considered appropriate – actions of Australian Services Union in failing to assist with preparation for and representation at hearing condemned.*

**[1]** Mr Adam Mills has made an unfair dismissal application pursuant to s.394 of the *Fair Work Act 2009* (Cth) (**the Act**). The Respondent to the unfair dismissal application is Glamorgan Spring Bay Council (**the Respondent**). The application proceeded to a hearing before me, at which time Mr Mills was self-represented and gave evidence. The Respondent was granted permission to be represented by lawyers and led evidence from Mr Darren Smith, Works Manager, and Ms Pamela Sinclair, its People Services partner at the material times. In addition, the Respondent relied on the testimony of Dr Robert McCartney, Occupational Physician.

**Initial matters to be considered – s.396 of the Act**

**[2]** The application was made within the required 21-day period after the dismissal took effect on 12 June 2024 (s.396(a) of the Act). There was no dispute that Mr Mills is a person protected from unfair dismissal because he completed the minimum employment period, the *GLAMORGAN SPRING BAY COUNCIL Enterprise Agreement 2022-2025* (**Agreement**) applied to his employment and he had an annual rate of earnings less than the applicable high-income threshold (s.396(b)). Further, it is not disputed, and I am satisfied, that the Respondent was not a small business employer, such that the question of whether the dismissal was consistent with the Small Business Fair Dismissal Code (s.396(c)) does not fall for

determination. Finally, it has not been claimed by the Respondent, and nor does the material before me suggest, that the dismissal was a case of genuine redundancy (s.396(d)).

**Section 385 of the Act – was the dismissal unfair?**

**[3]** As to the circumstances set out at s.385 of the Act, there is no question or dispute that Mr Mills was dismissed (s.385(a)). Further, as outlined above, this is not a matter that involves a small business and the consequent consideration of whether the dismissal of Mr Mills was consistent with the Small Business Fair Dismissal Code (s.385(c)). Nor is it one which requires the Commission to consider whether the dismissal was a case of genuine redundancy (s.385(d)). Only s.385(b) remains to be considered and I must determine whether the dismissal of Mr Wills was harsh, unjust or unreasonable.

**Background**

**[4]** Mr Mills commenced employment with the Respondent on 10 September 2018 in the position of Road Maintenance worker. At the time of his dismissal, Mr Mill held the position of a Works Officer. This required construction and maintenance work in rural and urban settings. Mr Mills described his duties as including the maintenance of roads, footpaths and parks, fixing signs, felling trees, clearing road verges and operating machinery. Mr Mills gave evidence that he was licensed and required to drive/operate trucks, bobcats, utility vehicles, excavators, front-end loaders and rollers.[1] Mr Mills performed some of his duties alone and some with other workers.

**[5]** In August 2020, Mr Mills was injured at work when using a bobcat. The injury occurred when Mr Mills's left foot was struck by a heavy steel ramp that is used to convey the bobcat from ground level onto a trailer. Mr Mills required 6 months off work following the resulting fractures and although they healed, he was left with chronic pain and had to wear special gumboots at work to combat the uncomfortable foot swelling he was experiencing. Various unsuccessful attempts were made to manage the pain, including cortisone injections, nerve blocks and morphine patches. Mr Mills disliked using the morphine patches because they made him feel nauseous and drowsy and he was concerned that he would develop an addiction to them.

**[6]** The evidence reveals Mr Mills was referred for the prescription of medicinal cannabis in early 2023 and first prescribed it in June 2023.[2] Mr Mills stated that he advised the Respondent that he was using medicinal marijuana at night that had been prescribed by his doctor. Mr Darren Smith confirmed that he and Mr Mills' supervisor (Mr Cleve Smith) had been informed by Mr Mills that he had received a recommendation to try medicinal cannabis. Mr Darren Smith said he sighted a letter from a sports injury specialist to Dr Winston Johnson, Mr Mills' treating General Practitioner, that outlined a recommendation that Mr Mills try CBD taking medicinal cannabis.[3] Mr Darren Smith stated that in response, he and Mr Cleve Smith said this would be acceptable provided Mr Mills obtained a letter from his doctor "*to say that he was right to work.*"[4]

**[7]** Mr Darren Smith recalled seeing the letter from Dr Johnson dated 19 June 2023. In this letter, Dr Johnson outlined that:

1) Mr Mills had chronic foot pain for which no physical treatment was feasible;
2) Pain management formed part of Mr Mills' ongoing management;
3) The "*most effective pain management modality includes the use of Medical Cannabis*";
4) Mr Mills had been referred "for Cannabis prescribing which he will start soon" (sic); and
5) Mr Mills was "*safe to do his normal duties including driving and operating the equipment as part of his usual job description*."[5]

**[8]** Mr Mills continued in his employment and Mr Darren Smith confirmed that he continued to fulfil the requirements of his position. On 14 February 2024, Mr Mills was subjected to a random drug test at work. He advised he was taking medicinal cannabis during this process. Mr Mills' sample screened non-negative onsite for cannabinoids and was subsequently confirmed positive for Delta-9-tetrahydrocannabinol (**THC**) at 42 µg/L.[6] At that point, he was stood-down with pay pending further investigation by the Respondent.

**[9]** Mr Mills forwarded the Respondent a letter dated 19 February 2024 from Dr Johnson which stated Mr Mills uses "*Medical CBD that is prescribed*" and that "[*t]here is ample evidence re the efficacy of CBD in the pain setting. Australian Cannabis Prescribers College can be consulted."*[7] This prompted the Respondent to seek further information from both Dr Johnson and the medical practitioner it understood to be prescribing the medical cannabis. In a letter dated 28 February 2024, Dr Johnson replied:

1) "*Medical CBD with potential THC is very effective in some people with Mechanical and Neuropathic pain*";
2) Mr Mills' dose was calculated and titrated "*as to response*" and he had responded very well;
3) Mr Mills was not using any other medications at present; and
4) The use of Medical CBD is unlikely to impair Mr Mills' work performance.[8]

**[10]** The Respondent also received a letter from Dr Andrew Clawson from CDA Clinics – Cannabis Doctors Australia dated 28 February 2024, which detailed Mr Mills was being prescribed the following medical cannabis:

- Medicinal Cannabis Flower – Cornerfield T21 night flower; and
- Medicinal Cannabis Flower – Kind Medical Taurus 25:1.

**[11]** This letter also disclosed that Mr Mills had previously been prescribed a "*THC:CBD balanced oil*."[9]

**[12]** The Respondent decided to engage Dr McCartney to provide an assessment as to whether Mr Mills could safely perform the role of Works Officer. This prompted the Australian Municipal, Administrative, Clerical and Services Union Vic/Tas Authorities & Services Brand (**ASU**) to send the Respondent an email on 21 March 2024, in which it raised concerns about the report the Respondent was seeking. The ASU argued there had been no issues previously raised in relation to Mr Mills' performance or his fitness to perform his duties, asserted that the Respondent had been aware that Mr Mills had been prescribed medical cannabis since June 2023 and maintained that in the ensuing period, there had been no reported issues of concern raised regarding ability of Mr Mills to perform the inherent requirements of his Works Officer role.

**[13]** The Respondent replied on 26 March 2024, acknowledging that Mr Mills had been performing his duties without any obvious concerns but outlining that because of the results of the 14 February 2024 drug test, it required an understanding of whether Mr Mills could safely perform his duties as a Works Officer and if not, whether reasonable adjustments could be made so that Mr Mills could perform his role in a manner that was safe for him and others. In particular, the Respondent outlined its desire to obtain an understanding as to whether the presence of THC would impact the ability of Mr Mills to safely perform his duties. Ultimately, Mr Mills provided his consent to undergo an examination and for Dr McCartney to provide the Respondent with a written report and engage in discussions related to the findings.[10] On 10 April 2024, Mr Mills attended a telehealth assessment with Dr Hurst from Resile Pty Ltd, accompanied by Mr Ken Richardson from the ASU and Ms Sinclair. Following this, Dr McCartney prepared a report dated 8 May 2024 which was provided to the Respondent.[11]

**[14]** Commenting on the effect of the use of medicinal cannabis on Mr Mills' ability to undertake the inherent requirements of his role as Works Officer, Dr McCartney stated:

> "Despite not reporting any side effects Mr Mills is still at an increased risk of impairment and adverse events when taking medicinal cannabis and therefore, from the information provided and on the balance of probabilities, he is not fit to perform safety critical work while using medicinal cannabis for his chronic pain condition.
>
> From the information provided Mr Mills in his role as a works officer is required to undertake safety critical tasks (e.g. operating and driving heavy vehicles) and therefore would not be able to safely perform all the inherent requirements of his role while using medicinal cannabis."[12]

**[15]** Dr McCartney expressed the opinion that without effective treatment for Mr Mills' chronic pain, Mr Mills might be unable to perform activities of daily living effectively, which could in turn impact his ability to work as a Works Officer. Having outlined that Mr Mills was at an increased risk of impairment and adverse events if working with drugs in his system, Dr McCartney opined that Mr Mills was not currently fit to safely perform safety critical work and this impacted his fitness to perform the Works Officer role. Further, Dr McCartney detailed:

> "Reassessment for fitness for work may be appropriate when and if:
>
> - Mr Mills finds effective alternative treatment and it is confirmed he is no longer taking THC
> - Mr Mills reports his symptoms are managed on alternative treatment
> - Mr Mills has a negative drug test."[13]

**[16]** A letter dated 21 May 2024[14] informed Mr Mills of the Respondent's response to the report of Dr McCartney. The Respondent:

1) Characterised the advice of Dr McCartney as having been that there were no modifications that could be made to enable Mr Mills to perform the safety critical aspects of his role, forming the bulk of his duties, whilst taking medicinal cannabis;
2) Advised that it had been unable to identify any suitable alternative roles that were safe for Mr Mills to perform either while using medicinal cannabis or in light of his symptoms of chronic pain, and which fitted within his qualifications, skills and experience;
3) Communicated that it was considering terminating Mr Mills' employment on the ground that he was not able to fulfil the inherent requirements of his role; and
4) Invited Mr Mills to review and respond to the report of Dr McCartney, identify any alternative roles or duties he considered he could perform and respond to it "preliminary decision" to terminate his employment.

**[17]** Mr Richardson provided a response on behalf of Mr Mills in a letter dated 24 May 2024.[15] Mr Richardson advised that Mr Mills had an appointment with his treating doctor on 6 June 2024 and asserted that for the Respondent to consider the termination of Mr Mills' employment without allowing him to pursue alternate treatment regimes in consultation with his treating doctor was a denial of procedural fairness. It was also contended on Mr Mills' behalf that providing him with non-safety critical duties was an option and would afford him the ability to return to work while collaborating with his treating doctor in relation to alternative treatment. Mr Richardson suggested that Dr McCartney's report provided the pathway of pursuing alternative pain management that did not involve THC, a subsequent assessment of fitness for duty and resumption of full duties, with the Respondent having the capacity to make temporary, reasonable adjustments in the meantime and argued that in these circumstances, terminating the employment of Mr Mills would be premature and unreasonable.

**[18]** The Respondent delayed a proposed follow-up meeting until after the appointment between Mr Mills and his treating doctor on 6 June 2024. This meeting took place on 12 June 2024 in two sessions. The parties met in the morning and then there was a break, during which time Mr Mills and Mr Richardson were able to converse, before the parties reconvened in the afternoon.[16] In the afternoon session, Ms Sinclair read aloud (for the benefit of Mr Mills) a letter dated 12 June 2024 (**Termination Letter**).[17] In the Termination Letter, the Respondent outlined an account of what was discussed, which detailed Mr Mills having confirmed his attendance at the medical appointment and saying that there was no alternative pain medication available apart from a morphine-based drug that he did not want to take. The Termination Letter also records Mr Mills as having said that he was prepared to stop taking medication and "*push through*."

**[19]** The Termination Letter also recorded Mr Richardson's contention that the Respondent should allow for a further 4 weeks to pass to enable Mr Mills to consult with his doctor about alternative pain medication.

**[20]** The Termination Letter then outlined:

> "As discussed, Council has formed the view that you are unable to safely perform the inherent requirements of your role of Works Officer now, or within a reasonable time period. There are no reasonable adjustments that would enable you to perform your role.

> Whist you have indicated your eagerness to consider alternative medications, there is no evidence of an alternative medication nor of the expected timeframe in which you may be able to be reassessed for fitness for duties. Council has provided you with a reasonable opportunity to consult with your doctor, and we understand that you have consulted with your doctor, and so does not agree to a further four weeks period to conduct further inquiries.
>
> We have explored the possibility of alternative roles and duties within the Council that could accommodate your capabilities. We have consulted with the Works Manager both prior to and after the meeting on the 21st of May 2024. Whilst there is no legal requirement to create a new role for you to perform, we did consider whether it was possible to create a role that would align with your skills and medical requirements.
>
> Unfortunately, there are no suitable alternative roles for you to perform. The nature of your medical condition necessitates a role that is predominantly office-based, and unfortunately, there is no role that matches your skill set. Given the size and resources of our Council we cannot create a new position.
>
> **Decision to terminate your employment**
>
> After careful consideration Council has decided to terminate your employment, effective today, Wednesday, 12 June 2024."
>
> (**emphasis** in original)

**[21]** The Termination Letter itemised various entitlements for Mr Mills on termination, including 4 weeks' pay in lieu of notice, accrued and unpaid salary, payment in lieu of accrued annual leave, an ex gratia payment of Mr Mills' accrued long serve service leave and access to an Employee Assistance Program (**EAP**) for 6 months.

## Consideration

**[22]** In considering whether I am satisfied that the dismissal of Mr Mills was harsh, unjust or unreasonable, I must take into account the criteria outlined in s.387 of the Act and will do so below.

*Was there a valid reason for the dismissal relating to Mr Mills' capacity or conduct? – s.387(a) of the Act*

**[23]** In dealing with s.387(a) of the Act, the question the Commission must address is whether there was a valid reason for the dismissal relating to the employee's capacity or conduct (including its effect on the safety and welfare of other employees). The well-established principles applicable to the consideration required under s.387(a)[18] were outlined in *Sydney Trains v Gary Hilder*, as follows:

1) A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.

2) When the reason for termination is based on the misconduct of the employee, the Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.

3) A reason would be valid because the conduct occurred *and* it justified termination. There would not be a valid reason for termination because the conduct did not occur *or* it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).

4) For the purposes of s 387(a), it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).

5) Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).

6) The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.

7) The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).

8) An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context, the issue is whether dismissal was a proportionate response to the conduct in question.

9) Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable. [19]

**[24]** The Respondent submitted there was a valid reason for the dismissal of Mr Mills because he was unable to safely perform his role as Works Officer. The submission was based on the opinion of Dr McCartney.

**[25]** Dr McCartney's report dated 8 May 2024 noted that in February 2024, Mr Mills was taking the Cornerfield T21 night flower every night and the Kind Medical Taurus 25:1 during non-working days. At the hearing, Dr McCartney advised that both forms of the medication have THC in them.[20] This was confirmed by the drug confirmation certificate[21] arising out of the drug test on 14 February 2024 and through the testimony of Mr Darren Smith, who produced a photograph that Mr Mills had shown him on 19 February 2024 displaying his medication.[22]

**[26]** In his report, Dr McCartney stated in relation to THC:

> "It is well accepted that THC impairs performance of complex tasks including driving and safety-sensitive work. Hence the RACGP **[Royal Australian College of General Practitioners]** advises that patients using THC-containing products should avoid driving and other safety-sensitive tasks (e.g. operating machinery). There is an extensive body of research literature that describes the increased crash risk associated with THC."[23]
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> (footnotes omitted, bold text inserted)

**[27]** In his report, Dr McCartney had outlined that the RACGP advises that THC impairs driving performance and can increase crash risk, that these effects are more pronounced in people who use THC occasionally, and that they can last for up to eight hours with oral THC products. Dr McCartney described driving related impacts that may occur as including slower reaction times, increased lane deviations, decreased car handling performance, impaired time and distance estimation, the inability to maintain distance between vehicles and impaired sustained vigilance. Dr McCartney's opinion was that the taking of the Cornerfield T21 night flower every night and the Kind Medical Taurus 25:1 during non-working days affected Mr Mills' ability to undertake the inherent requirements of his Works Officer role, as follows:

> "Current evidence shows that taking medicinal cannabis can result in numerous adverse events including fatigue, nausea, impaired memory and concentration and confusion. Therefore, these adverse events could result in impairment of functioning of a worker, which is turn can negatively affect workplace health and safety.
>
> Mr Mills is still at an increased risk of impairment and adverse events when taking medicinal cannabis and therefore, from the information provided and on the balance of probabilities, he is not fit to perform safety critical work while using medicinal cannabis for his chronic pain condition."[24]

**[28]** Mr Mills was engaged pursuant to a *Letter of Offer* dated 21 August 2018,[25] which, together with a *General Terms and Conditions of Employment* document, was said to have constituted his contract of employment with the Respondent. In both the *Letter of Offer* and his position description as a Works Officer, the responsibilities of Mr Mills included ensuring that he consider and effectively manage safety in all aspects of his performance, comply with all policies and procedures of the Respondent and carry out his responsibilities in accordance with the Respondent's code of conduct. The Respondent's *Alcohol and Other Drugs Policy* (**Policy**)[26] also applied to Mr Mills. The Policy included requirements on the Respondent's workers, including Mr Mills, and effectively meant Mr Mills was required to:

1) comply with the Policy;
2) meet his duty of care obligations and be accountable for his own safety and the safety of others at work; and
3) present for work in a state where he was "not under the influence of Alcohol or Drugs" or in excess of the "*Fit For Work Limits*".[27]

**[29]** The Policy outlines that the Respondent may, at its absolute discretion, conduct random testing to determine *Fit For Work Limits*. In relation to alcohol and illicit drugs, the *Fit For Work Limit* requirements in the Policy are that workers are not to have a blood alcohol content exceeding 0.00 or illicit drugs present in their system at any time during which they are at work

and/or carrying out work. A range of Full Bench decisions of the Commission have considered cases of dismissal where, having been tested, the employee concerned had a level of cannabinoids in their system that was in excess of permitted thresholds under the applicable drug and alcohol policy (*Harbour City Ferries Pty Ltd v Toms* [2014] FWCFB 6249 (***Toms***), *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033 (***Sharp***), *Sydney Trains v Hilder* [2020] FWCFB 1373 (***Hilder***) and *Sydney Trains v Reece Goodsell* [2024] FWCFB 401 (***Goodsell***)). A scenario whereby an employee has attended for work and returned a non-negative test, or a test result in excess of prescribed limits has come to be described as a breach of a drug and alcohol policy *simpliciter*.

**[30]** The *Fit For Work Limit* requirements imposed by the Policy extend to prescription drugs, which are defined under the Policy as drugs prescribed by an individual's treating medical practitioner for a medical condition.[28] Under the Policy, workers are only permitted to possess or consume prescription drugs in the workplace in accordance with a prescription or other medical authority and where it does not represent "*an unreasonable health and safety risk*".[29] A worker is required to advise their manager/supervisor if they are taking any prescription drugs which may render them unfit for work and/or affect their ability to perform work safely[30] and to take reasonable steps to reduce the risk of the drugs impacting on their ability to safely perform work by reporting any side effects to their medical practitioner and seeking their advice.[31] If a worker is required to participate in drug testing, they are required to disclose, prior to participating in the test, whether they are using, taking or have recently taken or used prescription drugs, and complete and sign a disclosure detailing the prescription drugs they were using.[32]

**[31]** Significantly, the *Fit For Work Limit* requirement in the Policy that applies to prescription drugs differs from those which apply to alcohol and illicit drugs. For prescription drugs, the *Fit For Work Limit* requirement is that a worker is not to have prescription drugs present in their system at any time during which they are at work and/or carrying out work in any quantity which renders them unfit for work and/or affects their ability to perform work safely.[33]

**[32]** A breach of the *Fit For Work Limit* requirement in the Policy that applies to prescription drugs is not a breach of a drug and alcohol policy *simpliciter*, as was the case in each of *Toms*, *Sharp*, *Hilder* and *Goodsell*. The assertion of the Respondent that there was a valid reason for Mr Mills' dismissal was reliant on the opinion of Dr McCartney that if Mr Mills was taking the medicinal cannabis Cornerfield T21 night flower and Kind Medical Taurus 25:1, he was at increased risk of impairment and adverse effects and therefore not safe to perform the safety critical duties required of a Works Officer.[34]

**[33]** In *Goodsell*, the Full Bench confirmed that in 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) of the Act in relation to whether the impairment or present or future risk of impairment is a valid reason for dismissal. The Full Bench stated that the Commission is required to determine whether the conduct occurred or the belief that it would occur in the future, was sound, defensible, well-founded, and therefore a valid reason for dismissal.[35]

**[34]** The Full Bench in *Goodsell* also recommended that 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.[36]

**[35]** Dr McCartney completed his report in relation to Mr Mills a number of months after the random drug test on 14 February 2024. The opinion he expressed was that even though Mr Mills reported that he was experiencing no side effects from taking the medicinal cannabis, he is still at risk of impairment and adverse events when using medicinal cannabis and, "*from the information provided and on the balance of probabilities*", was not fit to perform safety critical work inherently required in his role of Works Officer. Dr McCartney also confirmed, however, that there is no current globally accepted definition of impairment nor agreement as to how to accurately measure it,[37] and he opined that the mere presence of THC in blood or oral fluid THC does not reliably predict impairment.[38] That there has been and remains no direct scientific test for impairment arising from the use of cannabinoids has long been observed by this Commission, and the problem faced by employers of how to properly assess whether an employee is impaired continues.[39] In addition to Mr Mills' denial of any side effects, it would seem Mr Mills worked without incident for the period during which he was taking medicinal cannabis. There was no evidence from any employee of the Respondent that Mr Mills appeared to be unfit for work while carrying out his duties, or unable to perform his work safely, either prior to or on 14 February 2024. On the contrary, Mr Darren Smith gave evidence that Mr Mills had fulfilled his role to all the requirements.[40]

**[36]** The Respondent appeared to advance, as an alternative submission, that the combination of the advice from Dr McCartney that Mr Mills needed to find effective, alternative treatment that managed his symptoms before he could be reassessed as being fit for work and the advice it had received from Mr Mills that there were no alternative treatment options, supported the conclusion that Mr Mills was not fit to safely perform the inherent requirements of his role.

**[37]** This gave rise to the following exchange:

> "THE DEPUTY PRESIDENT: Does Dr McCartney's report rise to that level? Your proposition is that it seems to move from the impact of working whilst using medicinal cannabis to, all right, well, if he's not using medicinal cannabis, he's still going to be – it's still going to be unsafe for him to perform his normal duties. What do you base that upon, that proposition?
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> MS BARCLAY: Page 162 of the court book - - -
>
> THE DEPUTY PRESIDENT: Yes.
>
> MS BARCLAY: - - - we present that answer for question 9, taken in context of the answer on page 161 to question 5. We would submit that McCartney (indistinct) that while on medicinal cannabis, Mr Mills is not able to safely perform – he's not able to perform safe critical tasks, and secondly, that having come to that opinion, that his fitness to work was – the reassessment of his fitness to work would be appropriate when and if he finds effective alternative treatment.

THE DEPUTY PRESIDENT: Right.

MS BARCLAY: We would submit there is no evidence – there was no evidence at the time of dismissal that he had found effective alternative treatment.

THE DEPUTY PRESIDENT: Okay. Because Dr McCartney gave qualified evidence as to any physical barriers to Mr Mills performing his role. He said he would need to do a physical examination and have a functional capacity assessment carried out. Your proposition seems to be a narrow one in that you're saying that the Commission should accept that putting the physical impact of the ankle injury to one side, Mr Mills is only going to be fit for work when he's no longer taking THC, returns a negative drug test, and is on alternate pain relief.

MS BARCLAY: Well, we would submit that in circumstances where council had available this report, it was the case that he was unfit to perform work while on medicinal cannabis, and that if he were to cease using medicinal cannabis, there would have to be, on the medical evidence, an effective alternative treatment which managed his symptoms, and that Mr Mills had not produced any treatment options, and in fact, had told the council at the meeting on 12 June that there were no treatment options available.

(interjection from Mr Mills…)

THE DEPUTY PRESIDENT: Yes, but Dr McCartney also said, 'I can't speak to the physical state of Mr Mills. I wasn't asked to give an opinion on that'. **Your case seems to rest on Mills couldn't have performed his job unless he was on some form of pain relief.**

(interjection from Mr Mills…)

MS BARCLAY: **Not that he couldn't have, but it wouldn't be safe for him to do so**.

THE DEPUTY PRESIDENT: Where's the opinion that says it's unsafe?

MS BARCLAY: I can't take that any further, Deputy President."[41]

**[38]** I am not persuaded that this evidence from Dr McCartney rose to the level of asserting that it would not be safe for Mr Mills to work in his role as a Works Officer without effective pain management. Dr McCartney's opinion was that without effective treatment, Mr Mills may be unable to perform activities of daily living effectively, which in turn could impact his ability to work in his role as a Works Officer.[42] Further, at the hearing, Dr McCartney conveyed the following recommendation:

> "…And that re-assessment for fitness for work might – may be appropriate when and if Mr Mills finds effective alternative treatment?

> That is my recommendation: if he can find effective treatment without medication that has such concerning side effects when it comes to performing safety-critical work safely, then re-assessment on fitness for work would be appropriate. I can't give an opinion on what I would think then because then I'd be looking in much more detail about the foot, the ankle and whatever medications Mr Mills may be put on – any side effects, et cetera. **So I wouldn't want to give an opinion now as to whether I would think he was fit for work.** I would have to do another assessment and look at all of that and get something down – someone to do a very specific functional assessment. But it is my opinion that if he was no longer taking medicinal THC, and reports his symptoms are controlled and shows he has a functional capability of doing the job safely then it is likely the opinion on fitness for duty would be different to the one offered in this report, which is based – predominantly addressing the THC issue"[43]
>
> (**my emphasis**)

**[39]** Having regard to the nature of the evidence before me and the prevailing circumstances associated with testing for impairment, I am reticent about making a finding as to whether Mr Mills was unfit for work or unable to perform his work safely. However, regardless of the Respondent's purported reason for Mr Mills' dismissal and contentions in support, the Commission must decide for itself whether there were circumstances that constituted a valid reason to terminate the employment, not whether the reason relied on by the employer was a valid reason.[44]

**[40]** In this case, the Policy required Mr Mills to advise his manager/supervisor if he was *"taking any OTC and/or Prescription Drugs which may render them unfit for work and/or affect the Workers (sic) ability to perform work safely*" (**the Notification Requirement**).[45] I am satisfied that in or around June 2023, Mr Mills informed the Respondent that he would be using prescribed medicinal cannabis and provided the advice of his treating medical practitioner that it was safe for him to perform his normal duties, including driving and operating the equipment he was required to operate as part of his usual duties. Mr Darren Smith attested to having requested and seen such advice. Mr Darren Smith also gave evidence that it was his understanding that the medicinal cannabis was to be CBD medicinal cannabis because he had sighted another letter from a sports injury specialist to Dr Johnson outlining the recommendation that Mr Mills try CBD medicinal cannabis. I am satisfied there was no breach of the Notification Requirement in relation to the CBD medicinal cannabis. Additionally, having regard to the following testimony of Dr McCartney, I am satisfied that while Mr Mills was taking the CBD medicinal cannabis he could not have offended the *Fit For Work Limit* requirement imposed by the Policy:

> "CBD doesn't have that side effect of impacts on people's ability to do safety critical work. It can be taken safely. It doesn't have a positive drug test result, either on the roadside or in the workplace, and the evidence does remain that if you were just using that particular cannabinoid, CBD, then it doesn't impact on fitness for duty."[46]

**[41]** However, by the time Mr Mills was subjected to the random drug test at work on 14 February 2024, he was taking medicinal cannabis which included THC. This was confirmed by both Dr McCartney, who advised that both forms of the medication Mr Mills was being prescribed in February 2024 have THC in them,[47] and the drug confirmation certificate arising

out of the drug test on 14 February 2024.[48] Mr Darren Smith also testified that Mr Mills advised him on 19 February 2024 that while he had started on CBD medicinal cannabis, his prescribing doctor changed the medication to THC medicinal cannabis after a few months because the CBD did not work.[49] This would appear to be consistent with the 17 August 2023 date on the photograph of the medication that Mr Mills showed Mr Darren Smith on 19 February 2024.[50]

**[42]** Dr McCartney gave evidence that the THC was "*the problem*",[51] and more specifically:

> "It is well accepted that THC impairs performance of complex tasks including driving and safety-sensitive work. Hence the RACGP [**Royal Australian College of General Practitioners**] advises that patients using THC-containing products should avoid driving and other safety-sensitive tasks (e.g. operating machinery). There is an extensive body of research literature that describes the increased crash risk associated with THC."[52]
>
> (footnotes omitted)

**[43]** Mr Darren Smith gave evidence that he delivered a presentation on the Policy on 14 September 2022 which had been attended by Mr Mills, confirmed the conducting of random drug testing, made reference to prescription medication and involved the issuing of copies of the Policy.[53] Mr Mills remembered attending this session, receiving a "*pamphlet*" and that there was discussion about these things.[54] I also note that having had the dialogue with the Respondent in relation to the CBD medicinal cannabis in June 2023, Mr Mills appeared to be aware of the Notification Requirement. However, it would appear that before he underwent the random drug test at work on 14 February 2024, Mr Mills had not advised the Respondent that he was taking prescription drugs with THC in them, and which may have rendered him unfit for work and/or affected his ability to perform his work safely.[55] Therefore it is open to conclude that this failure to disclose the medicinal cannabis with THC was a breach of the Notification Requirement in clause 6.1(c) of the Policy.

**[44]** Not every established breach of a requirement of a workplace policy will constitute a valid reason for dismissal. However, producing a non-negative drug test result and confirmatory drug test result from the use of a prescription drug which may impact on a worker's ability to perform work safely and about which an employer has not been notified, is a serious matter. There are serious risks associated with managing a workplace in which an employee may or may not have attended for work impaired by drugs, particularly because accurately measuring impairment remains elusive. As outlined in *Goodsell*, the risks are not limited to possibility of injury to the impaired employee or to other employees but may also extend to the risk of legal liability of the employer to other employees, clients, customers or third parties and the reputational damage to the employer.[56]

**[45]** I am satisfied there was a breach of the Notification Requirement in Policy and that this was a matter of sufficient gravity to constitute a sound, defensible, well-founded and, therefore, valid reason for Mr Mills' dismissal, because it resulted in him attending for work without there having been the opportunity for the carrying out of any risk assessment. Mr Mills was required to fell trees, drive different vehicles and operate plant and machinery such as excavators, front-end loaders and rollers. Mr Mills worked alone and with others and he was obligated to perform his duties in a safe manner. The purposes of the Policy include fulfilling the Respondent's

commitment to providing a safe workplace and the implementation of strategies to limit, manage and control the risk of drugs in the workplace. The Policy requires workers to present for work in a state where they are not under the influence of drugs. I am satisfied that compliance with the Policy was a fundamental element of Mr Mills' employment in the sense discussed in *Hilder*. I am satisfied the failure of Mr Mills to comply with the Notification Requirement and advise the Respondent that he was taking medicinal cannabis with both THC and CBD constituted a valid reason for his dismissal. This is because it denied the Respondent the opportunity, during the period between Mr Mills commencing the course of medicinal cannabis with THC in it and his drug test on 14 February 2024, to assign Mr Mills suitable alternative duties, or seek further clarification from his treating medical practitioner as to whether he could perform work safely, and/or direct him to provide a clearance from his medical practitioner indicating he was able to perform work safely, all of which are contemplated by clause 6.1(d) of the Policy. It also denied the Respondent the opportunity to take other precautionary steps, such as seeking the opinion of Dr McCartney.

**[46]** That I have concluded there was a valid reason for Mr Mills' dismissal related to his conduct weighs in favour of a finding that his dismissal was not unfair.

*Notification of 'that reason' – s.387(b) of the Act*

**[47]** Consideration of s.387(b) of the Act in this matter requires asking whether Mr Mills was notified of "*that reason*", which is a reference to the valid reason referred to in s 387(a). I do not consider the fact that Mr Mills was not notified of the valid reason I have found to have existed in this case is a factor that weighs in favour of a finding of unfairness because the Respondent notified Mr Mills of the reason it considered was a valid reason for his dismissal.

*Opportunity to respond to 'any reason' related to the capacity or conduct – s.387(c) of the Act*

**[48]** Mr Mills was given an opportunity to respond to the reason related to capacity that the Respondent gave for his dismissal and as such this is not a factor that weighs in favour of a finding of unfairness.

*Any unreasonable refusal by the employer to allow a support person – s.387(d) of the Act*

**[49]** There was no refusal by the Respondent to allow Mr Mills to have a support person to be present to assist at the discussions relating to the dismissal. In the circumstances of this case, this factor is a neutral consideration.

*Warnings regarding unsatisfactory performance – s.387(e) of the Act*

**[50]** The Respondent did not dismiss Mr Mills on the basis of unsatisfactory performance, so this consideration is not a relevant factor in this case.

*Impact of the size of the employer on procedures followed – s.387(f) of the Act and absence of dedicated human resources management specialist/expertise on procedures followed – s.387(g) of the Act*

**[51]** I have noted that the Respondent had 60 employees at the time of Mr Mills' dismissal and that it has submitted s.387(f) of the Act is a neutral consideration. I do not consider the Respondent's size impacted on the procedures followed in any discernible respect. In terms of s.387(g), I observe that the Respondent had access to Ms Sinclair, who was engaged as its People Services Partner at the material times. As such, s.387(g) is not a relevant consideration in this case.

*Other relevant matters – s.387(h) of the Act*

**[52]** Mr Mills submitted that the dismissal was harsh in reference to his work history and personal circumstances. Mr Mills is a 43-year-old single parent raising 4 children with the assistance of his mother. In doing so, he has had sole responsibility for raising his now 10-year-old daughter since she was 6 months old. Mr Mills completed almost 6 years of employment with the Respondent without any prior incidents the Respondent had considered serious enough to warrant a disciplinary response or performance management. Mr Mills gave evidence that he was injured at work in 2020 and returned to work suffering from chronic pain resulting from the injury he had sustained. He continued to work from 2021 until 2023 without effective pain relief until mid-2023. During this time, he said he just pushed through the pain and got his work done. This was confirmed by the evidence of Mr Darren Smith, who said that Mr Mills had had been doing good work on projects assigned to him[57] and, as outlined above, had fulfilled his role to all the requirements.[58] As recounted above, Mr Mills commenced using medicinal cannabis in mid-2023, after informing the Respondent of the medical advice he had received and submitting the 19 June 2023 letter from his treating General Practitioner. Mr Mills submits he has a track record of fulfilling the requirements of his role without having taken medical cannabis.

**[53]** Mr Mills lives in regional Tasmania, in Triabunna. He described Triabunna as having limited employment opportunities, with the Respondent being one of the largest employers. At best, Mr Mills has an extremely limited capacity when it comes to literacy. He described his efforts to attain reading and writing capability by attending a literacy course. Mr Mills submits he will find it difficult to obtain suitable alternative employment for reasons including, but not limited to, his injury, his restrictions and his struggles with literacy. Mr Mills explained one of the impacts of his dismissal on his ability to secure employment in the following terms:

> "*Every contractor that came to the council asked for me to go work with them because I was the only one who'd go there and do the job and they were trying to poach me from the council, but they're not trying to poach me now because everyone thinks I've messed the council around and they - really, the council's messed me around. They've ruined my working name. I've never been sacked from a job in my life.*"[59]

**[54]** In addressing s.387(h) of the Act, the Respondent submitted that it took special steps to ensure that it explained to Mr Mills the actions that it was taking and the reason for those actions to accommodate his low levels of literacy and in response to the advice from Mr Mills that he

cannot read. The Respondent outlined that each of the relevant letters were read to Mr Mills and all meetings occurred in person with Mr Mills' union representative present.

**[55]** As was held in *Hilder*, matters raised in mitigation of misconduct which has been found to have occurred are to be brought into account in relation to the s.387(h) of the Act as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable.[60]

**[56]** I am satisfied Mr Mills acted without malevolence in failing to comply with the Notification Requirement. Having regard to his testimony and my observation of Mr Mills, I am open to the possibility that Mr Mills did not appreciate the significance of commencing the course of medicinal cannabis with some THC in it and consider it most likely that he simply acted on the clinical recommendations of his treating medical practitioner(s) throughout. In reference to the circumstances which had befallen him, Mr Mills stated at the hearing:

> "…I talked to the doctor about something to help me sleep at night a bit better and now this has happened, I've lost my job. I said to the doctor, 'Work won't approve it. Work won't approve it.' He said, 'They have to.' The doctor led me wrong too, the doctor led me wrong, but I went to them, they approved it.
>
> Yes? -I didn't go on it and then go to them. I went to them, they approved it, then I went back to the doctor and said, 'Well, work's approved it.' Then I went on it and then I failed a drug test, they sent me back to work, driving. Six months later, failed a drug test, they sent me back to work and then I'm on my RDO - on my birthday, sitting at home, get a phone call, 'Sorry, Adam, we've got to stand you down for work because of medical marijuana."[61]

**[57]** Secondly, I consider that the Respondent proceeded directly to the termination of Mr Mills' employment without giving due consideration to the terms of the Policy, including one of its purposes which specifically states that an aim of the Policy is to provide a fair and flexible approach to alcohol and other drugs matters which "*takes into consideration the individual, operational and environmental circumstances*."[62] Having regard to various other provisions in the policy, I consider the Respondent should have adopted an alternate approach.

**[58]** The Policy outlines the consequences when there is a failure to comply with *Fit For Work Limits*[63] in relation to prescription drugs and/or a failure to disclose use of prescription drugs.[64] The Policy provides that in the event of non-compliance, the Respondent will, at its discretion and having regard to the circumstances, take appropriate action in accordance with its contractual, legislative or other obligations which may include removal from the workplace or termination of services, or other disciplinary action in accordance with the Respondent's Disciplinary Policy. The Policy then outlines the range of possible disciplinary or other action for employees who fail to comply with *Fit For Work Limits* or fail to disclose use of prescription drugs, which may include, but is not limited to:

(i) the termination of employment;
(ii) exclusion from carrying out a particular type of work/duties;
(iii) a written warning;
(iv) prescribed testing for Drugs over a period of time as part of a rehabilitation or return to work program;[65]

(v) referral or direction to participate in EAP, action under the Fitness for Work Policy, return to work program and/or a rehabilitation program;
(vi) direction not to attend work (stand down);
(vii) direction to return home at their own cost by the safest available alternative method to them driving their own or work vehicle; and/or
(viii) a combination of any of the above or part thereof.[66]

**[59]** In clause 11, the Policy outlines that in order to facilitate appropriate health outcomes and ensure that workers are able to work in a manner that is not a risk to themselves, other workers or others in its workplace, the Respondent will, at its discretion and "*as reasonably appropriate in the circumstances*", provide confidential support and assistance to Employees committed to addressing "*the abuse or inappropriate use of Alcohol and/or Drugs*" by referring them to an EAP and/or rehabilitation program "*offered and run by a reputable organisation directed at addressing Alcohol and/or Drug abuse*",[67] which the Respondent might also agree to fund.[68]

**[60]** Acknowledging that there is no suggestion in this matter that there was drug abuse engaged in by Mr Mills, I observe that the Policy also recognises that drug abuse can be successfully managed and enunciates a commitment to reasonably assisting employees who suffer from "these problems", without relieving workers of responsibility for their actions and continuing to ensure the safety of all workers, and other persons, in the Respondent's workplace.[69]

**[61]** The Respondent submits that it had given Mr Mills additional time to meet with his GP to discuss alternative pain relief following which he was terminated in the meeting of 12 June 2024. The Respondent asserts that at this meeting, Mr Mills said there was no alternative pain medication to take other than a morphine-based drug. While Mr Mills may have told the Respondent there were no treatment options available as at 12 June 2024, I am not persuaded that this was the final position. Mr Mills asserted the position was "*misworded*" in the Termination Letter[70] and I have considered the following testimony given under cross-examination:

> "I put to you that at that meeting you told the Council that you had spoken to your doctor? -Yes.
>
> And that your doctor had said there were no other options other than a morphine patch? -At that time till he looks into it, yes. Till he gets more feedback, what I want to be on. What can help me. Yes, that was all he could do at the time.
>
> I put to you that you only told Council that the doctor said that there were no other options other than the morphine patch? -Well, that would be wrong if I said – even they had to believe that there was no other options. There's always options.
>
> Well, I put to you that you told them that there were no other options? -No. I will disagree with that. Because I wouldn't have said it like that. Because there's always options. It depends what options I want to take during my life to what affects me. So the doctor was looking into it to get more studies and look into what natural stuff, because I don't want to take morphine and all that so he was looking and – yes."[71]

**[62]** My view that a final position in relation to alternative pain treatment had not been reached as at 12 June 2024 is supported by the reference in the Termination Letter to Mr Richardson having suggested that Mr Mills had not been given reasonable time to consider alternative pain medication and that the Respondent should allow a further four weeks for Mr Mills to consult with his doctor about alternative pain medication.

**[63]** In summary, I am satisfied that Mr Mills acted without malevolence in failing to comply with the Notification Requirement and I am not persuaded that the Respondent gave Mr Mills sufficient time to explore other pain treatment or that it gave fulsome consideration to the purposes of the Policy and the options it made available for consideration and application. I consider that in its haste to terminate the employment of Mr Mills, the Respondent failed to give consideration to the options of an EAP tailored to his circumstances and/or a return to work program and/or a rehabilitation program.

**[64]** Nor was the Respondent open to giving Mr Mills the option of resuming his duties while not using medicinal cannabis, despite the desperation and determination of Mr Mills to keep his job, even if it meant carrying out his duties in physical discomfort.

**[65]** Mr Mills impressed as a valuable and dedicated worker with a no-nonsense and can-do attitude to his work. Mr Mills also impressed as a father devoted to the welfare of his children and fervent about instilling in them good values. Moreover, Mr Mills was the personification of the fundamental importance a person's job has to their economic independence and sense of self-worth and dignity. Mr Mills was deserving of a second chance and the ongoing support and understanding of his employer, not termination with immediate effect. Having regard to the circumstances of this case, I consider the s.387(h) matters weigh strongly in favour of a finding that Mr Mills' dismissal was harsh and unreasonable.

**Conclusion on the merits**

**[66]** I have made findings in relation to each matter specified in s.387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[72] While I am satisfied there was a valid reason for Mr Mills' dismissal and that the factors in ss.387(b)-(g) are either neutral or do not weigh in favour of a finding of unfairness, when weighed against the consideration of the matters falling under s.387(h) in this case, I am persuaded that the dismissal of Mr Mills from his employment was neither a proportionate nor appropriate response to the conduct in question and was, in the result, harsh and unreasonable.

**Remedy**

**[67]** Section 390 of the Act provides that, if the Commission is satisfied a person was protected from unfair dismissal and determines that that they were unfairly dismissed, it may order either reinstatement or compensation. Compensation can only be ordered, however, only if the Commission is satisfied that reinstatement is 'inappropriate' (s.390(3)(a)).

**[68]** A basis for reinstatement being considered inappropriate are circumstances where the employee is incapacitated by illness or injury, although the weight to be accorded to ongoing

incapacity when considering whether reinstatement is appropriate will depend upon all of the circumstances of the case.[73] The Respondent sought to emphasise that as at the date of the examination conducted by Dr Doig in July 2024, Mr Mills was still taking the medicinal cannabis. It emphasised that Dr Doig had reported (when responding to the question *"What if any treatment has been the most effective in aiding Mr Mills' recovery?*") that the medicinal cannabis still appeared to be assisting Mr Mills in his pain control. Based on this, the Respondent submitted reinstatement is not an appropriate remedy because Mr Mills is not fit to perform safety critical work while taking medicinal cannabis, and there was no evidence that his symptoms were currently being managed with an effective alternative treatment. The Respondent also submitted that Dr Doig's opinion was that Mr Mills could undertake work with significant restrictions but that this was predicated on his pain being controlled with medicinal cannabis.

**[69]** I have considered and rejected these propositions regarding Mr Mills' fitness for work above at [36]-[38] and I have noted that when it was put to Mr Mills at the hearing that he was still taking medicinal cannabis, he answered "*Yes. I do now and again, yes because I've got no reason to stop. Do I? Like you've just sacked me. Like – but I can stop. I can stop like that for my job*."[74]

**[70]** The Respondent did not squarely put that reinstatement was inappropriate on the basis that there has been a loss of trust and confidence such that it would not be feasible to re-establish the employment relationship. Regardless, any such submission must be soundly and rationally based.[75] Mr Mills' testimony indicated that he loved his job and was highly motivated to return to work. He submitted he had significant, demonstrated work capacity and suggested there would be no issues integrating back into the workplace because he would just do his job.[76] The onus of establishing a loss of trust and confidence rests on the party making the assertion.[77] Mr Darren Smith did not proffer that he had lost confidence in Mr Mills.

**[71]** Having regard to Mr Mills' skills, experience and ability, the Respondent argues there are no alternative duties or roles available for him to perform and advised that his former role of Works Officer had been filled by someone working as a casual employee. As to the latter consideration, it has long been established that the fact an employer has filled the position previously occupied by the dismissed employee will rarely, of itself, justify a conclusion that reinstatement is not appropriate.[78]

**[72]** I am persuaded that Mr Mills' job is so important to him that he would cease taking medicinal cannabis if reinstated, "push through the pain" and fulsomely explore alternative pain management options. I note that after Mr Mills' dismissal, Dr Graeme Doig, specialist in General Orthopaedics and Trauma, conducted a medico-legal assessment of Mr Mills on 26 July 2024. Dr Doig did not consider Mr Mills to be physically incapacitated, albeit he acknowledged Mr Mills experienced chronic pain and suggested a number of physical restrictions. The suggestions made by Dr Doig in relation to Mr Mills' capacity for work were couched in terms such as "*ideally*", "*try and avoid*" and "*may require*."[79] The Respondent purported to rely on a *Workers Compensation Certificate of Capacity*[80] completed by Dr Johnson but this was a curious document because it was issued on 9 August 2024 and referenced a consultation date of 2 May 2024. In any event, as that consultation predated Dr Doig's, I have preferred Dr Doig's report, and it has not persuaded me that Mr Mills is currently so incapacitated that he could not fulfil the inherent requirements of his role. Having regard to the

circumstances and material before me, I consider that the reinstatement of Mr Mills to the Works Officer position in which he was employed immediately before the dismissal is appropriate in this case and that such an order under s.391(1) of the Act should be made.

**[73]** I also consider that it is appropriate to make an order under s 391(3) of the Act that causes the Respondent to pay to Mr Mills the amount of remuneration that he has lost as a result of his dismissal because Mr Mills was dismissed in circumstances where the dismissal was harsh and unreasonable and he has suffered monetary loss. I am not persuaded that Mr Mills acted unreasonably following his dismissal in terms of his attempts to find new employment. I accept his evidence that his employment prospects in the Triabunna region were extremely limited and that his personal circumstances were challenging. I have noted that Mr Mills took steps to improve his literacy, undertook continuing rehabilitation efforts in relation to his left foot and ankle and was consulting psychologists and a drugs counsellor. [81]

**[74]** Based on the evidence before me, it is apparent:

1) Mr Mills had a gross annual salary of $61,710.00;
2) The Respondent paid 4 weeks' salary in lieu of notice;
3) The Respondent made payment in lieu of annual leave accrued as at 12 June 2024;
4) The Respondent made an ex-gratia payment calculated according to Mr Mills' long service accrual of 283.0375 hours as at 12 June 2024, being a gross amount of $8,839.26;
5) Mr Mills commenced receiving some income on or about 15 September 2024, albeit it would not appear that this was remuneration from new employment;[82]
6) The timing of the payments made to Mr Mills on termination had implications for his taxation liability, at least in the short term; and
7) There have been 31 weeks since Mr Mills' dismissal.

**[75]** I consider that Mr Mills was very poorly treated and that it is appropriate in all the circumstances of this case to make an order that causes the Respondent to pay to Mr Mills the amount which equates to the balance of 31 weeks' gross pay, **less** the gross amounts of the 4 weeks' salary paid in lieu of notice and the gross amounts paid on termination for his accrued annual and long service leave, **less applicable taxation**.

**[76]** I further consider it is appropriate to make orders under ss.391(2)(a) and (b) of the Act because Mr Mills was dismissed in circumstances that were harsh and unreasonable, and having regard to the factors I outlined in [63] above. The orders I make in this regard are to have the effect of restoring the annual leave and long service leave accruals of Mr Mills to the amounts accrued as at 12 June 2024 plus what has accrued since then so as to maintain the continuity of his employment and the period of his continuous service.

**[77]** The order I make to give effect to this decision will require payment of the compensation amount by the Respondent within 14 days after the date of the order. The order is published contemporaneously with this decision in PR783247.

**Additional Matter**

**[78]** The unfair dismissal application of Mr Mills was lodged on 28 June 2024 by the ASU. I issued initial directions dated 13 August 2024 for the filing and service of material. These were sent to the parties with a notice of listing for a mention, which was conducted on 15 August 2024. At the mention, Mr Mills was not in attendance, but I was content to hear from his (then) representative from the ASU, Mr Richardson. During the mention, I discussed the requirements imposed on the parties by the directions dated 13 August 2024. The first milestone was for Mr Mills to file with the Commission and serve on the Council his outline of argument, any witness statements, a list of the documents upon which he intended to rely (plus copies), by 3pm on Monday 2 September 2024. When this did not occur, I listed the matter for a non-compliance hearing. This was held on Tuesday 3 September 2024, at which time Mr Mills explained:

> "*I thought the Union was gonna back me. And so I thought they were gonna hand it all in. And then I get a call last Friday saying they weren't and yeah, and then I didn't even know what to do really. And here I am. I can't read and write*."

**[79]** I had previously noted that the union had lodged a Form F54 *Notice of Representative Ceasing to Act* (**Form F54**) on Friday 30 August 2024. I had been concerned about the timing of this because it was almost 3 weeks after the Mention was held and on the last business day before Mr Mills' material was due. As such, I had made an order requiring Mr Richardson to attend the non-compliance hearing because I wanted an explanation from Mr Richardson as to what steps (if any) had been taken to prepare Mr Mills' material between the mention and the filing of the Form F54. At the non-compliance Hearing, Mr Richardson explained:

> "*So, initially we had we reviewed all of the documentation. I did have conversations with Mr Mills about what was required in terms of witness statements, who would be potential witnesses and that was discussed. Mr Mills did inform me that he was intending to travel to Western Australia for sorry [sic] business. I didn't see that as an impediment. We could have organised that. On review of the documentation by our legal team, which is based in our Melbourne office, the decision was taken that we would not pursue the matter through to hearing. I communicated that decision to Mr Mills. Mr Mills then asked me not to close the matter and that he intended to pursue the matter himself. He was advised that the directions still need to be met ah that were issued by yourself and that, um, he was provided with the contact details for your Chambers. In the meantime, I did meet with Mr Ingham, the General Manager of Glamorgan Bay Council, last week to discuss a number of industrial matters, but one of the matters that was also discussed at that meeting was to see whether or not a settlement could be achieved. That was unsuccessful. And acting on the request from Mr Mills not to have the matter closed, the ASU then filed the F54 with the Commission*."

**[80]** At the end of the non-compliance hearing, I made the general observation that while I am not familiar with the ASU's internal processes and policies, I am aware that applicants in unfair dismissal cases before the Commission are left in a very challenging position if forensic decisions to cease representation are made very close to the point at which their material is required to be filed and served. I suggested that in such cases, that sort of a 'hard' conversation needed to be had relatively soon after an initial mention, such as the one I had I conducted. To these observations, Mr Richardson replied:

> "*Certainly Deputy President. Yes, certainly and very hard conversations were had but the decision was taken without my view taken into account*."

**[81]** I have no criticism to make of the role played by Mr Richardson. As this decision has outlined, Mr Richardson attended the relevant meetings as support person for Mr Mills, corresponded with the Respondent and advocated strongly on Mr Mills' behalf, including by arguing that termination was premature and unreasonable, and that Mr Mills need further time to consult with his doctor about alternative pain medication. Mr Richardson was attentive and engaged when representing Mr Mills and I commend him for his efforts as Mr Mills' union organiser. As Mr Mills himself said at the non-compliance hearing when asked whether he discussed what was needed in terms of preparation of his material with Mr Richardson:

> "*Yeah, Richardson's been really good to me, but I just don't know what to do. I really don't. I'm just so, I just want to work.*"

**[82]** I do not commend the ASU legal team for its role in this proceeding. As has been related to me, they made the decision not to pursue Mr Mills' application through to hearing and yet I have been persuaded in relation to the merits of Mr Mills' application that his dismissal was unfair and that it is appropriate to reinstate him. What is even more concerning is that the ASU's legal team ceased its representation of Mr Mills on the last business day before Mr Mills' material fell due under the directions dated 13 August 2024. As has been documented in this decision, Mr Mills had, at best, extremely limited capacity to read or write. That the ASU legal team left one of its members 'high and dry' like this is a disgrace.

**[83]** Mr Mills said, in closing his case:

> *"It's pretty sad. All I've done nothing wrong. I've been honest. All I teach my kids, 'Be honest, do your hardest and have some reliability about yourself and you'll go a long way in life'. And they're saying, 'Dad, look at you, look what's happening'. I keep saying to them, 'As long as I tell the truth, I'll be right'."*[83]

**[84]** The ASU legal team should perhaps reflect upon the reasons for its existence given it did not see fit to represent a member of the character of Mr Mills, who sought the assistance of his union with a case that was more than arguable and ultimately, in the Commission's view, meritorious.


DEPUTY PRESIDENT

*Appearances*:
*Mr A Mills* on his own behalf
*Ms C Barclay* for Glamorgan Spring Bay Council

*Hearing details:*
2024
Hobart
15 October.

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<PR783238>

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[1] Digital Court Book (**DCB**) at 23; Transcript PN 152-163.

[2] DCB at 253.

[3] Ms Sinclair also gave evidence of having seen this letter after mid-February 2024 – see PN 873-875.

[4] Transcript PN 786-788.

[5] DCB at 217.

[6] DCB at 141.

[7] DCB at 78.

[8] DCB at 86.

[9] DCB at 89.

[10] DCB at 153.

[11] Exhibit R1, Attachment RM3, DCB at 155.

[12] DCB at 161.

[13] DCB at 162 – 163.

[14] Exhibit A5, DCB at 191.

[15] DCB at 193 – 195.

[16] Transcript PN 846.

[17] DCB at 119 – 121.

[18] See *Michael Gelagotis v Esso Australia Pty Ltd* [2018] FWCFB 6092 at [117]; *Titan Plant Hire v Shaun Antony Van Malsen* [2016] FWCFB 5520, 263 IR 1 at [28]; *Owen Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033 at [25]-[35].

[19] [2020] FWCFB 1373 at [26], noting that "reg 1.07" is a reference to regulation 1.07 of the *Fair Work Regulations 2009* (Cth).

[20] Transcript PN 673.

[21] DCB at 77.

[22] Attachment DS4 to Exhibit R4 - DCB at 134.

[23] DCB at 159.

[24] DCB at 161 – see 4.

[25] DCB at 209 – 213.

[26] DCB at 52 – 75.

[27] DCB at 60 – see 4(a) - (c).

[28] DCB at 56.

[29] DCB at 60 – see 4(h).

[30] DCB at 62 – see 6.1(c).

[31] Ibid – see 6.1(b).

[32] DCB at 63 – see 6.2(a).

[33] DCB at 61 – see 5.3(a).

[34] DCB at 161 – see 5.

[35] [2024] FWCFB 401 at 115.

[36] Ibid at [159].

[37] DCB at 160 – see footnote 10.

[38] DCB at 159 – see footnote 8.

[39] See *Goodsell* - [2024] FWCFB 401 at [156].

[40] Transcript PN 774.

[41] Transcript PN 1112-1125.

[42] DCB at 161 – see 6.

[43] Transcript PN 699.

[44] *James Chol v Vivesco Pty Ltd* [2024] FWC 1220 at [18], upheld on appeal in [2024] FWCFB 335.

[45] DCB at 62 – see 6.1(c).

[46] Transcript PN 672.

[47] Transcript PN 673.

[48] DCB at 77.

[49] Transcript PN 748.

[50] Attachment DS4 to Exhibit R4 - DCB at 134.

[51] Transcript PN 687.

[52] DCB at 159.

[53] Exhibit R4 at (4) and (5) and Attachment DS1 – DCB at 128-129.

[54] Transcript PN 579–586.

[55] Namely that he was taking the Cornerfield T21 night flower every night and the Kind Medical Taurus 25:1 during non-working days and/or the medication he showed Mr Darren Smith on 19 February 2024.

[56] [2024] FWCFB 401 at [155].

[57] Transcript PN 738.

[58] Transcript PN 774.

[59] Transcript PN 209.

[60] [2020] FWCFB 1373 at [26].

[61] Transcript PN 258-259.

[62] DCB at 59 – see 2(d).

[63] DCB at 67-68 – see 10.1(a)

[64] DCB at 69 – see 10.2(a)(ii).

[65] DCB at 64-65 – see 7.4.

[66] DCB at 68 – see 10.1(d).

[67] DCB at 56 – see definition of *Rehabilitation Program.*

[68] DCB at 69 – see 11(b).

[69] DCB at 68 – see 10.1(d).

[70] Transcript PN 402.

[71] Transcript PN 386 – 389.

[72] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* (1999) 94 FCR 561, [1999] FCA 1836, [6] – [7].

[73] *Thinh Xuan Nguyen v Vietnamese Community in Australia T/A Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 (***Nguyen***) at [19].

[74] Transcript PN 430.

[75] *Nguyen* at [27].

[76] Transcript PN 986.

[77] *Nguyen* at [27].

[78] *Nguyen* at [17].

[79] Exhibit A3 – see DCB at 40.

[80] DCB at 122.

[81] Transcript PN 1011-1125.

[82] Transcript PN 1022-1029.

[83] Transcript PN 1178.