DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Manjeet Singh
v
CDC NSW Region 4 Pty Ltd T/A CDC NSW
(U2024/10161)

COMMISSIONER RIORDAN SYDNEY, 4 FEBRUARY 2025

Application for an unfair dismissal remedy

[1] On 27 August 2024, Mr Manjeet Singh (**the Applicant**) filed an application with the Fair Work Commission (**the Commission**) seeking a remedy for his alleged unfair dismissal pursuant to section 394 of the *Fair Work Act 2009* (**the FW Act**). The Applicant was employed by CDC NSW Region 4 Pty Ltd T/A CDC NSW (**the Respondent**) as a Bus Driver on a full-time basis from 7 August 2007 until the date of his dismissal on 7 August 2024.

[2] In its Form F3 – Employer Response, the Respondent provided that the Applicant was summarily dismissed for serious misconduct for using a mobile phone whilst operating a bus.

[3] The Applicant's employment with the Respondent was covered by the *CDC and TWU Drivers Agreement 2022*.

Background

[4] In early May 2024, after the Applicant had made disclosures as to an incident and potential injury suffered by him whilst driving on Sunday 5 May 2024, the Respondent undertook an investigation. As part of the investigation, the Respondent reviewed CCTV footage around the time of the incident. On review of that footage, the Respondent found that the Applicant had used a mobile telephone whilst operating a bus.

[5] The Respondent issued a 'Show Cause Notice' to the Applicant on 13 May 2024, which stated:

> "13 May 2024
>
> …
>
> Dear Manjeet,
>
> RE: SHOW CAUSE LETTER (SERIOUS MISCONDUCT)

We write to you in relation to a serious incident that occurred during your employment with CDC NSW and confirm that we are proceeding to Show Cause, for the reasons as set out herein.

Specifically, we refer to an incident involving you that occurred on Sunday 5 May 2024, at approximately 8:07 am whilst driving bus MO6153. We note relevantly as follows:

a) Our review of relevant CCTV footage whilst investigating a report of a workplace injury, shows that whilst you were approaching the Foundry Rd/Abbott Rd intersection you reached into your shirt pocket and grabbed your mobile phone.
b) You take both hands off the steering wheel to use your phone, looking away from the road whilst the bus is in motion,
c) You use your mobile phone whilst the vehicle is not safely parked and secured with the handbrake applied.

Objectively, the CCTV footage clearly depicts that you reached into your shirt pocket and used your mobile phone whilst the bus was in motion. Your conduct is proven, and simply cannot be refuted.

Noting our investigations – including our review of the CCTV footage – it is CDC's position that your actions are not only in violation of relevant road safety regulations but also severely compromises the safety of road users.

Driving is a complex task and anything that takes your mind or eyes off the road impacts the safety of everyone on the road. Being distracted increases your chances of having a crash. It slows down your reaction time and puts you and others in danger.

We have therefore determined, based on all available evidence, that you have acted inconsistent with your legal obligations (being obligations imposed upon all road users) and including your obligations under our established Policies and Procedures (as referred to, below).

It is our position that you were acutely aware of CDC's established Policies and Procedures (based on training provided to you) and that non-compliance with your legal obligations and expected standards of behaviour pursuant to our Policies (if substantiated) may result in disciplinary action (including up to the termination of employment). The obligations imposed upon you by virtue of our established Policies and Procedures were lawful and reasonable.

In CDC's considered view, your departure from our established Policies and Procedures constitutes serious misconduct that may be inconsistent with the continuation of employment. Specifically, we confirm that we have established the following contraventions:

1. CDC's "National Code of Conduct" (Effective Date 4 January 2022):
    i. Appropriate Behaviour: "Employees must maintain appropriate professional standards of behaviour" including "following CDC

policies and procedures, including those relating to health and safety".

ii. Breaches of the Code of Conduct "may result in disciplinary action including and up to the termination of employment".

2. CDC's "Work Health and Safety Policy" (Effective Date 31 March 2023):
   i. "[CDC] are committed to providing transportation services that are safe and meet the needs of our customers and the communities".
   ii. "[CDC] constantly strive to achieve the highest possible standards of health, safety and wellbeing for everyone that the company interacts with".
3. CDC NSW's "Cardinal Rules" (Effective Date 24 August 2020) which prohibits specific actions including but not limited to "use of mobile phone (or other electronic device) whilst driving or operating a bus", and which are considered "serious misconduct".
4. CDC's "Use of Mobile Phones Policy (Buses)" (Effective Date 24 August 2020):
   i. "In the interest of abiding with the law and upholding public safety, under no circumstances are employees who are in control of a bus or maintaining buses permitted to use a mobile phone or similar devices (including the use of Bluetooth earpiece etc) for any function or purpose whilst they are operating or working on a CDC Bus".
   ii. "Any breach of this policy will be considered a serious safety breach which will result in summary dismissal".
5. Fair Work Regulations 2009 (Cth) Reg 1.07, which provides that serious misconduct includes wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment, conduct that causes serious and imminent risk to the health or safety of a person, or the reputation, viability or profitability of the employer's business.
6. We otherwise refer to the Road Rules 2014 (NSW). Specifically, Reg 300 thereof, which provides that the driver of a vehicle must not use a mobile phone while the vehicle is moving. "Use", as defined under the Rules, involves any action by a driver including holding the body of the phone, sending, or looking at anything that is in the phone, or operating any other function of the phone.

Having substantiated the offending conduct arising out of the incident (which we say is reasonable based on an objective analysis of the CCTV footage) CDC advises that there are sufficient grounds to terminate your employment and that we are considering such disciplinary action. However, notwithstanding breaches (and serious misconduct) having been substantiated, the precise disciplinary action has not been determined.

In the circumstances, we have determined it appropriate to proceed straight to Show Cause, and we hereby invite you to attend a Show Cause meeting, the details of which are as follows:

Date: Wednesday 15 May 2024
Time: 10.30 am
Location: Foundry Road Depot
Attendees: Darren Baker, Depot Manager and Erin Calder, People and Culture Advisor

You are directed to attend this Show Cause meeting. At this meeting, you will be given an opportunity to show cause as to why your employment should not be terminated. You are invited to bring a support person or representative to the meeting, should you wish to do so.

At this meeting, you will be asked to provide a response in relation to our findings. If you choose not to attend this meeting, the meeting may progress in your absence and a decision will be made based on all available evidence (and assuming there is no response or defense).

You will remain stood down with pay whilst this process continues.

We remind you that CDC has a free and confidential Employee Assistance Program (EAP) should you feel it helpful to obtain counselling services. They can be contacted on [redacted].

If you have any questions, please contact me on [redacted].

Yours Sincerely,

Darren Baker
Depot Manager"

[6] The originally scheduled Show Cause meeting did not proceed on the proposed date and was rescheduled.

[7] The Respondent issued a 'Show Cause Meeting' notice letter to the Applicant on 31 July 2024 as follows:

"31 July 2024

…

Dear Manjeet,

RE: SHOW CAUSE MEETING

We refer to your email to Mr Darren Baker, Depot Manager, dated Monday 29 July 2024 regarding a Show Cause meeting which you are required to attend.

The meeting has been set up with regard to an incident that occurred on Sunday 5 May 2024, at approximately 8.07 am whilst driving bus MO6153 where you use your mobile phone whilst driving.

We note that you have requested further information with regard to this meeting, therefore please find answers to your questions below:

Question: Relevant documents which supporting viewing CCTV to investigate injury

Answer: Given you reported concerns about a safety incident that occurred during work hours, it is our responsibility to review CCTV relating to the incident. Our review is not intended to extend to consideration of CCTV footage to events that are not reasonably approximate to the incident reported. Whilst we respect the privacy of all our employees, we have a duty of care to fellow team members, customers, and our community when reviewing reported safety incidents.

Question: What is the relevant purpose to view my footage for 05/5/24 without my consent.

Answer: To investigate the nature of the reported workplace safety incident.

Question: Please provide me the CDC "usual process" policy / law which gives you permission to view the whole shift footage (it is only time bound process). I reported pain not any mechanical injury/incident

Answer: The entire shift footage has not been viewed by CDC.

Question: what is the time and place of injury according to your cctv footage?

Answer: No frank incident or injury was seen on the CCTV footage.

Questions: Where I reported the injury during driving according to your cctv footage?

Answer: You did not advise us of a time of your injury.

Question: According to cctv footage you viewed, Why I am driving after the injury and what protocol supervisor followed when I reported it on 05/5/24

Answer: You spoke to the Supervisor, Patrick Bedeux, on Sunday at the completion of your shift and reported a workplace safety incident. Mr Bedeux documented the reported injury in CDCs injury management database, Solv. You did not advise CDC that you were unfit to perform your role the following day, Monday 6 May 2024.

Question: You wrote I reported "sore shoulder" at end of shift, please match the words with doctor report and the last email sent to HR (about pain and place)

Answer: You reported a workplace safety incident at the end of your shift to Mr Bedeux. The diagnosis from doctor was not provided until a later date.

Question: Why I worked on Monday (6/5/24) if I was injured on Sunday (5/5/24) and reported it to supervisor

Answer: You did not provide a medical certificate to the business advising CDC that you were unfit to fulfil your role as a bus driver on Monday 6 May 2024. Moreover, when you signed on at the kiosk on Monday 6 May 2024, you declared that you were fit to drive your shift.

Question: Why I was not send to doctor/hospital on Sunday (5/5/24) when I reported pain instead of Monday

Answer: The nature of your reported workplace safety incident on Sunday 5 May 2024, was not assessed by Mr Bedeux as a life-threatening emergency, and you did not request an ambulance be called, therefore it was not recommended that you attend a hospital emergency department. It is also your responsibility to seek medical attention and attend a General Practitioner appointment should you feel pain that you believe needs a medical opinion.

As per our previous letter dated 13 May 2024, it remains CDC's position that your behaviour is a breach of our policies, which if validated by the investigation results could demonstrate serious misconduct.

In CDC's considered view, your departure from our established Policies and Procedures may constitute serious misconduct. Specifically, we refer to the following policies (attached for your reference):

1. CDC's "National Code of Conduct" (Effective Date 7 December 2023):
    i. Appropriate Behaviour: "Employees must maintain appropriate professional standards of behaviour" including "following CDC policies and procedures, including those relating to health and safety".
    ii. Breaches of the Code of Conduct "may result in disciplinary action including and up to the termination of employment".
2. CDC's "Work Health and Safety Policy" (Effective Date 1 March 2024):
    i. "[CDC] are committed to providing transportation services that are safe and meet the needs of our customers and the communities".
    ii. "[CDC] constantly strive to achieve the highest possible standards of health, safety and wellbeing for everyone that the company interacts with".
3. CDC's "National Workplace Behaviour Policy" (Effective Date 1 February 2023):
    i. "[CDC] does not tolerate inappropriate workplace behaviours that jeopardise the health, safety or wellbeing of its employees."
4. CDC's "Use of Mobile Phones Policy (Buses)" (Effective Date 24 August 2020):
    i. "In the interest of abiding with the law and upholding public safety, under no circumstances are employees who are in control of a bus or maintaining buses permitted to use a mobile phone or similar devices (including the use of Bluetooth earpiece etc) for any function or purpose whilst they are operating or working on a CDC Bus".
    ii. "Any breach of this policy will be considered a serious safety breach which will result in summary dismissal".
5. Fair Work Regulations 2009 (Cth) Reg 1.07, which provides that serious misconduct includes wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment, conduct that causes serious and imminent risk to the health or safety of a person, or the reputation, viability or profitability of the employer's business.

6. We otherwise refer to the Road Rules 2014 (NSW). Specifically, Reg 300 thereof, which provides that the driver of a vehicle must not use a mobile phone while the vehicle is moving. "Use", as defined under the Rules, involves any action by a driver including holding the body of the phone, sending, or looking at anything that is in the phone, or operating any other function of the phone.

As a result, we have deemed you to be stood down with pay pending further investigation. Please note the CCTV footage will be available for you to view should you wish.

We have now rescheduled the Show Cause meeting, which you are required to attend to respond to the allegation and to submit any information you consider relevant to our decision on Thursday 1 August at 1:00pm at Foundry Road Depot.

You are welcome to attend this meeting with a support person or representative. If you fail to attend the meeting without reasonable explanation, CDC NSW reserves the right to make a decision in respect of the allegation based on the evidence available and assuming there is no response or defence.

We remind you that the Employee Assistance Program (EAP) is available to you at this time. The EAP offers confidential independent counselling support to employees and may be of assistance to you. The contact number is [redacted].

If you have any questions, please contact me on [redacted].

Yours Sincerely,

Tina Purcell
Employee Relations Manager"

[8] Further to the Show Cause meeting, the Respondent Terminated the Applicant's employment by way of a formal Termination Letter dated 7 August 2024:

"7 August 2024

…

Dear Manjeet,

RE: OUTCOME OF INVESTIGATION – TERMINATION OF EMPLOYMENT

We refer to our letters dated 13 May 2024 and 31 July 2024 and the Show Cause meeting held on Thursday, 1 August 2024, which also included Darren Baker – Depot Manager, and Joseph Antony as your support person.

The letters and the Show Cause meeting were regarding an incident involving you that occurred on Sunday 5 May 2024.

Our investigations led us to review the relevant CCTV footage. Objectively, the CCTV footage clearly depicts that you were using your mobile telephone whilst driving. Your conduct is proven, and simply cannot be refuted.

Noting our investigations – including our review of the CCTV footage – CDC formed the considered view that your actions were not only in violation of relevant road safety regulations but also severely compromised the safety of road users.

CDC determined, based on all available evidence, that you acted inconsistently with your legal obligations (being obligations imposed upon all road users) and your obligations under our established Policies and Procedures (as referred to, below).

In CDC's considered view, your departure from our established Policies and Procedures constituted serious misconduct. Specifically, we confirm that we established the following contraventions:

1. CDC's "National Code of Conduct" (Effective Date 7 December 2023):
    i. Appropriate Behaviour: "Employees must maintain appropriate professional standards of behaviour" including "following CDC policies and procedures, including those relating to health and safety".
    ii. Breaches of Code of Conduct "may result in disciplinary action including and up to the termination of employment".
2. CDC's "Work Health and Safety Policy" (Effective Date 31 March 2023):
    i. "[CDC] are committed to providing transportation services that are safe and meet the needs of our customers and the communities".
    ii. "[CDC] constantly strive to achieve the highest possible standards of health, safety, and wellbeing for everyone that the company interacts with".
3. CDC's "National Workplace Behaviour Policy" (Effective Date 1 February 2023):
    i. "[CDC] does not tolerate inappropriate workplace behaviours that jeopardise the health, safety or wellbeing of its employees".
4. CDC's "Use of Mobile Phones Policy (Buses)" (Effective Date 24 August 2020):
    i. "In the interest of abiding with the law and upholding public safety, under no circumstances are employees who are in control of a bus or maintaining buses permitted to use a mobile phone or similar devices (including the use of a Bluetooth earpiece etc) for any function or purpose whilst they are operating or working on a CDC Bus".
    ii. "Any breach of this policy will be considered a serious safety breach which will result in summary dismissal".
5. Fair Work Regulations 2009 (Cth) Reg 1.07, which provides that serious misconduct includes wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment, conduct that causes serious and imminent risk to the health or safety of a person, or the reputation, viability or profitability of the employer's business.
6. We otherwise refer to the Road Rules 2014 (NSW). Specifically, Reg 300 thereof, which provides that the driver of a vehicle must not use a mobile phone while the vehicle is moving. "Use", as defined under the Rules, involves any action by a driver

including holding the body of the phone, sending, or looking at anything that is in the phone, or operating any other function of the phone.

Having substantiated the offending conduct arising out of the incident (and which we say is reasonable based on an objective analysis of the CCTV footage) CDC advised you, by virtue of our Show Cause letter, that there were sufficient grounds to terminate your employment, and that we were considering termination of your employment, however, no determination had been made as to the precise disciplinary action, subject to providing you with the opportunity to respond and present any mitigating circumstances for our genuine consideration.

At the Show Cause meeting, we note that you stated the following matters:

- I told Patrick at the end of the shift that I had a sore shoulder, and I was tired
- No incident happened on this shift
- There is a CCTV privacy policy, which says you can't view the CCTV without my permission and that you are limited to looking at 15 minutes before and after an incident
- My phone was switched off at 8:00am
- I understand the rules, you can't use your phone on the road
- I am a senior driver, I know these things
- I don't remember touching my phone

Having regard to your serious misconduct and your responses – which we have genuinely considered – CDC has determined that your employment will be terminated summarily effective today, Wednesday, 7 August 2024. CDC cannot overlook the breaches of our established Policies and Procedures and consider that you have breached the trust and confidence that we must have with all our employees. Put simply, your actions are inconsistent with the continuation of your employment. As we have determined to terminate your employment for serious misconduct, justifying summary dismissal, no payment in lieu of notice will be made to you.

You will be paid your accrued entitlements and any outstanding pay, up to and including your last day of employment.

We remind you that CDC has a free and confidential Employee Assistance Program (EAP) should you feel it helpful to obtain counselling services. They can be contacted on [redacted].

If you have any questions, please contact me on [redacted].

Yours Sincerely,

Tina Purcell
Employee Relations Manager"

[9] The matter was Heard in Sydney on Tuesday, 21 January 2025. The Applicant was granted leave pursuant to s.596 of the FW Act to be represented by Mr Chris McArdle, McArdle

Legal, during the Commission proceedings. The Respondent was represented by Mr Adam Arness, Head of Workplace and Employee Relations for the Respondent.

[10] The Applicant gave evidence on his own behalf at the Hearing.

[11] Mr Darren Baker, Depot Manager for the Respondent's Foundry Road/Seven Hills Depots, NSW gave evidence for the Respondent.

Statutory Provisions

[12] The relevant sections of the FW Act relating to an unfair dismissal application are:

> **"396 Initial matters to be considered before merits**
> The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
> (a) whether the application was made within the period required in subsection 394(2);
> (b) whether the person was protected from unfair dismissal;
> (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
> (d) whether the dismissal was a case of genuine redundancy.
>
> **381 Object of this Part**
> (1) The object of this Part is:
> (a) to establish a framework for dealing with unfair dismissal that balances:
> (i) the needs of business (including small business); and
> (ii) the needs of employees; and
> (b) to establish procedures for dealing with unfair dismissal that:
> (i) are quick, flexible and informal; and
> (ii) address the needs of employers and employees; and
> (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
> (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.
> Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.
>
> **382 When a person is protected from unfair dismissal**
> A person is protected from unfair dismissal at a time if, at that time:
> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
> (b) one or more of the following apply:
> (i) a modern award covers the person;
> (ii) an enterprise agreement applies to the person in relation to the employment;
> (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

384 Period of employment

(1) An employee's *period of employment* with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised; the period of service with the old employer does not count towards the employee's period of employment with the new employer.

385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

see section 388.

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person— whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
(h) any other matters that the FWC considers relevant."

Applicant's Submissions

[13] The Applicant submitted that he should not have been dismissed. The Applicant submitted that he did not handle a mobile phone whilst driving a bus, and therefore breached no law, breached no workplace policy, and disobeyed no directive. The Applicant submitted that he did not commit misconduct in any way.

[14] The Applicant submitted that he is a lifelong Sikh, and strictly observes the disciplines and rituals of that faith. The Applicant submitted that he would be perpetrating a serious blasphemy (in addition to committing a secular crime) if he gave untruthful evidence to this Commission.

[15] The Applicant submitted that if the Commission finds that he did not commit the misconduct in question, then he seeks an order for reinstatement to his position with the Respondent. The Applicant submitted that he has a previously unblemished record of over 17 years driving a bus at the Respondent's depot.

[16] The Applicant further submitted that he has had difficulty trying to find another job, in view of his workplace injury which would require him to be engaged in a staged return to work process.

Criteria for Harshness

Section 387(a) – whether there was a valid reason

[17] The Applicant submitted that the relevant facts are:

"*a. He took the vehicle on its usual route on 5 May.*

b. As can be seen from the bus-mounted video, when the bus was stopped (which is to be determined by looking at the moving - and then stationary - background in the video), he took an object from his pocket, glanced at it and put it back in his pocket. It was his devotional diary. Not a phone.

c. We refer to the "re-enactment video" made by the Applicant. It shows the exact personal movement using the religious diary. It is the same size as a phone. It, however, is not a phone.

d. By comparing the two videos, one can see at about point 46,47,or 48 on the bus video, a "flash" of white on the phone, which corresponds to the diary, which has a white panel on its back. Phones, one may assume, do not."

Section 387(b) – whether the person was notified of that reason and 387(c) – whether the person was given an opportunity to respond

[18] The Applicant referred to the letter of the Respondent dated 13 May (see paragraph [5] of this decision). The Applicant submitted that the letter provides no 'opportunity' to respond. The Applicant submitted that the letter confronted him with conclusions of the employer, reached without speaking with him. The Applicant submitted that a "*meeting they summon him to in that letter, would not be about whether or not he committed this action, since the "verdict" had been reached*". The Applicant referred to the words used as follows:-

> "*You are directed to attend this Show Cause meeting. At this meeting, you will be given an opportunity to show cause why your employment should not be terminated*"
>
> And
>
> "*At this meeting, you will be asked to provide a response in relation to* ***our findings***".
>
> (Applicant's emphasis)

[19] The Applicant submitted that, in other words, he was not granted an opportunity to provide an explanation as a verdict had already been reached by the Respondent and he could only give submissions on the appropriate 'sentence'.

[20] The Applicant therefore submitted that he was judged abruptly and inaccurately, and not permitted to speak in his own defence.

[21] The Applicant accepted that, at first glance, the conclusion of the employer seems unremarkable – a person takes an object from his pocket that is the same colour as, and the same size as, a mobile phone. However, the Applicant submitted that 'unremarkable' conclusion is not the correct one. The Applicant submitted that the Respondent should have given him time to respond, to view the footage, and to recall what happened on the day. The Applicant submitted that he denied using the phone from the beginning and should have been given time to reflect on what he had been actually doing.

[22] The Applicant submitted that:-

> "*It is entirely logical that, as one who routinely through the day engages in frequent and brief religious observances, [the Applicant] would not specifically recall doing that at that moment. If [the Applicant] had been given the correct level of opportunity (including viewing the footage) [the Applicant's] answer would have then seemed, as it should now, "unremarkable"*."

[23] The Applicant submitted that, as a well-behaved and loyal employee of 17 years, he was owed more than he was accorded from the Respondent in effecting his termination.

[24] The Applicant submitted that the employer may say that they went to the extent of fairness, and that they formed their view after due enquiry. The Applicant cited the Full Bench of the AIRC in *King v Freshmore (Vic) Pty Ltd*,[1] in which it was said:

> "*[24] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination*".

[25] The Applicant submitted that it is not the entitlement of the employer to arrive at an erroneous conclusion, no matter what the quality of the investigation. It is an objective test, to be applied by this Commission: *"Did he do what he is accused of, or didn't he?"*

[26] The Applicant submitted that also determines whether or not the reason for termination was a valid one. The Applicant submitted that a 'wrong' or 'false' reason cannot be 'valid'. Therefore, the Applicant submitted that if the Commission believes him, the case of the Respondent must fail.

Reinstatement

[27] The Applicant restated that if the Commission finds in his favour, then he seeks an order for reinstatement.

[28] The Applicant submitted that there is no indication of any wrongdoing by him in the past. The Applicant submitted that he worked for 17 years, became injured, and then was terminated on a false accusation against him.

[29] As to the issue of trust being re-established, the Applicant referred to the decision in *Perkins v Grace Worldwide (Aust) Pty Ltd* (*Perkins*),[2] in which the Full Court of the Industrial Court said:

> "*Trust and confidence is a necessary ingredient in any employment relationship.... So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.*
>
> **…**
>
> *It may be difficult or embarrassing for an employer to be required to re-employ a person the employer believed to have been guilty of wrongdoing. The requirement may cause inconvenience to the employer. But if there is such a requirement, it will be because the employee's employment was earlier terminated without a valid reason or without extending procedural fairness to the employee. The problems will be of the employer's own making. If the employer is of even average fair-mindedness, they are likely to prove short-lived. Problems such as this do not necessarily indicate such a loss of confidence as to make the restoration of the employment relationship impracticable*."

[30] The Applicant submitted that in the present case, no difficulty or embarrassment can be properly claimed. The Applicant submitted that he was terminated due to an error. Further, the Applicant made submissions to the effect that the likelihood of him coming into usual contact with the decision makers is remote.

[31] The Applicant acknowledged that if he is reinstated, due to his injury, he will have to go through a 'return to work' process, but submitted that would have applied even if it had not been for his "*mistaken dismissal*".

[32] The Applicant submitted, in relation to 'mitigation of loss', due to his injury he has not been able to seek work elsewhere. The Applicant submitted that his personal circumstances should be taken into account in this regard.

Conclusion

[33] By way of conclusion, the Applicant maintained that he did not perform the wrongdoing claimed by the Respondent. The Applicant submitted that the Commission should believe him, and his photographic and video evidence in relation to the events that occurred.

[34] The Applicant again stated his devout religious adherence. The Applicant submitted that he would not commit the most basic affront to his faith by lying about this. The Applicant submitted that he has not lied in these proceedings.

Respondent's Submissions

[35] The Respondent asserted that the decision to terminate the Applicant's employment can only be determined to be a fair dismissal, conducted in accordance with principles of procedural and substantive fairness, proportionate to the offending misconduct.

[36] The Respondent submitted that on the evidence before the Commission, the Applicant was not dismissed unfairly, and therefore, the Applicant's application should be dismissed.

Criteria for Harshness

Section 387(a) – whether there was a valid reason

[37] The Respondent submitted that the 'valid reason' for the termination of the Applicant's employment can be distilled as follows:

> "*(a) The Applicant acted inconsistently with his obligations under the Respondent's National Code of Conduct and Use of Mobile Phones (Buses) Policy (and other relevant Policies) including NSW Road Rules…;*
>
> *(b) The Applicant was aware of these obligations (having been trained on those obligations and the existence of the relevant Policies and Procedures) and was acutely aware that his non-compliance might result in the termination of his employment; and*
>
> *(c) The requirements of the National Code of Conduct (and other relevant Policies) were lawful and reasonable*."

[38] The Respondent submitted that for a reason to be a valid reason, it must be "sound, defensible or well founded" and should not be "capricious, fanciful, spiteful or prejudiced."[3]

The Respondent submitted that the use of mobile telephones (in contravention of an employer's established Policies) has been found to constitute a valid reason for dismissal.[4] Further, the Respondent submitted that the Applicant's misconduct was a wilful breach of Policy and thus, constituted a valid reason for dismissal.[5]

[39] The Respondent submitted that Regulation 300 of the Road Rules 2004 (NSW) provides that "Use" includes:

> "***any actions by a driver including holding the body of the phone****, sending, o****r looking at anything that is in the phone, or operating any other function of the phone***".
>
> (Respondent's emphasis)

[40] The Respondent submitted that, in accordance with the above description, the production of mobile telephone records by the Applicant endeavouring to prove that no texts and/or calls were made by the Applicant at the relevant time, is immaterial to a finding of a contravention of the "use" of the phone.

[41] The Respondent submitted that its requirement under the 'Use of Mobile Phones Policy (Buses)' (the Policy) that "***under no circumstances*** *are employees who are in control of a bus or maintaining buses* ***permitted to use a mobile phone*** *or similar devices (including the use of a Bluetooth earpiece etc)* ***for any function or purpose*** *whilst they are operating or working on a CDC Bus*" is one which is predicated on both individual and collective safety and well-being.

(Respondent's emphasis)

[42] The Respondent submitted the Policy expressly states that "*Any breach of this policy will be considered a serious safety breach which will result in summary dismissal*". The Respondent submitted that notwithstanding the reference to "*summary dismissal*", the Respondent maintains it affords all employees procedural and substantive fairness when dealing with allegations (and findings) of contravention (and that it did not deviate from such practice in this particular case).

[43] The Respondent submitted its position is that this is a lawful and reasonable Policy that goes to the "*heart of the service proposition*".[6]

[44] The Respondent submitted that, as was observed by Lawler VP and Cribb C in *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191 at [35]:

> "*A failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a "valid reason" for dismissal*."

[45] The Respondent submitted that so significant is the requirement to not use a mobile telephone whilst in control of a vehicle (including a heavy vehicle) "*for any function or purpose*" that inappropriate use of a mobile telephone by a driver of a public passenger vehicle is considered "*unacceptable conduct*" under the Passenger Transport Act 1990 (NSW). A

breach of this nature may lead to a driver's authority to operate a public passenger vehicle being suspended pending an investigation of the alleged unacceptable conduct.

[46] Further the Respondent submitted that:-

> "*(a) The Respondent (as with other bus operators) has positive reporting obligations to Transport for New South Wales ("the Regulator") to report the use of mobile telephones by drivers – obligations predicated on health and safety.*
>
> *(b) The Regulator's "Conditions and Responsibilities" (as published on their website) clearly states, inter alia, the following:*
>
> > *(i) 'If you are the holder of a bus driver authority, your authority is subject to the conditions prescribed in the regulations and the following additional conditions.'*
> >
> > *(ii) '**All…functions** including texting, video messaging, online chatting, reading preview messages and emailing are **prohibited**.'*
> >
> > *(iii) '**The law makes it clear that a driver in a moving or stationary vehicle (unless parked) MUST NOT HOLD a phone in their hand** other than to pass the phone to a passenger or use a mobile phone on loudspeaker while resting it on their lap.*"'
>
> (Respondent's emphasis)

[47] The Respondent acknowledged that the Applicant has denied using a mobile phone and that the item captured by the CCTV footage is a 'devotional diary', and that any claim of mobile telephone access or use is 'completely untrue'. However, the Respondent submitted that this is a fallacy designed to support the Applicant's application noting that:

> "*(a) At no time during the Show Cause process (nor, at any stage during the investigative and disciplinary process) did the Applicant assert that the item captured in the CCTV footage was a diary (or, for that matter, any other item).*
>
> *(b) There was ample opportunity to raise such matters (whether in writing or otherwise) before the decision to terminate. The Respondent says that the time between the initial allegations letter and any subsequent meeting is not a relevant consideration, as there was a genuine and reasonable opportunity to raise matters at any stage before the decision to terminate.*
>
> *(c) The first time any such denial (any "use" of another item) was asserted, was in the Applicant's Form F2 Application, filed more than three (3) months after the allegations and findings were first put to the Applicant, wherein it was asserted that:*
>
> > *(i) "The Applicant frequently carries other items in his pocket (e.g. diary and his calculator), and **thus he may have picked something else rather than a phone**. It is the Respondent's position that the Applicant's evidence cannot be accepted,*

> *supported by his claim having changed from "may" have been "something else" to now, a definitive position.*
>
> *(ii) Further, the Applicant now asserts that the diary was a "devotional diary". Notably, again, this was not raised in the Form F2*."

(Respondent's emphasis)

[48] The Respondent submitted that at paragraph 23 of the Form F2, it was asserted that "*the Applicant showed his phone to Mr Baker to prove that he was not using his phone whilst driving as alleged by the Respondent*". However, the Respondent submitted its evidence is that there was no mention of a diary, or any other item, at the time the relevant CCTV footage was shown to the Applicant, nor was the stated diary produced, instead, the Applicant has only asserted that he can produce this, several months later.

[49] The Respondent submitted that the Commission should not accept that the failure to produce the diary, or even mention its existence, is for the reasons as stated by the Applicant, particularly, noting the inconsistency in his evidence as to when that item was allegedly "*added in my [the Applicant's] routine*".

[50] Further, the Respondent submitted that instead of referencing "*use*" of another item or denying having "*used*" his mobile telephone altogether, the Applicant acknowledged the Respondent's Policies and Procedures.

[51] While the Applicant has asserted that he has "*consistently denied the wrongdoing*" and that the Respondent has "*ignored [his] denials*", the Respondent submitted that such statements are disingenuous, and the evidence proves that this is the case.

[52] As to the CCTV footage itself, the Respondent submitted its position is that:

> "*(a) The CCTV footage clearly depicts the Applicant using his thumbs on the item (with his arms clearly in motion) and that such use is indicative of mobile telephone use, in contravention of the Respondent's Policies and significantly, the Road Rules.*
>
> *(b) The actions shown by the CCTV footage are not consistent with the ordinary, customary use of a diary. The Respondent's position is that the "re-enactment video" as lodged in support of the application, is of no probative value.*
>
> *(c) Shortly after accessing the item (for which the Respondent says it cannot be refuted is a mobile telephone, despite the Applicant's claims) in plain sight of the CCTV camera:*
>
> > *(i) The Applicant proceeds to place the device next to his right leg (deliberately and consciously out of sight of the CCTV camera) and continues to use the mobile telephone for more than twelve (12) seconds (that is, from approximately 08:08:14 to 08:08:26. That period is not insignificant.*

(ii) In doing so, the Applicant takes both hands off the wheel and thus, is not in control of the Heavy Vehicle, posing a significant health and safety threat.

(iii) The Respondent says that it is far-fetched and fanciful to assert the item is a "devotional diary' (or any item other than a mobile telephone) as the action(s) depicted are not consistent with the "use" of a diary."

[53] The Respondent submitted that the Form F2 asserts that "*the Applicant was shown the CCTV footage; however it was not clear in the CCTV footage if the Applicant engaged in the conduct alleged by the Respondent*." The Respondent relied on the evidence that:

"*(a) Significantly, by virtue of the Form F2, or during the Show Cause Process, the Applicant did not deny using the mobile telephone – rather, his position was that he did not make any calls or texts, at the relevant time.*

(b) In fact, it is the Respondent's evidence the Applicant expressly acknowledged the existence of the established Policies and Procedures, and their significance."

Section 387(b) and (c) – whether the employee was notified of the "valid reason" and whether the employee had an opportunity to respond

[54] The Respondent submitted that it conducted a full investigation into all of the relevant matters as was reasonable in the circumstances, providing the Applicant a reasonable opportunity to respond to established findings (based on the CCTV footage), and that those findings were based upon reasonable grounds.

[55] The Respondent submitted that it afforded the Applicant both procedural and substantive fairness. The Respondent submitted that before dismissing the Applicant and having provided the Applicant ample opportunity to respond to the findings, the Respondent:

"*(a) Honestly and genuinely believed that it had reasonable grounds for finding that the Applicant was guilty of the misconduct alleged (per the CCTV footage, which was shown to the Applicant at the Show Cause Meeting); and*

(b) That even taking into account mitigating circumstances (including the Applicant's length of employment) such misconduct still justified dismissal."

Section 387(d) – any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions related to dismissal

[56] The Respondent submitted that the Applicant was not unreasonably refused a support person.

Section 387(e) – if the dismissal related to unsatisfactory performance by the person, whether the person had been warned about that unsatisfactory performance before the dismissal

[57] The Respondent submitted that this factor is irrelevant to the present case.

Section 387(f) and (g) – the degree to which the size of the employer's enterprise and the absence of dedicated human resource management expertise would be likely to impact on the procedures followed

[58] The Respondent submitted that it is an employer with human resources support. The Respondent submitted that it followed its own procedures with respect to the information gathering process. The Respondent submitted that the decision to terminate the Applicant's employment was then made by the appropriate individuals. The Respondent submitted that whether they properly exercised their discretion is a matter considered in respect of other factors.

Section 387(h) – any other matters

[59] The Respondent submitted that the Commission is required to balance all the circumstances and consider whether it is satisfied that a dismissal was harsh, unjust, or unreasonable.

[60] The Respondent submitted that it is charged with the carriage of the public in a safe and responsible manner. The Respondent submitted that the Applicant deliberately and wilfully chose to disobey Policies that held significance to the Respondent in its provision of services to the public (including school children). The Respondent submitted that Policies including forbidding use of "*any function or purpose*" of a mobile telephone are common in industries that require and/or involve the operation of heavy vehicles, and which have the potential to cause significant safety concerns including the endangerment of life.

[61] The Respondent submitted that the Applicant's actions were a deliberate departure from the Respondent's established Policies, and were of a magnitude that the Respondent could no longer contemplate the Applicant's continued employment.

Conclusion

[62] For all of the above reasons, the Respondent submitted that the logical conclusion is that the dismissal was not unfair or harsh, and the application should be dismissed.

[63] As to the question of whether reinstatement would be appropriate, the Respondent submitted that a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, that is providing the loss of trust and confidence is soundly and rationally based. The Respondent cited the decision in *Thinh Nguyen and another v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australian Chapter*,[7] in which the Full Bench conveniently summarised the approach required, which the Respondent did not repeat in its submissions. However, the Respondent submitted that adopting those principles:

> "*a. Reinstatement would not be appropriate in the circumstances (even if the item were found to be a diary (or, not a mobile telephone)) because the Applicant made a decision to take his hands off the wheel, was distracted and loss concentration for a not insignificant period, and so, was not in control of the heavy vehicle.*

b. Mr Baker's evidence is that given the Applicant's disregard for safety (in taking both hands off the wheel) there is no confidence that the Applicant would follow the Respondent's established safety policies and procedures (including the Road Rules) in the future.

c. Reinstating the Applicant would present a safety risk to other employees, and the public who rely on the Respondent's services (including other road users). It would serve to undermine the Respondent's safety policies, including the requirements of the Regulator for which the Respondent is answerable to."

Applicant's Submissions in Reply

[64] In reply, the Applicant submitted that the Respondent "*is simply wrong in this matter*". The Applicant submitted that if the Respondent had properly followed s.387 of the FW Act, "*they would not have fallen into this error*".

[65] The Applicant did not dispute that using a mobile phone whilst operating a bus is a sackable offence. The Applicant submitted that he acknowledged as much in his first reaction, when confronted the day after he had made his workers compensation claim. However, the Applicant submitted that he did not use a mobile phone whilst operating a bus.

[66] The Applicant specifically responded to the Respondent's submissions as follows:-

(a) As to the Respondent's submission that "At no time during the Show Cause process (nor, at any stage during the investigative and disciplinary process) did the Applicant assert that the item captured in the CCTV footage was a diary (or, for that matter, any other item)", the Applicant submitted that:

> "*We believe this point has been addressed in the original statement of Mr Singh and his Statement in Reply filed with these submissions. He was stumped/flabbergasted/caught off guard. If he had been shown the video footage on 6 or 7 May instead of 1 August, he probably would have had it clearer in his mind that the object was what it was. Getting a "finding" without warning on 7 May, though, was not reacted to with complete presence of mind. He did, though, bring the issue up on 9 October at conciliation. The reaction is recorded in his attached statement*."

(b) As to the Respondent's submission that "There was ample opportunity to raise such matters (whether in writing or otherwise) before the decision to terminate. The Respondent says that the time between the initial allegations letter and any subsequent meeting is not a relevant consideration, as there was a genuine and reasonable opportunity to raise matters at any stage before the decision to terminate", the Applicant submitted that:

> "*A confused, medicated, and unwavering "denier" thought that producing the mobile phone records showed enough. His evidence is that he simply did not think of the diary. It was such an incidental part of life that he did not have it in the forefront of his mind in this context*."

(c) As to the Respondent's submission that "The first time any such denial (any "use" of another item) was asserted, was in the Applicant's Form F2 Application, filed more than three (3) months after the allegations and findings were first put to the Applicant…" the Applicant submitted that:

> "*It is wrong to say that "denial" came late in the day. It has not been disputed that "denial" was immediate, consistent, and backed up with phone records. The F2 was within 21 days of 7 August, and was the first contact after the "quick fire" termination of that day. A worrying consistency in this respect is that the "finding" of 7 May remained the "finding" no matter what was offered in response*."

[67] In response to the Respondent's submissions generally, the Applicant submitted that the task at hand is for the Commission to determine whether or not the Applicant used a mobile phone on 5 May - or operated, or even handled a mobile phone - whilst in control of a bus. The Applicant submitted that – "*If he did, he accepts, and has always accepted, that he should be sacked. If he did not, he should not have been*".

Consideration

[68] I have taken into account all of the submissions that have been provided by the parties and I have attached the appropriate weight to the evidence of the witnesses.

[69] It is not in dispute, and I find, that the Applicant is protected from unfair dismissal, submitted his application within the statutory timeframe, was not made genuinely redundant and did not work for a Small Business.

[70] When considering whether a termination of an employee was harsh, unjust or unreasonable, the oft-quoted joint judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines* (*Byrne*)[8] is of significance:

> "*It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted*."

[71] In analysing *Byrne*, a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan* (*AMH*)[9] held:

> "*The above extract is authority for the proposition that a termination of employment may be:*

- *unjust, because the employee was not guilty of the misconduct on which the employer acted;*
- *unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or*
- *harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct*".

[72] Further, a Full Bench of the AIRC in *King v Freshmore (Vic) Pty Ltd*[10] said:

"*[24] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination*".

.

[73] I now turn to the criteria for considering harshness as provided in s.387 of the FW Act.

Section 387(a) - Valid Reason

[74] The meaning of the phrase "valid reason" has been universally drawn from the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*:[11]

"*In broad terms, the right is limited to cases where the employer is able to satisfy the Court of a valid reason or valid reasons for terminating the employment connected with the employee's capacity or performance or based on the operational requirements of the employer. ...*

In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly…".

[75] In *Rode v Burwood Mitsubishi*,[12] a Full Bench of the Australian Industrial Relations Commission held:

"*… the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason*."

[76] In *Qantas Airways Ltd v Cornwall* (*Cornwall*)[13] the Full Court of the Federal Court of Australia said:

> "*The question is whether there was a valid reason. In general, conduct of that kind would plainly provide a valid reason.* ***However, conduct is not committed in a vacuum, but in the course of the interaction of persons and circumstances, and the events which lead up to an action and those which accompany it may qualify or characterize the nature of the conduct involved.***"
>
> (My emphasis)

[77] The standard of proof required in an unfair dismissal proceeding emanates from the decision in *Briginshaw v Briginshaw*,[14] and has been encapsulated in the phrase "*on the balance of probabilities*":

> "*The standard of proof remains the balance of probabilities but 'the nature of the issue necessarily affects the process by which reasonable satisfaction is attained' and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences' or 'by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion*.'"

[78] The most relevant and crucial piece of evidence in this matter is the CCTV video of 5 May 2024.

[79] I have watched this CCTV footage video and the reenactment video of the Applicant more than 20 times. From my observations, the Applicant undertook the following actions:-

a) At 08:08:08 – the Applicant makes an involuntary movement with his right hand from his lap to his chest;
b) At 08:08:13 – the Applicant grabbed the right hand collar of his v-neck jumper to pull it down whilst the bus is still moving;
c) At 08:08:14 – the Applicant reached into his right pocket of his shirt with his left hand and removes an object. The bus is still moving at this point but the Applicant has neither of his hands on the steering wheel;
d) At 08:08:15 – the Applicant looks directly at the face of the object that he cradles in both hands and taps the front of the object with his right thumb;
e) At 08:08:16 – the Applicant moves the object down and to the side of his right knee out of sight of the CCTV camera and below the level of the window. The Applicant then removes his left hand off the object;
f) At 08:08:19 – the Applicant returns his left hand to the object to hold it whilst his right thumb is actively moving up and down, but not left to right as if he was actually turning a page;
g) At 08:08:26 – the Applicant returns the object to his right shirt pocket.

I have taken this into account.

[80] The Respondent's Mobile Phone Policy (Buses) is written in plain English and was understood by the Applicant. The Policy states:-

> "*CDC NSW*

USE OF MOBILE PHONES POLICY (BUSES)
IMS Management System

ComfortDelGro Australia recognises that mobile phones are a widely used and valuable tool for communication. CDC also recognises that many of our employees carry their private mobile phone with them while at work.

It is illegal in Australia to drive any motor vehicle while using a hand held mobile phone. Further, the use of hands free devices such as Bluetooth headsets is considered an offence if it causes a driver to lose proper control of a vehicle.

In the interest of abiding with the law and upholding public safety, under no circumstances are employees who are in control of a bus or maintaining buses permitted to use a mobile phone or similar devices (including the use of Bluetooth earpiece etc) for any function or purpose whilst they are operating or working a CDC Bus.

During break times or in the event of an emergency, a mobile phone can be used only after the vehicle has been safely parked and secured with the handbrake applied.

Any breach of this policy will be considered a serious safety breach which will result in summary dismissal.

…

CEO NSW"

(My emphasis)

[81] In *B, C and D v Australian Postal Corporation T/A Australia Post*,[15] a Full Bench of the Commission found that:-

"*[36] A failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a "valid reason" for dismissal*."

[82] Further, the NSW Road Rules are also relevant in my consideration. Regulation 300 of the NSW Road Rules provides:-

"*300 Use of mobile phones*
(1) The driver of a vehicle must not use a mobile phone while the vehicle is moving, or is stationary but not parked, unless—
(a) the phone is being used to make or receive an audio phone call or to perform an audio playing function and the body of the phone—
(i) is secured in a mounting affixed to the vehicle while being so used, or
(ii) is not secured in a mounting affixed to the vehicle and is not being held by the driver, and the use of the phone does not require the driver, at

any time while using it, to press any thing on the body of the phone or to otherwise manipulate any part of the body of the phone, or

(b) the phone is functioning as a visual display unit that is being used as a driver's aid and the phone is secured in a mounting affixed to the vehicle, or

(c) the vehicle is an emergency vehicle or a police vehicle, or

(d) the driver is exempt from this rule under another law of this jurisdiction.

Maximum penalty—20 penalty units."

[83] I am satisfied and find that the object in the Applicant's hand at 08:08 on 5 May 2024 is a mobile phone for the following reasons:-

a) His hand actions and the use of his thumb are consistent with the use of a smart phone and not the actions of opening or turning a page of a paper diary.
b) There was no need to hide the object out of view of the CCTV camera if the object was a diary. There is no law against reading a paper document if the vehicle you are driving has stopped.
c) There would also have been no need to struggle to open the diary with one hand, as demonstrated by the Applicant in the reenactment video, if he was simply looking to read his diary.

I have taken this into account.

[84] I am satisfied and find that, on the balance of probability, the Respondent had a valid reason to terminate the Applicant.

Section 387(b) - Notified of the Reason

[85] It is not in dispute that the Applicant was notified of the reason for his termination. I have taken this into account.

Section 387(c) - Opportunity to Respond

[86] The Applicant submitted that the letter of 13 May 2024 (see paragraph [5] of this decision) provided no opportunity to respond. However, the Respondent submitted that it provided the Applicant ample opportunity to respond to its findings before the final decision was made to terminate the Applicant. The Applicant was invited to, and attended, a Show Cause meeting on 1 August 2024. Whilst perhaps not best practice, the Applicant was provided an opportunity to respond. I have taken this into account.

Section 387(d) - Any refusal of a support person

[87] There was no refusal of a support person by the Respondent. I have taken this into account.

Section 387(e) - Unsatisfactory performance

[88] The Applicant was not dismissed for unsatisfactory performance. I have taken this into account.

Section 387(f) - Size of Employer and Section 387(g) - Dedicated HR specialists

[89] The Respondent is not a small employer and has dedicated human resources support. I have taken this into account.

Section 387(h) - Any other matter

[90] At 8.08.27 of the video, it is possible to see the back cover of the object. The Applicant's diary has a distinctive white panel on its back cover. No white panel was visible on the back of this object. I am satisfied and find that the object that the Applicant put back into his shirt pocket was not his diary. I have taken this into account.

[91] At 8.08.20 – 8.08.24, the Applicant brings his left hand over to the object. The Applicant claims that was to assist in opening the pages of the diary, however, the Applicant's left hand doesn't move, only his right hand moves in a motion up and down the diary. If the Applicant was trying to open a diary so he could read it, his left hand would have to move to allow him to open the cover or to turn the pages. There would be absolutely no need for the Applicant to move his right hand up and down the page. I note that in the Applicant's re-enactment video, the Applicant's right hand does not replicate the movements seen in the CCTV footage, where his right thumb is very active. I have taken this into account.

[92] The Applicant reported a sharp pain in his right arm on Monday 6 May 2024. The Applicant stated in this report, that this pain started yesterday during his shift, but that it had gotten worse on this day. The Applicant then sought approval to take leave as a result of this injury. The Respondent completed an 'Injury Management Investigation Checklist' and identified 5 May 2024 as the date that the injury occurred, possibly due to the overuse of his right arm. I note that the fourth section of this checklist requires the investigator to watch and download the CCTV footage 'before, during and after the incident'. The Applicant did not give a time where this incident occurred, therefore, it was relevant for the Respondent to view the footage from the start of his shift on 5 May 2024. I have taken this into account.

[93] Whilst the Applicant was in the witness box, he produced his diary and his daughter's phone, which he claimed was the same make and model as his phone. The diary was clearly longer than the phone. I note that when the Applicant was holding the object in the CCTV, the object appeared to be the length of an iPhone rather than the length of his diary. I have taken this into account.

[94] I do not accept that the Applicant was "*caught off guard*" by the show cause meeting. The Applicant was aware of the meeting for months. In hindsight, it may have been more appropriate for the Respondent to conduct the show cause meeting earlier, however, the Respondent gave the Applicant ample time to overcome his alleged injury. The simple fact is that the Applicant, who claimed to be the "*most honest driver in the depot*", was fully aware of the Respondent's policies and understood the consequences of being caught using a mobile phone whilst operating a bus. I am satisfied that because the Applicant knew the consequences of his actions, he steadfastly denied the accusation. I have taken this into account.

[95] I do not accept the submission that the Applicant's use of the devotional diary was an "*incidental part of life*". The Applicant claims that he had recently increased his religious devotion and was learning new prayers and chants. The Applicant submitted that he used his diary to help memorise these new religious chants. If this evidence is to be believed, then the Applicant's devotional diary was an important part of his life and should have been at the forefront of his mind when accused of using his mobile phone whilst operating the bus. I have taken this into account.

[96] I also note that the Applicant in his re-enactment returns his diary back to his pocket upside down, thereby hiding the back of the diary, which is white, from the camera. That is not the case in the CCTV footage. The object is returned to his pocket the same way as it came out of his pocket. The back of the object is visible. A white panel cannot be seen. I have taken this into account.

[97] During the Hearing, the Respondent was able to provide video footage on a laptop computer which could be shown in slow motion. This footage showed a flash of white when the Applicant starts the process to put the object back in his pocket from beside his right knee. I am satisfied and find that this 'flash of white' was nothing more than a reflection of light emanating from the window of the bus. I have taken this into account.

[98] When the Applicant pulls the object out of his pocket, he touches it with his right thumb. Mr McArdle demonstrated during the Hearing that such an action illuminates the screen on his phone. It does on mine as well. No illumination can be seen on the Applicant's phone. However, for reasons best known to the Applicant, the Applicant failed to bring his mobile phone to the Hearing. An obvious explanation for the lack of illumination on the Applicant's phone would be if it had a privacy screen installed which prevents the face of the phone being seen by anyone but the user. However, the Applicant did not produce his mobile phone. I have taken this into account.

[99] There were no passengers on the bus at the time of the incident. There was no reason for the Applicant to hide the object next to his right knee except to take it out of the view of the CCTV camera and the general public who may have been outside of the bus. I have taken this into account.

Conclusion

[100] I have previously found that the Respondent had a valid reason to terminate the Applicant. Whilst the show cause process may not have been 'best practice' in not allowing the Applicant sufficient time to reflect on the CCTV footage, and that some of the wording in the Show Cause correspondence could be regarded as being conclusive, any deficiency of procedural fairness is overcome by the seriousness of the offence and the strength of the Respondent's evidence.

[101] The object the Applicant takes out of his pocket looks like a phone. The Applicant's hand movements whilst he has hold of the object are consistent with operating a phone and totally inconsistent with opening a diary. I am satisfied and find that the Applicant's claim that he was holding and opening his diary is a fabrication.

[102] I agree with the submission of the Applicant that if he did use his phone then he should have been sacked and that he can't win.

[103] I am satisfied and find that there are no reasons contained in sections 387(b)-(h) of the FW Act which would render the Applicant's termination harsh, unjust or unreasonable.

[104] The Applicant's conduct blatantly breached the policies of the Respondent and the NSW Road Rules. His conduct cannot be condoned.

[105] The unfair dismissal application of the Applicant is dismissed.

[106] I so Order.

COMMISSIONER

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[1] Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000).

[2] [1997] IRCA 15.

[3] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[4] *Michael Hudson v Metcash Trading Limited* [2021] FWC 2765; *Robert Drysdale v John L Pierce Pty Ltd* [2017] FWC 1251.

[5] *Browne v Coles Group Supply Chain Pty Ltd* [2014] FWC 3670 (Hatcher VP, 10 June 2014) at para. 62; citing *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 (Lawler VP, Hamberger SDP, Cribb C, 28 August 2013) at para. 36, [(2013) 238 IR 1].

[6] CDC's "Use of Mobile Phones (Bus) Policy" (Effective Date 24 August 2020).

[7] [2014] FWCFB 7198.

[8] (1995) 185 CLR 410.

[9] (1998) 84 IR 1.

[10] [2000] AIRC 1019.

[11] (1995) 62 IR 371.

[12] PR4471.

[13] (1998) 84 FCR 483.

[14] *Briginshaw v Briginshaw* [1938] HCA 34 (30 June 1938), [(1938) 60 CLR 336]; cited in *Barber v Commonwealth of Australia as represented by the Department of Parliamentary Services* [2011] FWA 4092 (Thatcher C, 6 July 2011) at para. 33, [(2011) 212 IR 1].

[15] [2013] FWCFB 6191.