



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Lee Witherden**

v

**DP World Sydney Limited**

(U2024/7478)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 3 FEBRUARY 2025

*Application for an unfair dismissal remedy – random drug testing – positive test result for cocaine metabolites – drug and alcohol policy – valid reason for dismissal — dismissal was harsh and unreasonable – reinstatement order*

## Introduction and outcome

[1] On 27 June 2024, Mr Lee Witherden made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with DP World Sydney Limited (DP World).

[2] DP World operates an intermodal container stevedoring terminal at Port Botany in the state of New South Wales. Mr Witherden was employed as a stevedore by DP World. On 7 June 2024, Mr Witherden was dismissed after testing positive for cocaine metabolites following a random drug test on 27 May 2024.

[3] There was no dispute between the parties that in testing positive for cocaine metabolites on 27 May 2024, Mr Witherden breached DP World's drug and alcohol policy and that there was a valid reason for the dismissal. However, Mr Witherden contended that the dismissal was harsh because of numerous factors including his age and lengthy and practically unblemished employment history, the absence of any risk that Mr Witherden was impaired when he attended work and DP World's failure to consider options other than dismissal.

[4] In summary, I have found that Mr Witherden breached DP World's drug and alcohol policy and that this was a valid reason for dismissal. However, due to other factors, including Mr Witherden's lengthy period of service, the inadequacy of the information in the drug and alcohol policy regarding inactive metabolites and hangover effects and DP World's failure to consider rehabilitation, I have determined that Mr Witherden's dismissal was harsh and unreasonable and made orders for reinstatement and continuity of employment.

## **The hearing**

[5] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[6] After taking into account the views of Mr Witherden and DP World, and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing pursuant to s.399 of the FW Act.

[7] At the hearing, Mr Witherden was represented by Mr Kirk Bond, National Legal Officer, Maritime Union of Australia Division of the Construction Forestry and Maritime Union (MUA). DP World was represented by Mr James McLean of Counsel who I granted permission to appear pursuant to s.596(2) of the FW Act as I was satisfied that it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

[8] The following witnesses gave evidence on behalf of Mr Witherden, and were cross-examined by Mr McLean:

1. Mr Witherden
2. Professor Robert P. Weatherby, Adjunct Professor in the Faculty of Health at Southern Cross University NSW

[9] The following witnesses gave evidence on behalf of DP World and were cross-examined by Mr Bond:

- a. Mr Scott Eadie, General Manager Operations, at DP World's Botany Terminal
- b. Dr John Lewis, Consultant Toxicologist
- c. Dr Michelle Williams, Chief Toxicologist, Brassetts Group

[10] Mr Witherden filed submissions in the Commission on 6 September 2024 and DP World filed submissions in the Commission on 24 September 2024. I have considered the submissions made by the parties and all of the evidence before me in my determination of this matter and the conclusions I have reached.

## **Factual Background**

[11] DP World operates an intermodal container stevedoring terminal at Port Botany in the state of New South Wales (the Botany Terminal).<sup>1</sup> Conditions of employment at the Botany Terminal are covered by the *DP World Sydney Enterprise Agreement 2024* (Agreement).<sup>2</sup>

[12] Mr Scott Eadie is the General Manager Operations at DP World's container stevedoring terminal at Port Botany in New South Wales. Prior to being appointed to this role in April 2021, Mr Eadie was employed by DP World Brisbane Pty Limited in numerous roles from 1997 to 2021.<sup>3</sup>

[13] The Botany Terminal is a 39 hectare facility, with three berths and almost one kilometre of quay line. The primary operations at the Botany Terminal involve the movement of shipping containers on and off vessels, trucks and trains. These containers each weigh between two and

35 tonnes, are hoisted up to 42 metres in the air using cranes and are then stacked up to five containers high in the yard.<sup>4</sup>

**[14]** The Botany Terminal is a high traffic area, with large numbers of heavy machinery, equipment and vehicles in operation. At any given time, there can be:

- up to 7 cranes operating;
- up to 3 vessels alongside;
- up to 18 rubber tire gantry cranes (RTGs), eight heavy forklifts and four empty handlers loading and unloading trucks and trains and stacking shipping containers around the Botany Terminal,
- up to 36 internal transfer vehicles (ITVs) moving containers around the Botany Terminal,
- up to 80 trucks and two trains inside the Botany Terminal (interacting with RTGs, heavy forklifts, empty handlers and ITVs) and
- in excess of 200 people performing work at the Botany Terminal, including employees, contractors, truck drivers, rail crews, ship crews, regulatory authorities and visitors.<sup>5</sup>

**[15]** The nature of the operations at the Botany Terminal means that there are a number of risks at the terminal including:

- the risk of collisions (where a crane, RTG, ITV or forklift, or the cargo they are lifting, collide with people, equipment or containers);
- the risk of equipment lifting unintended cargo (for example, when a crane, RTG, ITV or forklift inadvertently lifts equipment, such as a truck, that has not properly disconnected from the container);
- the risk of injury during manual handling tasks both onboard vessels and around the Botany Terminal;
- the risk of stack collapses, where containers are incorrectly stacked or are struck by machinery and subsequently topple over; and
- the risk of damage to, or spill of, container contents which are declared as ‘dangerous goods’.<sup>6</sup>

**[16]** Given these risks, the Botany Terminal is a safety critical environment, and there is a risk of serious injuries and damage to property if operations are not carried out with proper care. In the last 12 months, there have been two high potential incidents at the Botany Terminal where RTGs pulled laden containers onto trucks, causing significant damage. Both of these high potential incidents were reported to SafeWork NSW.<sup>7</sup>

**[17]** Because of these risks, it is critically important that all workers at the Botany Terminal are in a fit and proper state so that they can perform their duties without compromising or risking the health and safety of themselves or other people. Further, the container terminal business is competitive, and the contents of the containers are valuable. If DP World clients become aware that there are workers undertaking work with illicit substances in their systems, there is a real possibility the customers will take their business elsewhere to ensure the safety of their cargo.<sup>8</sup>

**[18]** DP World has six ‘Critical Safety Commitments’, which are referred to in the DP World Code of Conduct (Code) and are the most important safety obligations at DP World that all employees are required to follow. One of the six Critical Safety Commitments is ‘Fit for Work’.

This Critical Safety Commitment details the employee expectation that ‘I will be drug and alcohol free at work and advise of any injuries, medications or medical conditions that could impede my ability to do my job safely, before I commence work.’<sup>9</sup>

[19] DP World has had an Alcohol and other Drugs Policy (AOD Policy) since at least 2012. The current version of the AOD Policy has been in place since 2021.<sup>10</sup>

[20] Although DP World has ‘zero tolerance’ for drugs and alcohol in the workplace, a breach of the AOD Policy does not automatically result in dismissal. The disciplinary response, if any, will depend on all of the relevant circumstances. For example, Mr Eadie might consider differently an employee who had their drink spiked, or self-declared prior to performing work.<sup>11</sup>

[21] The importance of the AOD Policy and Code is continually reinforced to employees by DP World including:

- a. at the induction of new employees;
- b. in email updates sent to mailing lists that include all DP World employees;
- c. during various refresher and re-familiarisation training;
- d. during toolbox meetings; and
- e. more generally through posters on the walls and noticeboards around the Botany Terminal and through the distribution of workplace bulletins and emails to employees.<sup>12</sup> There are large posters of critical work commitments mounted in various positions in the terminal and the fit for work poster is mounted outside the entry to the employee locker room.<sup>13</sup>

[22] Mr Witherden, along with other employees was sent a copy of the AOD Policy on 27 June 2022. In the email attaching the AOD Policy, DP World advised employees that there is no way to determine impairment and as such the AOD Policy is based on the presence of drugs and alcohol. DP World has also advised employees that given this, DP World does not need to prove that work or performance has been adversely affected by drugs. The presence of drugs in the system is the breach of the AOD Policy.<sup>14</sup>

[23] Mr Witherden demonstrated an awareness of the AOD Policy on night shift on 17 March 2021 and day shift on 1 June 2023 when he completed employee disclosure forms in relation to prescription drugs.<sup>15</sup>

[24] At the time of the hearing, Mr Witherden was 49 years old. On 26 October 1999, Mr Witherden began working at DP World (formerly P&O Ports) as a stevedore. Prior to Mr Witherden’s termination on 7 June 2024, he had been employed by DP World for 25 years.

[25] DP World operates as a 24-hour a day terminal. There are three shifts of 8 hours each day. DP World refers to these shifts as Day, Evening and Night shifts. The shifts are:

- a. Day 6.00am – 2.00pm
- b. Evening 2.00pm – 11.00pm
- c. Night 11.00pm – 6.00am<sup>16</sup>

[26] Mr Witherden’s roster at DP World consisted of a 16 week cycle comprising day, evening and night shifts arranged in ‘blocks’ of between two and six days duration.<sup>17</sup>

[27] Mr Witherden worked predominantly as a Forklift Driver, ITV driver, and RTG driver. Additionally, on occasion Mr Witherden was upgraded to work in higher salary positions such as Head Lasher and Yard Foreman.<sup>18</sup>

[28] In April 2022, Mr Witherden suffered an on-the-job shoulder injury, suffering tears in both his left and right shoulders. Mr Witherden had an operation on his left AC joint in about June 2023. Mr Witherden's treatment included a course of three monthly Platelet Rich Plasma injections, in both his left and right shoulder tears and five cortisone injections. Mr Witherden filed a workers' compensation claim in relation to the injury that remains open.<sup>19</sup>

[29] Mr Witherden returned to work on light duties on 31 July 2023 following seven weeks off on workers compensation.<sup>20</sup>

[30] Mr Witherden said that recovery from his shoulder injuries has been slow and often painful. In addition to the physical effects of his injury, the prolonged recovery period has led to Mr Witherden suffering symptoms of depression and anxiety. Mr Witherden found himself frequently getting stressed out and inappropriately lashing out at loved ones. Mr Witherden said he started self-medicating with illicit drugs, primarily cocaine. Mr Witherden said that after using cocaine, for a short time at least, he felt euphoric, excited, confident and happy and that it 'definitely' has an addictive effect on him.<sup>21</sup>

[31] Mr Witherden said that at the time that he tested positive for cocaine he was back working on suitable duties at DP World. Mr Witherden had been medically cleared to perform all duties except for lashing.<sup>22</sup>

[32] Mr Witherden said that he has been randomly tested for drugs and alcohol many times over the years. He estimates that he has been tested ten times, during his time working for DP World.<sup>23</sup>

[33] Mr Witherden commenced a shift at the Botany Terminal at approximately 6am on 27 May 2024 and was assigned to operate, and did operate a RTG. During his shift Mr Witherden was selected for a random drug and alcohol test. Mr Witherden provided a saliva sample at about 7:28am which returned a non-negative result for a proscribed substance, namely cocaine. Because of this, Mr Witherden was required to provide a urine sample for confirmatory testing which he did. Mr Witherden was immediately stood down on full pay while a confirmatory test was arranged and occurred. The confirmatory test was undertaken by Douglas Hanley Moir Pathology on 27 May 2024 and confirmed the presence of both benzoylecgonine and ecgonine-methyl-ester listed on the test report under the heading 'cocaine'.<sup>24</sup>

[34] Mr Witherden said in his witness statement that the shift on which he tested positive was his first rostered shift after having been rostered off for five consecutive days. Mr Eadie said that Mr Witherden had been rostered off for only two consecutive days on 25 and 26 May 2024, that he worked an evening shift driving a RTG on 23 May 2024 and at 23:19 that night called in sick for his allocated evening shift on 24 May 2024.<sup>25</sup> Mr Witherden confirmed during cross-examination that Mr Eadie's evidence about his work pattern was correct. During cross-examination Mr Witherden said that he did not use cocaine when he returned home from work on the evening of 23 May 2024 and called in sick for his shift the following day.

[35] Mr Witherden said that during his days off, he used cocaine heavily for three consecutive days from 24 May 2024 with his last usage being at approximately 7:00am on Sunday, 26 May 2024, 24 hours before his next rostered shift.<sup>26</sup>

[36] Mr Witherden said that when he woke up on the morning of 27 May 2024, he felt good and alert after having had a good night’s sleep and that he was not impaired in any way. He said that the intoxicating effects of cocaine on him generally last between 15 and 45 minutes. As such, Mr Witherden was certain when he went to work on 27 May 2024 that his usage 24 hours earlier would not pose any health and safety risk to him or his fellow workers.<sup>27</sup>

[37] Mr Witherden said that while he was generally aware of the AOD Policy, DP World did not explain to him what it means to be ‘fit for work’ under the AOD Policy. DP World never explained to him the significance of cut-off levels and how the Australian Standards apply. When Mr Witherden attended work on 27 May 2024, he believed that he was fit for work because he knew that he was not impaired.<sup>28</sup>

[38] Mr Witherden said that he understands the high risks involved with moving containers around a terminal. He has always prioritised health and safety in the workplace and he would not tolerate one of his co-workers coming to work impaired by drugs or alcohol. Mr Witherden said he would never endanger others by coming to work impaired.<sup>29</sup>

[39] On 3 June 2024, Mr Eadie sent Mr Witherden a letter inviting him to show cause as to why DP World should not terminate his employment for breaching the AOD Policy.<sup>30</sup> The letter relevantly provided:

The Company has now received the confirmatory results which has confirmed that the following prohibited drugs were present while you were working on shift. A copy of the results is attached, however, a summary is below:

Confirmation Analysis	Result	Cut-off level	High range Threshold
Cocaine	POSITIVE	150 ng/ml = 150 ug/L	>600 ng/ml = >600 ug/L
Benzoylcegonine	>10,000 ug/L = >10,000 ng/ml		
Ecgonine methyl ester	6,400 ug/L = 6,400 ng/ml		

As a result of the Incident, the Company is concerned that your conduct on 27 May 2024 constitutes a breach of:

- DP World Australia Alcohol and Other Drugs Policy;
- DP World Code of Conduct;
- The obligations contained in your employment contract; and
- Your workplace, health, safety and environment responsibilities.

The Company is equally concerned that you took a course of action that had the potential to cause a risk to your health and safety and the health and safety of others.

The metabolite levels detected are far in excess of the cut-off level in the Australian Standard (150 ug/L). Additionally, The DP World Australia Alcohol and Other Drugs

Policy contains ‘high range detection levels’; the level of Benzoyllecgonine detected is more than 16 times the high range detection level and the level of Ecgonine methyl ester detected is more than 10 times the high range detection level. This constitutes a serious breach of the DP World Australia Alcohol and Other Drugs Policy.<sup>31</sup>

[40] Mr Witherden responded to Mr Eadie’s letter on 6 June 2024 via email.<sup>32</sup> The email relevantly provided:

First, I take full responsibility for breaching the policy. I am deeply sorry, and I apologise to you, to my family, and to my co-workers. I am embarrassed and am fearful that my poor judgment will result in the company losing faith in me to safely and skilfully perform the job that I have proudly carried out for the past 25 years.

For the reasons set forth below, I beg you to give me a second chance and allow me to continue working for a company that I love and hope to eventually retire from. I offer no excuses for my behaviour. I screwed up, full stop. I understand that it’s unacceptable – especially in a safety critical workplace like ours – to attend work with detectable traces of drugs in my system. I have been tested many times over the years and I have never tested positive for alcohol or any drug. For 25 years I have attended work fully fit to perform my job. On a single occasion I made a stupid and irresponsible choice to consume cocaine some 24-hours before my next scheduled shift. I should have known better. Now, I clearly do. The positive drug test has been an enormous wakeup call for me. If you show me mercy and permit me to continue working at DP World, I believe that I will look back on this terrible moment in my life as a blessing in disguise. I have used cocaine recreationally at times over the years – always when I was on lengthy periods of leave from work. This positive test has made me realise how much recreational drug use can impact my life. Drug use threatens my livelihood and could subject me to criminal prosecution. I’m done with using illicit drugs. I have engaged with Hunterlink, and I am committed to continuing with all recommended treatment plans to give me the tools that I need to ensure sobriety for the rest of my life. I have attached to his email a referral letter confirming that I am undergoing counselling with Hunterlink.

Obviously, I can’t undo the fact that I attended work with cocaine in my system. I can promise you, though, that if you give me the opportunity to continue my career with DP World, I will not let you down. My word is my bond, and I give you my word that I am done with drug use, and I will never in the future put you in the difficult position of having to make a decision as to whether I can continue my employment with the company. I have been a valuable and productive employee for a quarter century, and I undertake to spend the remainder of my career being the best version of myself that I can be.

I am willing to do anything to prove to you that I will never again attend DP World with drugs or alcohol in my system. I am happy to undergo frequent and random testing for as long as necessary to regain your trust. I am happy to provide evidence that I am continuing counselling to demonstrate my commitment to sobriety. Whatever conditions you might require for me to regain your trust, I am happy to comply with.<sup>33</sup>

[41] On 7 June 2024 Mr Witherden met with Mr Eadie and Ms Karen Brady, Human Resources Manager for DP World. Paul Keating, MUA Sydney Branch Secretary represented Mr Witherden at the meeting and advocated for DP World to not terminate Mr Witherden's employment.<sup>34</sup> Mr Eadie said that during the meeting:

- Mr Witherden advised Mr Eadie that he had used cocaine late on Saturday night and had admitted to using cocaine at times over the years,
- That the system was down so he never moved a container or placed anyone in danger,
- Mr Eadie showed Mr Witherden records demonstrating that he had actually operated a RTG and lifted containers that morning, two of which were loaded onto a truck. In response, Mr Witherden said 'sorry, didn't think I moved any.'<sup>35</sup>

[42] Mr Eadie then suspended the meeting so he could consider what Mr Witherden and Mr Keating had said to him. Mr Eadie said that he reflected on Mr Witherden's conduct and the matters he had raised leading up to and during their meeting. He decided to terminate Mr Witherden's employment with immediate effect. He made that decision for the following reasons:

- the Botany Terminal is a safety critical environment, which Mr Witherden knew and acknowledged, and as with any port operation, there is a real risk of serious injuries, fatalities and damage to property;
- despite that, and despite DP World communicating its expectations, Mr Witherden attended for and performed work at the Botany Terminal on 27 May 2024, including high risk work in circumstances where he was not fit for work in accordance with the AOD Policy;
- it was Mr Witherden's responsibility both under his contract of employment and the AOD Policy to ensure that he was fit for work on 27 May 2024, and he had an opportunity to self-disclose if he was not fit for work but did not do so;
- ultimately Mr Witherden had breached the AOD Policy and had exposed himself and others to unnecessary risk which was not fair on anyone. He effectively denied DP World the opportunity to take steps to reduce this risk.<sup>36</sup>

[43] Mr Eadie said that while he was sympathetic to Mr Witherden's personal circumstances, those circumstances did not excuse his conduct. Neither did his length of service, which if anything meant that he should have thoroughly understood DP World's position with respect to the AOD Policy.<sup>37</sup>

[44] Mr Eadie said that he takes any decision to terminate employment seriously and before he makes a decision he reviews and considers all available information including relevant policies, length of service, disciplinary record and considers the impact that the dismissal may have on the employee. He also considers whether other forms of discipline are appropriate. In this case he did not consider any of those matters justified anything other than the termination of Mr Witherden's employment. Ultimately, he had lost confidence in Mr Witherden and his ability to comply with DP World's requirements, including in what is a safety critical environment. Accordingly, Mr Eadie resumed the meeting with Mr Witherden and told him that his employment was terminated with immediate effect. He did, however, pay Mr Witherden a discretionary payment equivalent to his five week notice period given his period of employment



with DP World and provided him six months access to DP World's employment assistance provider, given his personal circumstances.<sup>38</sup>

[45] Later that day, Mr Eadie sent Mr Witherden a letter by email which confirmed that Mr Eadie had decided to terminate Mr Witherden's employment 'on grounds of serious misconduct'. The letter repeated the statements in the show cause letter dated 3 June 2024 regarding:

- the results of the drug test,
- the metabolite levels detected being far in excess of the cut-off level in the Australian Standard (150 ug/L)
- the level of Benzoyllecgonine detected is more than 16 times the 'high range detection level' and the level of Ecgonine methyl ester detected is more than 10 times the 'high range detection level' in the AOD Policy, constituting a serious breach of the AOD Policy.<sup>39</sup>

[46] The letter confirmed Mr Witherden's email response and the following responses during the meeting on 7 June 2024:

- Mr Witherden was deeply regretful of his actions and felt embarrassed, ashamed and disappointed.
- Mr Witherden had been on Worker's Compensation for the last two years and that this had impacted his mental health.
- Mr Witherden disclosed that his wife had been asking him to seek help for his mental health but he had been putting this off.
- Mr Witherden explained that his decision to use cocaine was partly a coping mechanism to deal with feelings of stress.
- Mr Witherden felt 'normal' when he had woken on Monday and did not know how long the cocaine would stay in his system. Mr Witherden would not have attended work if he had felt inebriated.
- Mr Witherden was willing to seek support via a psychiatrist and possibly Foundation House.<sup>40</sup>

[47] The letter concluded by stating:

We have taken into account your responses, the matters you have raised in response, your length of service, and the impact that this decision will have on you. I have also taken into account the seriousness of this matter.

As a result of your actions, the Company is concerned that you took a course of action that had the potential to cause a risk to your health and safety and the health and safety of others. Your conduct demonstrates behaviour that is unacceptable and damages irrevocably the trust and confidence that DP World Sydney can have in your employment moving forward.

As discussed with you, the Company considered your actions constituted serious misconduct and a breach of the following key terms of your employment:

- DP World Australia Alcohol and Other Drugs Policy

- The DP World Code of Conduct, which refers to:
  - Meeting your health, safety and environmental responsibilities;
  - Complying with our health, safety and environmental systems, procedures and policies;
  - Responsibility for your own health and safety and that of others;
  - Being drug-and-alcohol free at work; and
  - Ensuring you are not at risk of being unable to safely perform your duties as a result of illicit drugs.
  
- The obligations contained in your employment contract dated 24 September 2012.
  
- Your workplace health and safety responsibilities.

For the above reasons the Company made a final decision to terminate your employment on grounds of serious misconduct.<sup>41</sup>

**[48]** Mr Eadie was concerned that Mr Witherden sought to downplay his conduct by claiming that he had not moved any containers due to system outage on 27 May 2024 when he in fact moved containers with an RTG that day.<sup>42</sup>

**[49]** In Mr Witherden's response to Mr Eadie's show cause letter, he committed to seeking treatment to ensure that he remained drug free. Even though DP World terminated his employment, Mr Witherden said that he followed through with that commitment.<sup>43</sup>

**[50]** To date, Mr Witherden has attended approximately 5 sessions with Hunterlink, a 24/7 counselling and employee wellbeing service that provides an extensive employee assistance program that includes proactive mental health services and training resources for workers and their managers.<sup>44</sup>

**[51]** Mr Witherden said that he is also seeing a psychiatrist on a regular basis. Mr Witherden said his psychiatrist has diagnosed him as being borderline ADHD and is intending to start Mr Witherden on prescription medication to treat his condition. Mr Witherden was required to participate in a drug screen so that his psychiatrist could be sure, before prescribing medication, that he had not taken illicit drugs. Mr Witherden has been informed by his psychiatrist that testing will be an ongoing requirement.<sup>45</sup>

**[52]** Mr Witherden said that although he has been seeking employment since his termination, he has been unsuccessful in securing a job and intends to apply for JobSeeker benefits through Centrelink.<sup>46</sup>

**[53]** Mr Witherden said that losing his job has had a devastating effect on him and his family. In addition to the loss of his career and income, Mr Witherden feels a tremendous sense of loss of identity. He has been a 'wharfie' for a quarter century working with colleagues who he likes, many of whom he considers to be friends.<sup>47</sup>

[54] Mr Witherden said that he harbours no grudges or animosity toward Mr Eadie or any other DP World manager. If he gets his job back, he intends to prove to DP World during the remainder of his work life that he was deserving of a second chance.<sup>48</sup>

### *The AOD Policy*

[55] The AOD Policy states the following in relation to ‘fitness for work’:

As an Employee it is your responsibility to be ‘fit for work’. To be considered fit for work, a person must be in a state (physical, mental and emotional) which enables them to perform assigned tasks competently and in a manner which does not threaten the safety or health of themselves or others.

A person will be deemed unfit for work under this Policy if any of the following apply but not limited to:

- Where the person is working in or visiting a DP World site and the person’s Breath Alcohol Concentration (BrAC) is greater than 0.00;
- The person has an amount of drugs, that is, present in their saliva and urine that exceeds the test cut-off levels as set out in Appendix B of this Policy;
- The person has any other drug in their system which a medical practitioner advises could impact that person’s ability to safely perform their duties, whether or not such a drug is a prescription drug; or
- A “deemed positive” test result has been obtained (as set out at the Failure to Comply with a Request section of this Policy).<sup>49</sup>

[56] The AOD Policy states that DP World recognises alcohol or other drug dependency as a treatable condition and that any person who suspects that they have an alcohol and other drug dependency condition is encouraged to seek advice and to obtain appropriate medical treatment. The AOD Policy sets out guidelines for the rehabilitation of employees who ask for assistance with alcohol and/or other drug dependency issues. Where an Employee comes forward of their own volition and asks for assistance with alcohol and/or other drug dependency issues prior to a test being conducted, DP World will support them. In these circumstances, an Employee Support Plan will be developed and implemented to assist the Employee’s recovery and there will be no disciplinary action.<sup>50</sup>

[57] The AOD Policy provides that where an employee tests positive (whether at the initial screening or confirmatory test), it will be at DP World’s discretion whether rehabilitation support is offered to the Employee. In these circumstances, disciplinary action may still be taken.<sup>51</sup>

[58] In addition to supporting an employee with any alcohol and/or drug dependency issues, the AOD Policy states that DP World may require an employee to enter into an Employee Support Plan, where DP World considers this necessary or appropriate. Such a plan is developed by the site HR Team, in consultation with the individual concerned and their relevant Manager, and has the following mandatory requirements:

- Negative test result to be achieved prior to return to work using the Company preferred testing provider;

- Process to be adopted to achieve a negative test result;
- Timeframe in which a negative test result is to be achieved; and
- Offers of rehabilitation assistance, i.e. referral to an (Employment Assistance Program) EAP or another specialist agency.<sup>52</sup>

**[59]** The AOD Policy provides that additional requirements that may be addressed in an Employee Support Plan include:

- Mandatory attendance at EAP counselling (or alternative provider);
- Additional testing regimes;
- Additional supervision; and
- Any other matters/steps considered to be appropriate to the specific case/circumstances.<sup>53</sup>

**[60]** In relation to Mr Witherden's admitted use of cocaine, the AOD Policy provides that:

- No Employee will attend work in breach of the alcohol and/or other drug standards set out in the AOD Policy.<sup>54</sup>
- Employees must not attend for work with an alcohol or other drug level that exceeds the limits contained in Appendix B of the AOD Policy.<sup>55</sup>
- The use and consumption of illegal drugs and alcohol in breach of the limits contained at Appendix B of the AOD Policy may result in disciplinary action up to and including termination of employment.<sup>56</sup>
- An Employee will be subject to target testing where they have obtained their first non-negative test result for alcohol and/or other drugs, for a period of 12 months from the date of the first non-negative test result. The Employee may also be subject to further review at DP World's discretion and may be extended.<sup>57</sup>
- Where an Employee is concerned in any way about his or her degree of fitness for work, they must consult with their Manager or Supervisor before commencing work. In particular, any Employee who suspects that his or her Breath Alcohol Concentration could be greater than 0.00 must use one of the DP World Terminal breath testing instruments before commencing work.<sup>58</sup>

**[61]** In relation to Mr Witherden's 'confirmed positive test result', the AOD Policy provides that the following steps will be taken:

- the Employee tested and their Manager will be informed of the test result;
- Disciplinary discussions will take place which will include consideration as to what disciplinary outcomes are appropriate in the circumstances;
- If the result of the test is high range in accordance with the approved levels contained at Appendix B, then the employee may be subject to termination of their employment with the Company;
- The Employee will not be permitted to return to work until they test negative to an additional alcohol and other drug urine test, which they will need to do at their own expense, but they must use the company preferred testing provider to provide those results;
- While an employee is off work as a result of returning a positive test result, it will be their responsibility to keep in touch with their Supervisor about their return to work;
- The Employee will be required to undergo testing for a period of 12 months as detailed in the Testing Procedure section of the AOD Policy if they remain with DP World as part of the support provided to employees as detailed in the Policy.<sup>59</sup>

[62] The AOD Policy provides that disciplinary action will be taken in numerous circumstances including where an employee records a confirmed positive alcohol or other drugs screening test and that DP World has discretion to take appropriate action which may include termination of employment. The AOD Policy also provides that breaches of the Policy may be considered serious misconduct which may result in instant dismissal, in particular, where there is a ‘high range’ level detected or where there is a second breach.<sup>60</sup>

[63] The AOD Policy sets out numerous responsibilities of employees to ensure that the objectives of the Policy are achieved which include:

- Not attending or performing work with a level of alcohol or other drug in their system that would result in a positive test result.
- Notifying their supervisor or their manager if they think they may be or are affected as a result of the use of alcohol or other drugs.
- At all times ensuring that they are fully fit for work and that any medication they are taking does not impact on their fitness for work.<sup>61</sup>

[64] Appendix B of the AOD Policy sets out the Alcohol and Other Drugs Detection Levels. It provides that the cut of levels are intended to reflect Australia Standard Detection Levels. Table 1 of Appendix B refers to ‘Cut-off for screening with urine or saliva’ and lists six different substances. In relation to ‘Cocaine and metabolites’ it has a cut of level of 50ng/ml in relation to saliva and 300ng/ml in relation to urine. Table 2 of Appendix B refers to ‘Cut-off for laboratory confirmation with urine or saliva’. The information in relation to cocaine is presented as follows:<sup>62</sup>

Drug Class	Compound	Cut off level ng/ml (saliva)	Cut off level ng/ml (urine)
Cocaine	Cocaine	25	150
	Benzoylecgonine	25	150
	Ecgonine methyl ester	25	150

[65] Appendix B of the Policy sets out a final table under the heading ‘high range detection levels’. The information in relation to cocaine is presented as follows:<sup>63</sup>

Drug Class	Compound	Cut off level ng/ml (urine)
Cocaine	Cocaine	
	Benzoylecgonine	➤ 600
	Ecgonine methyl ester	➤ 600

[66] The ‘high range detection levels’ for each of the compounds listed in the final table appears to be the table 2 urine cut off level multiplied by four. In the case of alcohol, Appendix B provides that the alcohol related detection level is determined to be greater than 0.00 (BrAC) at all DP World sites and the ‘high range detection level’ is 0.06 or above at all DP World sites.

Appendix B concludes by stating ‘high range detection will be considered a serious breach of this policy’.<sup>64</sup>

### *Expert evidence*

[67] Expert evidence was provided by Professor Robert P. Weatherby on behalf of Mr Witherden and by Dr John H Lewis and Dr Michelle Williams on behalf of DP World.

[68] Professor Weatherby is an Adjunct Professor in the Faculty of Health at Southern Cross University, New South Wales. He is a qualified Pharmacologist with more than 30 years professional experience preparing reports in drug and alcohol related legal cases. His main area of expertise as an academic is in Pharmacology, specifically in areas of the use of central nervous system drugs and other psychoactive drugs including alcohol.<sup>65</sup>

[69] Dr Lewis is a Consultant Toxicologist who previously held the position of Principal Scientist and Head Toxicology Unit, Pacific Laboratory Medicine Services, Northern Sydney and Central Coast Health Service. Dr Lewis’ main interests have been in proficiency testing and the implementation of quality standards in drug toxicology. From 1993-2020 Dr Lewis was chairman of Standards Australia committee CH/36 which was the committee responsible for the production of Australian Standard AS4308 and later AS/NZS 4308:2008, which is the recommended practice for the collection, detection and quantitation of drugs of abuse in urine.<sup>66</sup>

[70] Dr Williams is employed by Brassets Group as its Chief Toxicologist. Brassets Group is contracted by DP World to provide onsite drug testing of employees and others present at its sites.<sup>67</sup>

### *How long does cocaine stay in the human body?*

[71] Professor Weatherby’s evidence was that cocaine has a very short half-life in the human body of approximately 0.5-1 hour. This means it disappears from the body rapidly in about 2-3 hours. Therefore, for a positive cocaine sample to be obtained, the cocaine should have been ingested in the immediate past, that is, within two hours. The duration of action of cocaine is relatively brief and can last for up to 90 minutes.<sup>68</sup> Dr Lewis and Dr Williams did not disagree with these conclusions.<sup>69</sup>

### *What are the physiological effects of cocaine?*

[72] Professor Weatherby said that cocaine is a central nervous system (CNS) stimulant drug and produces euphoric feelings. The euphoria results in feelings of extreme happiness, being excited and energetic. Cocaine also elevates energy levels and produces mental alertness. In addition, there are increases in heart rate, blood pressure and the contractility of the heart muscle. It can also produce hypersensitivity to sight, sound and touch responses. Adverse effects can be irritability and paranoia. Being tired and restless can also occur for a day or two after cocaine use.<sup>70</sup>

[73] Professor Weatherby said that cocaine impairs normal functioning by increasing the production of a neurotransmitter known as dopamine. It also affects a number of other neurotransmitters including serotonin and norepinephrine (noradrenaline). Physical

functioning is affected by increased heart rate and blood pressure and by hypersensitivity to light and sound and touch receptors. Physical aggressiveness can also occur. Cognitive functioning is affected by the euphoric feeling which distracts attention from normal functioning. By improving mental alertness, it can improve some aspects of performance both mentally and physically. Reasoning is affected due to being inattentive to situations and inappropriately responding in decision-making.<sup>71</sup>

[74] Dr Williams said that she disagreed with Professor Weatherby's statement that cocaine impairs normal functioning by increasing the production of dopamine. She explained that cocaine affects the dopamine system by blocking the transporter that removes dopamine from the synaptic cleft. The net effect is an increase in the amount of dopamine available within the synapses however this occurs by very different mechanism than increased production. This overabundance of dopamine causes the 'rush' effects of cocaine.<sup>72</sup> The physiological effects of cocaine, at moderate doses include euphoria, improved alertness, concentration, libido, general feelings of well-being, reduced fatigue and appetite.<sup>73</sup> The negative effects include insomnia, anxiety, irritability, dysphoria and impulsive behaviour.<sup>74</sup>

[75] Dr Lewis' evidence is that the first phase of cocaine impairment is the immediate euphoric effects that include stimulation, heightened awareness, alertness, euphoria, excitation, feelings of well-being, general arousal, increased sexual excitement, dizziness, self-absorption, increased focus and alertness, mental clarity, increased talkativeness and motor restlessness, reduced fatigue, improved performance in some simple tasks, and loss of appetite. Higher doses may exhibit a pattern of psychosis with confused and disoriented behaviour, delusions, hallucinations, irritability, fear, paranoia, antisocial behaviour, and aggressiveness.<sup>75</sup>

*Was there a risk that Mr Witherden was impaired at work on 27 May 2024?*

[76] Professor Weatherby's evidence was that as cocaine has a very short half-life in the human body, there would be no cocaine present, and no intoxication or impairment due to cocaine on 27 May 2024 at 7.28 am. However, metabolites, which would be mainly benzoylecgonine, stay around a lot longer. Benzoylecgonine has a half-life of approximately 12 hours and therefore can be detected for 2-3 days. Benzoylecgonine is pharmacologically inactive and has no impairing effects. The other major metabolite, ecgonine methyl ester, is also inactive. Therefore, Mr Witherden would not have been impaired or intoxicated at the time of the drug test on 27 May 2024.<sup>76</sup>

[77] Dr Lewis' evidence is that once the euphoric effects have worn off, cocaine users can be impaired following the withdrawal of the drug. This impairment includes mood changes and sleep deprivation. Dr Lewis' evidence is that based on studies by Johanson et al and Pace-Schott et al, the three-day heavy use of cocaine would have resulted in some form of disruptive sleep pattern. This would have been despite Mr Witherden's subjective opinion that he felt good and alert after having had a good night's sleep. There would have been a high likelihood of fatigue and a lack of alertness in the days following his cocaine use. Dr Lewis agreed with Professor Weatherby, that Mr Witherden would not have been intoxicated (i.e. acute impairment), however he disagreed that there would not have been some form of withdrawal impairment in the days following his heavy use of cocaine.<sup>77</sup>

**[78]** Dr Lewis expressed the opinion that the nature of cocaine, its acute stimulant effects, possibly leading to impulsivity or risky behaviour and the known withdrawal effects of fatigue, depression and sleep pattern disorders, demonstrate a risk of impairment of persons involved in safety sensitive work environments. A study by Burns found a trend towards poorer performance on the morning after cocaine use when compared to placebo. Performance was task and dose dependent and persisted past the period of acute stimulation. This study suggests a risk of poor performance in the workplace following cocaine use.<sup>78</sup>

**[79]** Dr Williams gave evidence that cocaine withdrawal can occur in three phases, the first is the acute or crash phase, followed by the post-acute phase and finally protracted withdrawal. The crash phase is characterised by intense cravings, anxiety, agitation and exhaustion. These severe symptoms can last several days and less severe symptoms such as fatigue, depressed mood and concentration difficulties can last one to three weeks. The post-acute phase involves exhaustion, sleepiness, mood changes and cravings for the drug. Protracted withdrawal was often associated with heavy or prolonged use and can include lingering fatigue, lack of energy and depression that can last for weeks following the acute periods. Furthermore, regular cocaine use can cause long-term changes within the brain, specifically a decrease in dopamine receptor availability. This in turn causes a prolonged low mood. Cocaine has also been shown to produce impairment for months following absence in the widespread cognitive domains including attention and impulsivity, verbal learning and working memory.<sup>79</sup>

**[80]** Dr Williams gave evidence that the risk of Mr Witherden being impaired at the time of the test is significant. If Mr Witherden last used cocaine at 7am on 26 May 2024, this is the last ‘peak’ of use and he would be experiencing the acute effects of cocaine for 15 to 30 minutes. Thereafter as the drug is metabolised, the effect of withdrawal would begin. The crash phase can last for a number of days, therefore it is likely that over the following hours on Sunday and Monday he would have experienced agitation, anxiety, cognitive impairment including impulsiveness and exhaustion. The length and quality of sleep experienced by Mr Witherden on Sunday night is unknown, however it is unlikely to compensate for three days of stimulant exposure. Dr Williams said that based on her qualifications and experience, it is her professional opinion that Mr Witherden would have been impaired from the preceding day’s cocaine use at the time he presented for work on 27 May 2024.<sup>80</sup>

*What does the laboratory test show?*

**[81]** There was disagreement between Professor Weatherby and Professor Lewis about the accuracy of initial drug testing screens which use ‘immunoassay’. However, given that DP World relies upon the results of the confirmatory laboratory test, I do not need to resolve this disagreement. Professor Weatherby noted that the confirmatory laboratory test recorded the following results:

Benzoylecgonine >10,000 micrograms/L  
Ecgonine methyl ester 6,400 micrograms/L<sup>81</sup>

**[82]** Professor Weatherby said that urine concentrations are variable due to the varying volumes of urine produced and the frequency of voiding of urine. He observed that the ecgonine methyl ester is a low concentration and although the laboratory could only provide a result of >10 mg/L [10,000 micrograms/L] concentrations in users can be more than ten times that



concentration of benzoylecgonine. Professor Weatherby said that the concentrations of the cocaine metabolites are consistent with use 24 hours before testing. Benzoylecgonine is the major metabolite and therefore its presence at a concentration higher than Ecgonine methyl ester is as would be expected.<sup>82</sup>

[83] Professor Weatherby said that it appeared from the termination letter that DP World had misunderstood the analytical results. The letter stated that the initial sample ‘returned a non-negative result for Cocaine’ which appears to indicate that the author of the letter believed that cocaine was detected as the Table in the letter has Cocaine POSITIVE. That is not the case as the test would have been positive to ‘cocaine and/or metabolites’. The analytical result which is the confirmatory result does not show any cocaine was present, only the metabolites, benzoylecgonine and ecgonine methyl ester. The results are consistent with Mr Witherden using cocaine 24 hours earlier. Therefore, the laboratory test results only show that cocaine had been used some time earlier.<sup>83</sup>

[84] Professor Weatherby said the other area that the writer of the letter appears to be very confused about is the ‘cut-off’ levels. The writer appears to believe that the ‘cut-off’ level has some relationship to how much drug may have been used and the seriousness of any intoxication, however that is not true. The ‘cut-off’ level is an analytical issue and is about the sensitivity of the laboratory analytical result. The laboratory is confident above that point that it is reporting a correct result. The cut-off level has no relationship to impairment or intoxication. The comment that the ‘metabolite levels detected are far in excess of the cut-off level in the Australian Standard’ is referring to analytical laboratories and the accuracy of their results, it has absolutely no pharmacological (or impairment) relevance in any way. Amounts in urine cannot reflect accurately any amount of drug taken as urine is an ‘end product’ and depending on urinary emptying the amounts present can be high or low.<sup>84</sup>

[85] In relation to Professor Weatherby’s observation that Mr Witherden’s result did not show that any cocaine was present, Dr Lewis said that parent cocaine is rarely detected in urine, unless the sample had been collected within a very short time after use. The presence of the major metabolites, benzoylecgonine and ecgonine methyl ester are indicative of cocaine use (as noted in Australian Standard AS/NZ 4308).<sup>85</sup>

[86] In his report, Professor Weatherby stated that it is complete nonsense to indicate that a person's offence is bad due to exceeding a cut-off level by a certain amount. In response, Dr Williams said that this is a model adhered to by every police department in Australia whereby higher penalties are imposed based upon the severity of offences such as driving under the influence of alcohol or speeding.<sup>86</sup>

### **When can the Commission order a remedy for unfair dismissal?**

[87] Section 390 of the FW Act provides that the Commission may order a remedy if:

- (a) the Commission is satisfied that the person was protected from unfair dismissal at the time of being dismissed; and
- (b) the person has been unfairly dismissed.

[88] Both limbs must be satisfied. I am therefore required to consider whether Mr Witherden was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that Mr Witherden was so protected, whether Mr Witherden has been unfairly dismissed.

**When has a person been unfairly dismissed?**

[89] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission 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.

***Initial matters***

[90] A threshold issue to determine is whether Mr Witherden has been dismissed from his employment.

[91] There was no dispute, and I find that Mr Witherden's employment with DP World was terminated at the initiative of DP World. I am therefore satisfied that Mr Witherden has been dismissed within the meaning of s.385 of the FW Act.

[92] Under s.396 of the FW Act, the Commission is obliged to decide the following matters 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.

[93] I have decided these matters below.

[94] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[95] Both parties submitted that the termination took effect on 7 June 2024. It is not disputed, and I find, that Mr Witherden made the application on 27 June 2024. I am therefore satisfied that the application was made within the period required in s.394(2).

[96] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (a) the person is an employee who has completed a period of employment with his or his 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.

**[97]** It was not in dispute, and I find, that at the time of dismissal, Mr Witherden had completed at least the minimum period of employment with DP World, and that an enterprise agreement applied to Mr Witherden in relation to the employment.

**[98]** I am therefore satisfied that, at the time of dismissal, Mr Witherden was a person protected from unfair dismissal.

**[99]** It was not in dispute, and I find, that Mr Witherden's dismissal was not a case of genuine redundancy and that the Small Business Fair Dismissal Code does not apply.

**[100]** Having considered each of the initial matters, I am required to consider the merits of the application.

***Was the dismissal harsh, unjust or unreasonable?***

**[101]** Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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 Commission considers relevant.

[102] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>87</sup>

[103] I set out my consideration of each of these criteria below.

*Was there a valid reason for the dismissal related to Mr Witherden's capacity or conduct?*

[104] In order to be a valid reason, the reason for the dismissal should be 'sound, defensible or well founded'<sup>88</sup> and should not be 'capricious, fanciful, spiteful or prejudiced.'<sup>89</sup> However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>90</sup>

[105] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>91</sup> 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.<sup>92</sup>

[106] Mr Witherden acknowledges that he breached the AOD Policy when he attended work on 27 May 2024 and tested positive for benzoylecgonine and ecgonine-methyl-ester and submits that it is clear from prior decisions of this Commission that this breach of policy was a valid reason for dismissal.

[107] I accept that Mr Witherden breached the AOD Policy when he attended work on 27 May 2024 and find that this was a valid reason for the dismissal related to Mr Witherden's conduct.

*Was Mr Witherden notified of the valid reason?*

[108] Proper consideration of s.387(b) requires a finding to be made as to whether Mr Witherden 'was notified of that reason'. Contextually, the reference to 'that reason' is the valid reason found to exist under s.387(a).<sup>93</sup>

[109] Mr Witherden accepts that he was notified of the reason for his dismissal.

*Was Mr Witherden given an opportunity to respond to any reason related to his capacity or conduct?*

Submissions of Mr Witherden

[110] Mr Witherden accepts that he was given an opportunity to respond to the allegations against him but submits that DP World's decision maker[s] had closed their minds to Mr Witherden's continued employment, indicating a process that was, in substance, procedurally unfair. Mr Witherden submits that there was nothing he could have said to change DP World's mind, and it is clear that DP World took a zero-tolerance approach to Mr Witherden's breach of the AOD Policy.

#### Submissions of DP World

[111] DP World submitted that Mr Witherden's contention that he was not afforded an opportunity to respond to the reason for the dismissal, is, at best, inferential. The mere fact that Mr Witherden's response did not result in an outcome other than dismissal does not mean Mr Witherden was deprived of an opportunity to respond. Having regard to the direct evidence from Mr Eadie that DP World gave genuine consideration to the matters raised by Mr Witherden, the Commission should properly find that Mr Witherden was afforded the requisite opportunity.

[112] Moreover, and in any event, DP World submitted that its zero-tolerance approach does not mean that all breaches of the AOD Policy will necessarily result in termination of employment. This is demonstrated by the AOD Policy, which provides for discretion regarding disciplinary outcomes and other sanctions depending on the circumstances. This weighs in favour of finding that the dismissal was not unfair.

#### Findings

[113] The evidence establishes that Mr Witherden was provided with an opportunity to respond to the 'show cause' letter on 3 June 2024, both in writing and at the meeting with Mr Eadie and Ms Brady on 7 June 2024. The letter of termination referred to the matters which Mr Witherden raised in his email dated 6 June 2024 and verbally during the meeting on 7 June 2024. The letter of termination recorded that DP World had taken into account Mr Witherden's responses, his length of service, and the impact that the termination will have on Mr Witherden. In his witness statement, Mr Eadie said that he takes any decision to terminate employment seriously and before he makes a decision, he reviews and considers all available information including relevant policies, length of service, disciplinary record and considers the impact that the dismissal may have on the employee. He also considers whether other forms of discipline are appropriate. In this case he did not consider any of those matters justified anything other than the termination of Mr Witherden's employment as ultimately he had lost confidence in Mr Witherden and his ability to comply with DP World's requirements, including in what is a safety critical environment. I found Mr Eadie to be a genuine and credible witness, and I have no reason to doubt his evidence that he took Mr Witherden's responses into account.

[114] Based upon the evidence before me, I find that Mr Witherden was given an opportunity to respond to any reason related to his capacity or conduct and that DP World took these responses into account when it decided to terminate his employment. Based upon the expert evidence, I have some concerns about the AOD Policy referring to 'high range detection levels' as constituting a 'serious breach of the policy' and the potential impact of this on Mr Eadie's

decision making process. However, this is a matter which is appropriately dealt with as a factor to be considered under s. 387(h) rather than s.387(c).

*Did DP World unreasonably refuse to allow Mr Witherden to have a support person present to assist at discussions relating to the dismissal?*

[115] There is no dispute between the parties that Mr Witherden had a support person present at the time his termination was discussed.

*Was Mr Witherden warned about unsatisfactory performance before the dismissal?*

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

*To what degree would the size of DP World's enterprise be likely to impact on the procedures followed in effecting the dismissal?*

[117] Mr Witherden submits that DP World is a large company and, as such, should comply with appropriate procedures, including procedural fairness, when terminating the employment of employees.

[118] DP World did not contend that the size of its enterprise had an impact on the procedures followed in effecting the dismissal.

*To what degree would the absence of dedicated human resource management specialists or expertise in DP World's enterprise be likely to impact on the procedures followed in effecting the dismissal?*

[119] Mr Witherden submits that DP World has dedicated human resource staff which should ensure compliance with appropriate procedures when terminating the employment of employees.

[120] DP World did not contend that the absence of dedicated human resource expertise had an impact on the procedures followed in effecting the dismissal.

*What other matters are relevant?*

[121] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. A number of matters raised by the parties are potentially relevant to my consideration under this provision.

[122] Mr Witherden submitted that in relation to the factors under s. 387(h), he relied almost exclusively on the decision of Deputy President Easton in *Reece Goodsell v Sydney Trains* (Goodsell).<sup>94</sup> This decision was recently upheld on appeal by a Full Bench of this Commission.<sup>95</sup>

[123] Given that these decisions deal with a long serving employee who tested positive to cocaine metabolites, I set out the background facts of that matter. It should be noted that

Professor Weatherby and Dr Lewis who gave evidence in the matter before me, provided evidence on behalf of the applicant and respondent respectively in *Goodsell*.

[124] Mr Goodsell was employed by Sydney Trains and its predecessors for 26 years. At the time of his dismissal, Mr Goodsell was employed in the role of Work Group Leader (Traction), a Category 1 Rail Safety Worker role. In that role Mr Goodsell's duties involved identification of hazards and risk control for various works including in rail corridors where liaison with rail safety officers to gain access was required.<sup>96</sup> Mr Goodsell was absent from work on a period of leave and a rostered day off, from 25 May to 3 June 2022. During the period of leave, on 31 May 2022, Mr Goodsell accepted an offer from friends to try cocaine. It was a 'one-off' incident. Mr Goodsell did not feel in any way impaired when he attended for work and did not realise that there would still be traces in his system.<sup>97</sup>

[125] On 4 June 2022, Mr Goodsell returned to work and while on duty undertook a random drug and alcohol test which returned a positive reading for benzoylecgonine (a cocaine metabolite) at a concentration of 264ng/L. There was no dispute between the parties that cocaine metabolites are inactive and indicate that a person has consumed cocaine rather than indicating that the person is impaired. It was also not disputed that by returning a non-negative test result, Mr Goodsell breached Sydney Train's Drug and Alcohol Policy.<sup>98</sup> Following a disciplinary process, Mr Goodsell was dismissed on 23 September 2022.<sup>99</sup>

[126] In determining the matter, Deputy President Easton found that Mr Goodsell's breach of Sydney Train's Drug and Alcohol Policy by testing positive to benzoylecgonine in a drug test at work was a valid reason for dismissal. However, the Deputy President considered the following matters relevant to s.387(h) in concluding that the dismissal was harsh unjust and unreasonable:

- (a) Mr Goodsell's lengthy and unblemished employment history;
- (b) Mr Goodsell's cooperation with Sydney Trains' investigation, his remorse and that he unconditionally accepted responsibility for his actions;
- (c) the absence of any risk that Mr Goodsell was impaired when he attended work in the circumstances;
- (d) the employer's mind was closed in the disciplinary process to Mr Goodsell continuing in his employment;
- (e) the information available to employees about the Drug and Alcohol Policy; and
- (f) Sydney Trains' failure to consider options other than dismissal.<sup>100</sup>

### Employment history

[127] The evidence established that Mr Witherden was employed by DP World and its predecessors for 25 years. Initially, Mr Witherden worked as a supplementary stevedore then was appointed as a Variable Salary Employee then as a Fixed Salary Employee in 2012. On occasions Mr Witherden was upgraded to work in higher salary positions such as Head Lasher and Yard Foreman. Mr Witherden has been randomly tested for drugs and alcohol many times over the years and estimates that he has been tested ten times during his employment with DP World.

[128] Mr Witherden's evidence is that prior to the events that led to his dismissal, he had not previously been subject to any disciplinary action. In his witness statement, Mr Eadie said that before he makes a decision, he reviews and considers all available information including the employee's disciplinary record. Mr Eadie did not refer to any disciplinary record in relation to Mr Witherden in his witness statement so it was somewhat surprising when during the hearing, Mr Eadie gave evidence that Mr Witherden had previously been issued with a 'formal warning' and a 'final warning'. Mr Eadie said that he did not take into account these warnings when making the decision to dismiss Mr Witherden. DP World submitted that on the basis of these warnings, it could not be said that Mr Witherden has an 'unblemished' employment history. This leaves the Commission in a rather unsatisfactory predicament. I have no reason to believe that Mr Eadie was being dishonest when giving evidence that Mr Witherden has been issued with two warnings in the past. However, given that Mr Eadie has been working at the Botany Terminal for only three years, it is possible that in giving his evidence he was simply referring to Mr Witherden's employment record rather than having any direct knowledge of the warnings. I have no evidence before me about how old the warnings were or what they were about. If the warnings were issued many years ago, this might explain why Mr Witherden has no recollection of receiving them.

[129] I note that the enterprise agreement permits DP World to stand down employees without pay in certain circumstances and there is no indication that DP World has ever undertaken such action with respect to Mr Witherden.

[130] In the circumstances, while I cannot find that Mr Witherden has an unblemished employment record, I find that the fact that the disciplinary sanctions imposed on Mr Witherden during his 25 years service with DP World are limited to only two warnings and that he has never previously breached the AOD Policy despite being tested on many occasions are matters which support a finding that the dismissal was harsh.

[131] In making this finding, I have considered the observations of the Full Bench in *Harbour City Ferries Pty Ltd v Christopher Toms* (Toms),<sup>101</sup> that an employee's seniority and very high level of responsibility are factors which attract sympathy when considering outcome, but equally demand a high level of compliance with policy.<sup>102</sup>

[132] The evidence shows that Mr Witherden had a high level of compliance with the AOD Policy as he had been tested many times previously but had never tested positive until 27 May 2024. The evidence establishes that Mr Witherden consumed cocaine in his own time and approximately 23 hours before attending work. According to Dr Weatherby, the metabolite levels detected in the positive test were consistent with consumption 24 hours before the test. The reason that Mr Witherden was in breach of the AOD Policy on 27 May 2024 was not because he attended work while intoxicated but because he tested positive to non-active metabolites. Mr Witherden's evidence was that the intoxicating effects of cocaine on him generally last between 15 and 45 minutes. As such, Mr Witherden was certain when he went to work on 27 May 2024 that his usage 24 hours earlier would not pose any health and safety risk to him or his fellow workers. Although DP World called expert evidence which sought to challenge Mr Witherden's subjective views that he was fit for work, there was no allegation by DP World that Mr Witherden knowingly attended work with non-active metabolites in his system which were above the cut off levels in the AOD Policy. Further, for the reasons stated later in this decision, Mr Witherden's compliance with the AOD Policy on 27 May 2024 was



made difficult because the AOD Policy did not explain that it tests for inactive metabolites as well as 'drugs' and that detection of these will result in a positive test even after the parent drug has left the employee's system and the person is not regarded as being intoxicated.

### Cooperation and remorse

[133] Mr Witherden submits that his cooperation with the investigation and remorse is evidenced by the provision of his written and verbal responses to the show cause letter and his attendance at the meeting on 7 June 2024.

[134] In his written response, Mr Witherden:

- Took full responsibility for breaching the AOD Policy.
- Apologised to DP World, to his family, and to his co-workers.
- Referred to his embarrassment and poor judgment.
- Said he offered no excuses for his behaviour and that he 'screwed up.'
- Said he understood that it is unacceptable, especially in a safety critical workplace, to attend work with detectable traces of drugs in his system.
- Said he had used cocaine recreationally at times over the years, always when he was on lengthy periods of leave from work and that the positive test made him realise how much recreational drug use could impact his life.
- Said he was done with using illicit drugs and that he had engaged with Hunterlink and was committed to continuing with all recommended treatment plans to give him the tools that he needs to ensure sobriety for the rest of his life.
- Promised DP World that if he is given the opportunity to continue his career, he would not let DP World down.
- Said he would never in the future put DP World in the difficult position of having to make a decision as to whether he can continue his employment with the company.
- Undertook to spend the remainder of his career being the best version of himself that he can be.
- Said he was willing to do anything to prove to DP World that he would never again attend with drugs or alcohol in his system.
- Offered to undergo frequent and random testing for as long as necessary to regain DP World's trust.
- Offered to provide evidence that he is continuing counselling to demonstrate his commitment to sobriety.
- Offered to comply with whatever conditions are required for Mr Witherden to regain DP World's trust.

[135] DP World relied on a number of matters to submit that Mr Witherden was not cooperative and remorseful. It claimed that Mr Witherden was not forthright which is inconsistent with cooperation. DP World submitted that Mr Witherden was not truthful when stating that he consumed cocaine at the end of a period of five rostered days off when in fact he only had two rostered days off and took personal leave on a day preceding those two days. DP World pointed to Mr Eadie's evidence that during the meeting on 7 June 2024, Mr Witherden said that the system was down on 27 May 2024 so he never moved a container or placed anyone in danger. Mr Eadie showed Mr Witherden records demonstrating that he had actually operated

a RTG and lifted containers that morning, two of which were loaded onto a truck, to which he said 'sorry, didn't think I moved any.'

[136] The meeting on 7 June 2024 took place 11 days after 27 May 2024 and occurred in the context of Mr Witherden being informed by DP World that DP World was considering terminating Mr Witherden's employment. There is no evidence before me that Mr Witherden has a history of being dishonest in the course of his employment with DP World. There would be little purpose in Mr Witherden deliberately misleading Mr Eadie about not moving any containers on 27 May 2024 and that he had taken five rather than two rostered days off given that Mr Eadie was able to verify Mr Witherden's responses against DP World's records. It is likely that this was a very stressful time for Mr Witherden and on this basis I cannot rule out the possibility that this impeded Mr Witherden's ability to think clearly and recall when speaking to Mr Eadie on 7 June 2024 that he moved containers on 27 May 2024. In the circumstances I do not accept that Mr Witherden was being deliberately dishonest or misleading at the meeting on 7 June 2024 or when stating in his witness statement that he took two rather than five rostered days off.

[137] DP World was also critical that Mr Witherden did not accept during the hearing that there was any risk of impairment when he attended work on 27 May 2024. Much of the hearing was spent debating whether impairment referred to intoxication or hangover effects from consuming cocaine with DP World arguing that impairment extended to hangover effects and Mr Witherden arguing it was confined to intoxication. Professor Weatherby, the expert engaged by Mr Witherden unequivocally stated in his report that Mr Witherden could not have been impaired when he commenced work on 27 May 2024 but stated that being tired and restless can occur for a day or two after cocaine use. This appears to indicate that Professor Weatherby equated impairment with intoxication rather than hangover effects. In the circumstances, given the differences of opinion between the experts about the meaning of impairment, I think little turns on Mr Witherden's unwillingness to concede there was any risk of impairment when he attended work on 27 May 2024. The fact that Mr Witherden said in his email to DP World that he understood that it is unacceptable, especially in a safety critical workplace to attend work with detectable traces of drugs in his system demonstrates the seriousness with which he regarded the matter.

[138] Taking into account this evidence, I accept that Mr Witherden was cooperative with the investigation and remorseful. I do however have concerns about the truthfulness of Mr Witherden's evidence before the Commission in one respect.

[139] Mr Witherden's evidence was that at the time of signing his witness statement on 6 September 2024, he had attended approximately five sessions with Hunterlink, a 24/7 counselling and employee wellbeing service. These appointments were initially arranged after Mr Witherden tested positive. Mr Witherden referred to these in his email to DP World dated 6 June 2024, relevantly stating 'I have engaged with Hunterlink, and I am committed to continuing with all recommended treatment plans to give me the tools that I need to ensure sobriety for the rest of my life.'

[140] During the hearing I asked Mr Witherden whether he had attended any additional appointments with Hunterlink to which he responded, 'maybe one or two'. DP World called for the production of records showing these additional appointments but there were none.

[141] The consequences of this are firstly, that Mr Witherden may not have been genuine when he said to DP World on 6 June 2024 that he is committed to continuing with all recommended treatment plans and secondly that he may have been untruthful to the Commission in his evidence at the hearing. In relation to the first matter, I note Mr Witherden's evidence that he is seeing a psychiatrist on a regular basis and that his psychiatrist recently diagnosed him as being borderline ADHD and required him to participate in drug screening so that he could be sure, in prescribing medication, that Mr Witherden is not taking illicit drugs. During the hearing, Mr Witherden confirmed that his psychiatrist has prescribed Ritalin in relation to the borderline ADHD diagnosis. There was no challenge to Mr Witherden's evidence about the treatment he is receiving from his psychiatrist, and I accept this evidence. This evidence shows that Mr Witherden is addressing the mental health issues which he says led to his drug taking so I do not regard the cessation of this appointments with Hunterlink as demonstrating that he was not genuine in relation to obtaining treatment.

[142] In relation to the second matter, it very concerning that Mr Witherden did not provide an accurate answer to my question about whether he had attended any additional appointments with Hunterlink. I do not know whether Mr Witherden's actions in this regard were deliberate or otherwise as he had completed his evidence by the time that Hunterlink confirmed that he had attended no further appointments. If Mr Witherden's actions were deliberate, this may amount to a breach of s.678(1) which provides:

### **678 False or misleading evidence**

#### *Giving false or misleading evidence*

- (1) A person (the *witness*) commits an offence if:
- (a) the witness gives sworn or affirmed evidence; and
  - (b) the witness gives the evidence as a witness:
    - (i) in a matter before the FWC; or
    - (ii) before a person taking evidence on behalf of the FWC for use in a matter that the witness will start by application to the FWC; and
  - (c) the evidence is false or misleading.

Penalty: Imprisonment for 12 months.

Note: A person will not commit an offence if the person carries out the conduct constituting the offence under duress (see section 10.2 of the *Criminal Code*).

[143] I note that in responding to my question, Mr Witherden's used the word 'maybe', indicating perhaps that he was not sure whether he had attended additional appointments since filing the witness statement. However, given that this was a matter which Mr Witherden raised in his witness statement, he should have expected that he would be asked questions about this and been prepared to provide accurate answers. That he did not do so reflects very poorly on Mr Witherden. If Mr Witherden was not sure whether he had attended additional appointments, he should have said this directly in response to my question rather than providing an answer which he ought to have known may not be correct. Because there is insufficient evidence to establish that Mr Witherden was being deliberately untruthful to the Commission, I have not taken this matter into account in determining whether the dismissal was unfair, but I have had regard to it in considering remedy.

Was there a risk that Mr Witherden was impaired at work?

[144] Professor Weatherby's evidence was that as cocaine has a very short half-life in the human body, there would be no cocaine present, and no intoxication or impairment due to cocaine on 27 May 2024 at 7.28 am. Benzoyllecgonine and ecgonine methyl ester metabolites can be detected for a longer period, but they are both pharmacologically inactive and have no impairing effects. Therefore, Mr Witherden would not have been impaired or intoxicated at the time of the drug test on 27 May 2024. Professor Weatherby also said that tiredness and restlessness can occur for a day or two after cocaine use.

[145] Dr Lewis and Dr Williams agreed that there would be no intoxication due to cocaine on 27 May 2024 at 7.28 am and that benzoyllecgonine and ecgonine methyl ester metabolites are both pharmacologically inactive and have no intoxicating effects. However, both Dr Lewis and Dr Williams said that cocaine users can be impaired following the withdrawal of the drug. This impairment includes mood changes, sleep deprivation and cognitive impairment including impulsiveness and exhaustion.

[146] Mr Bond on behalf of Mr Witherden submitted that the conclusions that Dr Lewis and Dr Williams reached about the risk that Mr Witherden was impaired were based on research which were not applicable to a recreational cocaine user like Mr Witherden. In cross-examination, Dr Lewis accepted that the studies he referred to were in relation to persons who were cocaine dependent. In cross-examination, Dr Williams accepted that the studies she referred to in her report were in relation to cocaine users who had been diagnosed with 'stimulant use disorder' or 'cocaine use disorder'. Mr Bond submitted that Dr Lewis and Dr Williams relied upon studies that do not deal with a person who is not addicted to cocaine so there is no scientific basis for their opinions that there was a risk that Mr Witherden was impaired while he was at work on 27 May 2024. The Commission was not provided with information about what constitutes 'cocaine dependency' and therefore cannot form a view about whether Mr Witherden was cocaine dependent based on the information available about Mr Witherden's cocaine use.

[147] DP World submitted that there were deficiencies in Professor Weatherby's conclusions because they were made without the knowledge that Mr Witherden had consumed cocaine for three consecutive days. In any event, Professor Weatherby's statement that tiredness and restlessness can occur for a day or two after cocaine use was sufficient to establish that there was a risk that Mr Witherden was impaired when he attended work on 27 May 2024.

[148] Mr Bond submitted that Mr Witherden was terminated because he had certain metabolites in his system not because he was tired and that he was not asked to respond to any allegation that he was fatigued or tired.

[149] In *Goodsell*,<sup>103</sup> Deputy President Easton's findings that there was no risk of impairment were based on the following:

- Mr Goodsell was absent from the workplace for the eight consecutive days immediately prior to testing.

- Assuming that Mr Goodsell was impaired for a period of time after consuming the cocaine, that relatively short period of impairment was some time in the previous two to five days.
- Mr Goodsell was on leave for all of those days and so the period of impairment could only have been while Mr Goodsell was away from the workplace on leave. The circumstances would be theoretically different if Mr Goodsell had worked during the four days before the test because then there would be a possibility that he worked with an intoxicant in his system.
- The concentration of benzoylecgonine was very low, albeit measured against an even lower cut-off limit under the Australian Standards. Sydney Trains' Chief Health Officer said that the benzoylecgonine concentration measured in the test was consistent with Mr Goodsell's account that he had consumed the cocaine almost four days prior. Sydney Trains' witnesses said the positive test result was also consistent with the cocaine having been consumed less than four days prior.
- Professor Weatherby's assessment was that if cocaine had been consumed only 12 hours before testing and even if that consumption had caused some noticeable impairment 10-12 hours before testing, the very small effects caused by such a low dosage would have long passed before Mr Goodsell attended work and was tested.<sup>104</sup>

**[150]** Deputy President Easton did not deal directly with the risk of impairment arising from the effects of withdrawal compared to the risk of impairment arising from the intoxicating effects of cocaine. However, in finding no errors in the Deputy President's approach, the Full Bench said the following:

The risk referred to in the submissions of Sydney Trains, based on the medical and scientific evidence at first instance about when Mr Goodsell likely took cocaine, and the possibility of impairment occurring 2 – 4 days from the last consumption of cocaine, because of restlessness, tiredness, sadness, fatigue and insomnia, was countered by the concessions made by Dr Lewis under cross-examination, and taken into account by the Deputy President. Those concessions were to the effect that Mr Goodsell's urine sample did not indicate levels of any substance that could be correlated with a hangover effect and that the study cited in his evidence was old and concerned with several days of heavy cocaine use and regular cocaine users. It was reasonably open for the Deputy President to make the finding in paragraph [117] of the Decision based on evidence that there was no active drug in Mr Goodsell's system at the time he was tested, the test results were consistent with his evidence about when he used cocaine, he showed no signs of impairment when tested, and he was not impaired by a hangover effect. It was also reasonably open to the Deputy President to find that Mr Goodsell is not a habitual or regular user of cocaine and that his ingestion of cocaine was a one-off event, on the basis of his uncontested evidence that he has undertaken some 40 drug tests in his 26-year unblemished career and has not returned a positive result on any other occasion...<sup>105</sup>

**[151]** It is clear from the Full Bench's reasoning that hangover effects are relevant to considerations of risk of impairment. A separate issue arises as to whether employees of DP World were on notice that the AOD Policy is intended to manage risks associated with hangover effects in addition to intoxication, which is dealt with below. However, for the purpose of assessing whether there was a risk of Mr Witherden being impaired when he attended work on

27 May 2024, I am required to have regard to hangover effects as well as intoxication. The urine test did not detect cocaine, so I find that there is no evidence to support a finding that Mr Witherden was intoxicated by cocaine when attending work on 27 May 2024. Further, there is no evidence to support a finding that Mr Witherden was actually impaired when attending work on 27 May 2024. However, in circumstances where Mr Witherden admitted using cocaine 24 hours before attending work on 27 May 2024 and Professor Weatherby's evidence is that tiredness and restlessness occur for a day or two after cocaine use, I cannot rule out the possibility that Mr Witherden was impaired by tiredness or hangover effects when he attended work on 27 May 2024. Accordingly, I am unable to make a finding that there was no risk of impairment when Mr Witherden attended work on 27 May 2024.

Was the information available to employees about the AOD Policy adequate?

[152] The evidence establishes that Mr Witherden had been provided with a copy of the AOD Policy and Code and demonstrated awareness of the AOD Policy when he completed employee disclosure forms disclosing prescription drugs in 2021 and 2023. I accept Mr Eadie's evidence that the existence of the AOD Policy is promoted and reinforced through posters on the walls and noticeboards around the Botany Terminal and through the distribution of workplace bulletins and emails to employees. I also accept Mr Eadie's evidence that Mr Witherden, along with other employees, were sent an email on 27 June 2022 in which DP World advised employees that there is no way to determine impairment and as such the AOD policy is based on the presence of drugs and alcohol, which means that DP World does not need to prove that work or performance has been adversely affected by drugs.

[153] Mr Witherden's evidence was that while he was generally aware of the AOD Policy, DP World did not explain to him what it means to be 'fit for work' under the AOD Policy, the significance of cut-off levels and how the Australian Standards apply. When Mr Witherden attended work on 27 May 2024, he believed that he was fit for work because he knew that he was not impaired.

[154] There is no evidence before me about the specific training which is provided to employees about the AOD Policy. I have therefore based my findings about the AOD Policy on the plain and ordinary meaning of the language of the AOD Policy.

[155] The AOD Policy refers to employees being 'drug and alcohol free at work' and an employee being deemed unfit for work if they have an amount of drugs present in their saliva and urine that exceeds the test cut-off levels as set out in Appendix B of the AOD Policy. Employees are prohibited from attending or performing work with a level of alcohol and/or other drug in their system that would result in a positive test result. The expression 'other drugs' is defined in the AOD Policy as 'any chemical substance (either natural or synthetic), which alters the structure or function of the body, and/or any drug described as an illegal substance under Australian law.'

[156] The expert evidence relied upon by both Mr Witherden and DP World establishes that cocaine would certainly be regarded as falling within the definition of 'other drug'. However, Mr Witherden did not test positive for cocaine. Mr Witherden tested positive for benzoylecgonine and ecgonine methyl ester which are pharmacologically inactive and have no impairing effects. Benzoylecgonine and ecgonine methyl ester do not therefore fall within the

definition of ‘other drugs’ in the AOD Policy. Although these substances could not be considered ‘other drugs’ for the purposes of the AOD Policy, the AOD Policy provides cut off levels in relation to these substances at Appendix B. This suggests that for the purposes of the AOD Policy, Benzoyllecgonine and ecgonine methyl ester are regarded as drugs although they do not fall within the definition of ‘other drugs’. In my view, this is potentially confusing for employees so the AOD Policy should explicitly state that it tests for non-active metabolites as well as drugs.

[157] The Australian Standards were not in evidence in the proceedings and no explanation was provided about why the Australian Standards test for substances which have no intoxicating effects. However I note the observations of Deputy President Easton in *Goodsell* that the information obtained from the testing regime under the Australian Standard, being evidence of use of a drug at some time prior to testing, might be sufficient for screening athletes in a sport that bans all use of certain drugs.<sup>106</sup> In circumstances where the purpose of drug testing is to ensure that the subject does not consume drugs at all, it may well be appropriate to test for cocaine use by testing for benzoyllecgonine and ecgonine methyl ester. However, where the purpose of testing is to manage the risk of impairment, I have some difficulty with a testing regime that can eliminate the possibility that a person is intoxicated by cocaine (by the person testing negative to cocaine) but can deem a person unfit for work on the basis of prior cocaine use without explicitly advising employees of this possibility. It is easy to imagine a situation where an employee like Mr Witherden could obtain information through their own research or from a doctor which confirms that cocaine leaves the body within 2-3 hours of use and to assume that they are ‘drug free’ when returning to work 23 hours after last using cocaine. The memo which DP World sent to employees on 27 June 2022 does not assist to clarify DP World’s expectations as it refers to ‘drugs in the system’ and the ‘presence’ of drugs which could be reasonably interpreted as referring to cocaine and not the inactive metabolites of cocaine.

[158] During the hearing, in response to questioning by me, Mr Eadie advised that DP World aims to test at least fifty per cent of its employees per year on a random basis. An employee could therefore expect to be tested once every two years on average, however tests could occur more or less frequently than this on a specific employee because of the random nature of the testing. Because of the infrequency of testing, and the importance of safety at the Botany Terminal, DP World cannot rely solely upon the testing regime to ensure that employees are not at risk of impairment at work. It is therefore essential that DP World proactively ensures that employees understand what DP World’s expectations are in respect of fitness for work, including that DP World regards tiredness and hangover effects after alcohol and other drug consumption as being as serious a safety issue as intoxication in the workplace. I note that the AOD and the Code both refer generally to the requirement that employees are fit for work, however I believe that these documents should refer specifically to fitness for work as including being unaffected by tiredness or hangover effects following alcohol and other drug consumption so that employees know exactly what is expected of them.

[159] The Full Bench in *Goodsell* said the following about training in relation to the Sydney Trains Policy:

At the very least, an intelligible explanation of the kind discussed by the Full Bench in *Hilder* would include details of the prohibited drugs covered by the Policy and minimum cutoff levels, that the testing shows drug use rather than impairment, the existence of

and measurement for inactive metabolites of prohibited drugs and the length of time that measurable traces of drugs or metabolites at or around cutoff levels may remain in a person's system even after the effect of the drug has worn off. It should also have been made clear that a zero-tolerance policy means that if employees attending for work were found to have traces of proscribed substances exceeding cutoff levels in their systems, Sydney Trains would assume that they pose an unacceptable risk to fellow workers and customers because of those results. Further, it should have been explained that Sydney Trains would have this view, regardless of whether the employee concerned was demonstrating obvious impairment at work or whether the drug was consumed at work or in the employees' own time outside work.<sup>107</sup>

**[160]** The AOD Policy was not deficient in the way described by the Full Bench in *Goodsell* because it included details of the prohibited drugs covered by the AOD Policy and minimum cutoff levels. However, it does not describe the length of time that measurable traces of drugs or metabolites at or around cutoff levels may remain in a person's system even after the effect of the drug has worn off. While I do not necessarily think that DP World is required to precisely spell out in the AOD Policy how long illicit drugs may be detected in a drug test after consumption, I believe that the AOD Policy should have made it clear that it tests for inactive metabolites and that detection of these will result in a positive test even after the parent drug has left the employee's system and the person is not regarded as being intoxicated. This is particularly important as the AOD Policy implicitly acknowledges that employees may not always be aware that they have detectable levels of substances in their systems by its reference to the possibility of 'self-management' options being provided by DP World such as 'self-testing' and the requirement that any employee who suspects that his or her Breath Alcohol Concentration could be greater than 0.00 use one of the breath testing instruments before commencing work.

**[161]** DP World relied upon an email which it sent to all employees including Mr Witherden on 27 June 2022 which attached the AOD Policy. In the email DP World advised employees:

.... there is no safe 'window of detection' and that certain drugs can stay in your system for days, weeks or months. This means there is no means by which an employee can be confident there are no drugs in their system when they attend for work.<sup>108</sup>

**[162]** In my view, this is important information and should have formed part of the AOD Policy. It was not sufficient for DP World to simply put this information in an email which employees may have difficulty finding to reference in the future. Further, the reference to 'drugs' is incomplete and should also refer to inactive metabolites, as there were no 'drugs' in Mr Witherden's system when he attended work on 27 May 2024.

**[163]** In the circumstances, I find that the information available to Mr Witherden and other employees about the AOD Policy was inadequate. In particular, the AOD Policy should have stated that employees will be tested for inactive metabolites and that detection of these will result in a positive test even after the parent drug has left the employee's system and the person is not regarded as being intoxicated. Employees should also have been explicitly advised that the AOD Policy is intended to manage risks associated with hangover effects in addition to intoxication. These matters weigh in favour of a finding of unfairness.



Was DP World's mind closed in the disciplinary process to Mr Witherden continuing in his employment?

[164] As noted above, I have found that Mr Witherden was given an opportunity to respond to any reason related to his capacity or conduct and that DP World took these responses into account when it decided to terminate his employment. However, based upon the expert evidence, I have some concerns about the AOD Policy referring to 'high range detection levels' as constituting a 'serious breach of the policy' and the potential impact of this on Mr Eadie's decision making process.

[165] Professor Weatherby said that it appeared from the termination letter that DP World had misunderstood the analytical results. The letter stated that the initial sample 'returned a non-negative result for Cocaine' which appears to indicate that the author of the letter believed that cocaine was detected as the Table in the letter has Cocaine POSITIVE. That was not the case as the confirmatory result does not show any cocaine was present, only the benzoylecgonine and ecgonine methyl ester metabolites.

[166] A further concern which Professor Weatherby raised was that Mr Eadie appeared to believe that the 'cut-off' level has some relationship to how much drug may have been used and the seriousness of any intoxication, however that is not true. Professor Weatherby said the 'cut-off' level is an analytical issue and is about the sensitivity of the laboratory analytical result. Professor Weatherby explained that the laboratory is confident above that point that it is reporting a correct result and that the cut-off level has no relationship to impairment or intoxication. Professor Weatherby said that the comment that the 'metabolite levels detected are far in excess of the cut-off level in the Australian Standard' is referring to analytical laboratories and the accuracy of their results. It has absolutely no pharmacological (or impairment) relevance in any way. Amounts in urine cannot reflect accurately any amount of drug taken as urine is an 'end product' and depending on urinary emptying the amounts present can be high or low. Dr Lewis appeared to agree with Professor Weatherby about this issue when he agreed in cross-examination that a testing result of greater than 10,000ug/l cannot be correlated with intoxication or impairment, nor can the result be correlated with the frequency of use or dose of cocaine or any other drug.

[167] Dr Williams' response to this issue was rather cryptic. She said that exceeding a cut off level by a certain amount is 'a model adhered to by every police department in Australia whereby higher penalties are imposed based upon the severity of offences such as driving under the influence of alcohol or speeding'. Dr Williams' commentary about alcohol and driving offences may well be correct but she did not provide any evidence which contradicts the evidence of Professor Weatherby and Dr Lewis that the cocaine cut off levels have no relationship to how much drug may have been used and the seriousness of any intoxication.

[168] Professor Weatherby's and Dr Lewis' evidence is consistent with Deputy President Easton's consideration of testing standards in *Goodsell*:

[95] The Australian Standard sets protocols and standards for urine testing. Amongst other things the Australian Standards set minimum "cut off" limits for detection of certain substances.

As Dr Lewis said:

“The Standard is not an impairment measuring document, as stipulated in AS/NZS 4308: 2008 Clause 1.1 SCOPE, Notes 2. The Standard is a document designed to measure the competence of a laboratory, such that compliance with that Standard should ensure a correct result, viz, the presence or absence of a drug/metabolite being indicative of either recent or not recent ingestion.”

[96] Professor Weatherby’s and Dr Lewis’ evidence was that the cut off limits are set to avoid measurement errors and to provide confidence in testing outcomes. In other words, the cut off limits are set in the Australian Standards by reference to margins of error in the accuracy of the results recorded.

[97] Benzoylecgonine is a case in point. The testing cut-off limit in the Australian Standard is 150ug/L, which is a cut-off level determined by the technology and methodology used in the testing process. As Professor Weatherby said, a normal positive reading might be 7000ug/L, which is 46 times larger than the cut-off. This relativity suggests that the testing process can reliably detect minute concentration levels.

[98] For drug testing, and particularly tests for cocaine metabolites, there is no utility in comparing a particular positive reading to the cut-off level. Where one might think a blood alcohol level of 0.10 is significant because it is twice the legal driving limit of 0.05, the same kind of comparison for testing cut-off limits is not helpful.

[99] The fact that Mr Goodsell’s result was almost double the testing limit sounds terrible for Mr Goodsell, but it just means that his concentration was very low compared to an even lower cut-off limit.<sup>109</sup>

[169] Elsewhere in the decision, the Deputy President’s reference to Professor Weatherby’s evidence about benzoylecgonine concentration levels appeared to suggest that a low concentration level indicates that Mr Goodsell was near the end of the process of eliminating the benzoylecgonine from his system.<sup>110</sup>

[170] Taking into account the evidence before the Commission about testing levels, it is unclear why the AOD Policy provides that a detection level of greater than 600ug/L for benzoylecgonine and ecgonine methyl ester is a ‘high range detection level’ which ‘will be considered a serious breach of this policy’. In the absence of any evidence to explain the reason for this, the only rational explanation is that DP World regards a person with a level of greater than 600ug/L for benzoylecgonine and ecgonine methyl ester as being at greater risk of impairment than a person with a level of 600ug/L or less. However, there is simply no evidence to support a finding that this is the case.

[171] Although DP World claims that it is not the intention of the AOD Policy to test for impairment, this appears to be inconsistent with the AOD Policy’s reference to high range detection levels and these being regarded as a serious breach of the Policy.

[172] Both the show cause letter and the letter of termination referred to the level of benzoylecgonine detected being more than 16 times the high range detection level and the level of ecgonine methyl ester detected being more than 10 times the high range detection level which ‘constitutes a serious breach’ of the AOD Policy. In deciding to terminate Mr Witherden’s employment, Mr Eadie took into account the seriousness of the matter and stated that DP World regarded Mr Eadie as engaging in serious misconduct. The relevance of a ‘high range detection level’ being ‘considered a serious breach of this policy’ is that according to the AOD Policy, a breach may be considered serious misconduct which may result in instant dismissal in particular where there is a ‘high range’ level detected or where there is a second breach. While the AOD Policy contemplates an employee being dismissed for any breach, it draws employees’ attention to two specific situations, where there is a ‘high range’ level detected and where there is a second breach. Faced with a high range test result and having regard to what the AOD Policy said about such a result, it is perhaps understandable that Mr Eadie considered that dismissal was the only appropriate outcome. However, the fact that a ‘high range’ level with respect to an inactive metabolite does not increase a person’s risk of impairment is a matter which is relevant to the objective seriousness of the matter. The AOD Policy led Mr Eadie to attribute a greater level of seriousness in relation to Mr Witherden’s conduct that simply was not available when the expert evidence is considered. This is a matter which weighs in favour of a finding that the dismissal was unfair.

[173] These circumstances can be contrasted to the cases of *Mr Craig Hancock v DP World Brisbane Pty Ltd* (Hancock)<sup>111</sup> and *Michael Gauci v DP World Brisbane Pty Ltd* (Gauci)<sup>112</sup> which are other decisions of the Commission involving DP World and the AOD Policy that DP World relied upon. In both cases, Dr Williams, who gave evidence in the proceedings before me, gave evidence on behalf of DP World, and Dr Michael Robertson gave evidence on behalf of the respective applicants.

[174] In *Hancock*, the applicant was employed for 25 years and suffered from significant mental health issues. During a two week period of leave, he smoked marijuana every evening to help him with sleep and anxiety issues including 13 hours before he was due to return to work. He was subject to a random drug test during the afternoon that he returned to work and tested positive to THC to a level of 564ug/l which was regarded as ‘high level’ under the AOD Policy. Dr Williams’ evidence was that the high level test result suggested impairment as it was indicative of a person consuming either a significant amount of cannabis the evening before or potentially that morning.<sup>113</sup>

[175] In *Gauci*, the applicant had been employed for over 19 years. In recent years he experienced a significant deterioration in his mental health and had been prescribed and was consuming medicinal cannabis. He tested positive to THC to a level of 635ug/l which was 42 times higher than the cut off level of 15ug/l prescribed by both the Australian Standards and the AOD Policy and some 10 times higher than the high range threshold of 60ug/l prescribed in the AOD Policy. Mr Gauci was dismissed because he breached the AOD Policy by failing to declare his use of prescription medication and for attending work with an elevated level of a proscribed substance in his system.

[176] Dr Robertson described the level of THC in Mr Gauci’s system as being consistent with significant consumption.<sup>114</sup> It was common ground between the experts that the dose that would have been consumed by Mr Gauci was equivalent to about 280 milligrams of THC, a level of

THC Dr Robertson equated with smoking 10 to 15 joints.<sup>115</sup> Dr Williams noted that there is a difference between detectable (i.e. above the cut off specified in Australian Standards being 15ng/ml) and returning a result as high as the one returned by Mr Gauci being 635ug/ml.<sup>116</sup> Dr Williams disagreed with Dr Robertson's contention that Mr Gauci would not have experienced any material impairment 24 hours after consuming medicinal cannabis.<sup>117</sup>

[177] In both *Gauci* and *Hancock*, the high levels of THC were relevant to the Commission's findings that the dismissals were not unfair.<sup>118</sup> The evidence of Dr Williams in both cases appeared to suggest that high levels of THC were connected to the quantity consumed and therefore the risk of impairment. It was relevant to the Commissioner's consideration of the matter in *Gauci* that the applicant breached two parts of the AOD Policy and that the level of THC detected in Mr Gauci's urine was 10 times greater than the high level prescribed by the AOD Policy.<sup>119</sup> Further, Mr Gauci was on notice of the potential effects of THC as he signed a patient consent form acknowledging that he understood that he must not drive or operate heavy machinery while taking medicinal cannabis containing THC.<sup>120</sup>

[178] Mr Hancock, Mr Gauci and Mr Witherden relied upon similar mitigating circumstances of:

- A one-off breach of the AOD Policy;
- lengthy employment history; and
- drug use explained by mental health issues.

[179] However, the facts in *Hancock* and *Gauci* are distinguishable from the matter before me because it appeared to be accepted by the Commission in both *Hancock* and *Gauci* (and not disputed by the parties) that:

- Mr Hancock and Mr Gauci tested positive to an intoxicating substance, namely THC;
- The high range of THC detected increased the risk of impairment; and
- The high range of THC amounted to a serious breach of the AOD Policy.

[180] This is to be contrasted to Mr Witherden's case as:

- Mr Witherden did not test positive to an intoxicating substance but to inactive metabolites;
- There is no evidence that the high range of inactive metabolites increased the risk of impairment; and
- There appears to be no scientific or other reasonable basis for DP World to regard a specific level of inactive metabolites as a serious breach of the AOD Policy compared to a lower level.

[181] The current proceedings are also distinguishable from *Gauci* as:

- Mr Gauci breached the AOD Policy in two respects however Mr Witherden committed one breach;
- Mr Gauci had signed a patient consent form stating that he must not drive or operate heavy machinery while taking medicinal cannabis containing THC, which was not a feature of Mr Witherden's case

DP World's failure to consider options other than dismissal

[182] By recognising alcohol or other drug dependency as a ‘treatable condition’ in the AOD Policy, DP World is acknowledging that alcohol or other drug dependency is a medical condition which a person may require treatment for, in order to overcome.

[183] Mr Witherden’s evidence was that injuries sustained to his shoulders at work resulted in his mental health deteriorating. Recovery had been slow and often painful, and the prolonged recovery period has led him to suffer symptoms of depression and anxiety. Mr Witherden said that he found himself frequently getting stressed out and inappropriately lashing out at loved ones. He started self-medicating with illicit drugs, primarily cocaine and used cocaine during a three day period that he did not attend work, from 24-26 May 2024.

[184] The letter of termination confirmed that during the meeting on 7 June 2024, Mr Witherden disclosed that he had been on Worker’s Compensation for the last two years and that this had impacted his mental health, his wife had been asking him to seek help for his mental health but he had been putting this off, his decision to use cocaine was partly a coping mechanism to deal with feelings of stress and that he said that he was willing to seek support via a psychiatrist and possibly Foundation House (which I understand to be a drug and alcohol rehabilitation centre). Following the dismissal, Mr Witherden started seeing a psychiatrist on a regular basis. Mr Witherden said his psychiatrist had diagnosed him as being borderline ADHD and was intending to start Mr Witherden on prescription medication to treat his condition. Mr Witherden was required to participate in a drug screen so that his psychiatrist could be sure, before prescribing medication, that he had not taken illicit drugs. Mr Witherden has been informed by his psychiatrist that testing will be an ongoing requirement. At the hearing, Mr Witherden advised that he had commenced taking Ritalin.

[185] There was disagreement between the parties during the hearing about whether Mr Witherden could be regarded as ‘cocaine dependent’, with Mr Witherden’s representative describing him as a ‘recreational’ user and the experts called by DP World relying on studies of cocaine addicts to express opinions about the risk of Mr Witherden being impaired on 27 May 2024. Regardless of whether Mr Witherden is cocaine dependent or not, it appears to me that if Mr Witherden had disclosed to DP World that he was self-medicating with illicit drugs to deal with mental health issues, he would have been regarded as having an ‘alcohol and/or other drug dependency condition’ for the purpose of the AOD Policy and therefore entitled to rehabilitation assistance. This assistance comprises of access to the DP World EAP, development of an Employee Support Plan, and access to accrued leave or leave without pay for employees who require leave from work to receive treatment. The AOD Policy provides that an employee who comes forward of their own volition and asks for assistance with alcohol and/or other drug dependency issues prior to a test being conducted will not be subject to disciplinary action. However, where an employee tests positive (whether at the initial screening or the confirmatory test), DP World has discretion about whether rehabilitation support is offered to the employee and disciplinary action may still be taken. The AOD Policy also refers to the possibility of ‘self-management’ options being provided by DP World such as ‘self-testing’.

[186] DP World’s commitment to refrain from disciplining employees who disclose an alcohol and/or other drug dependency issue prior to a test being conducted is likely to act as a powerful incentive for employees to make such disclosures and hopefully prevent such

employees from attending the workplace while impaired by drugs or alcohol. It is reasonable and appropriate for DP World to make such a commitment. However, it is also reasonable and appropriate for DP World to maintain the ability, as it has, to refrain from disciplining employees who have an alcohol and/or other drug dependency issue and who do not make a disclosure. This is because there may be a range of reasons why an employee does not make a disclosure but is still a suitable candidate for rehabilitation rather than disciplinary action.

[187] The AOD Policy contains conflicting statements about whether disciplinary action ‘may’ or ‘will’ occur if an employee tests positive to a drug test. As noted above, the section dealing with rehabilitation states that disciplinary action may still be taken if an employee tests positive and DP World is considering whether to provide rehabilitation support. This suggests that an employee with an alcohol and/or other drug dependency issue may not be subject to disciplinary action if the employee tests positive. Elsewhere in the AOD Policy, it provides that following a confirmed positive test result, ‘Disciplinary discussions *will* take place which *will* include consideration as to what disciplinary outcomes are appropriate in the circumstances.’ [emphasis added]. The AOD Policy also provides under the heading ‘Disciplinary Action’ that disciplinary action will be taken in specific circumstances including where an employee records a confirmed positive alcohol or other drugs screening test.

[188] Notwithstanding this apparent contradiction, it appears to me that DP World has discretion under the AOD Policy to refrain from taking disciplinary action against an employee who tests positive, particularly if alcohol and/or other drug dependency issues are present. Further, the AOD Policy does not mandate that dismissal must occur in the event of a positive test. Mr Eadie’s evidence was that he may consider a response other than disciplinary action for an employee who had their drink spiked, or self-declared prior to performing work. However, it is difficult to see why DP World would need to exercise discretion in these cases and how employees in these circumstances would ever be considered for disciplinary action. The AOD Policy specifically states that where an employee comes forward of their own volition and asks for assistance with alcohol and/or other drug dependency issues prior to a test being conducted, there will be no disciplinary action. Similarly, an employee who had their drink spiked would be considered a victim of crime and presumably would not be regarded as engaging in any wrongdoing under the AOD Policy.

[189] In my view, Mr Witherden’s disclosure to Mr Eadie and Ms Banks on 7 June 2024 about his mental health issues should have prompted consideration of whether rehabilitation support would be offered to Mr Witherden under the AOD Policy. Mr Eadie’s actions in providing Mr Witherden with six months access to DP World’s EAP, given his personal circumstances, demonstrate that Mr Eadie had regard to Mr Witherden’s mental health issues. However, there is no indication that Mr Eadie ever considered that Mr Witherden’s breach of the AOD Policy was health related and that rehabilitation support was an option that was available for him to consider. The AOD Policy contemplates that an employee who is being offered rehabilitation support may have recorded a positive test result, by requiring that the employee undergo target testing for a period of 12 months from the test result. It is difficult to understand why Mr Witherden was not even considered for rehabilitation support, given his lengthy period of service, his generally favourable employment record and that he has not previously tested positive, despite being tested many times previously. Further, this was not a situation where Mr Witherden caused a safety incident, consumed drugs or alcohol at work or was intoxicated at work. All of the circumstances point to Mr Witherden being deserving of a second chance and

that any concern by DP World about Mr Witherden attending work in the future after consuming drugs could be mitigated by placing Mr Witherden on an Employee Support Plan and subjecting him to target testing.

#### The severity of Mr Witherden's misconduct

[190] DP World submitted that while Mr Witherden's breach of the AOD Policy itself discloses a valid reason for dismissal, the severity of that breach is relevant:

- a. in determining whether Mr Witherden's conduct amounted to 'serious misconduct' for the purposes of section 123(1)(b) of the FW Act (and the consequent determination of whether Mr Witherden was entitled to payment in lieu of notice on termination); and
- b. in the Commission's assessment of whether, in all the circumstances, and in light of the demonstrated valid reason, Mr Witherden's dismissal was otherwise 'harsh, unjust, or unreasonable'.

[191] DP World submitted that its operation at the Botany Terminal is a high turnover container terminal. It is a safety-critical operating environment, with up to 7 cranes, 18 RTGs, 8 heavy forklifts, 4 empty handlers, 36 ITVs, and up to 80 trucks and 1 train moving around the Terminal at any one time, in addition to in excess of 200 workers. Mr Witherden's responsibilities on 27 May 2024 included operating an RTG, which is used to stack 40 tonne shipping containers around the Port, including on and off trucks and trains. There was a prospect that at any time, Mr Witherden could have been assigned to undertake any of the other stevedoring tasks for which he was qualified to perform.

[192] DP World submitted that Mr Witherden had been put on notice that termination of employment was a potential outcome if Mr Witherden attended for work with a proscribed substance in his system. Confirmatory testing found the level of 'benzoylecgonine' in Mr Witherden's urine at a level in excess of 10,000 ug/L and 'ecgonine-methyl-ester' at a level of 6,400 ug/L in circumstances where the AOD Policy defines any reading of more than 600ug/L as 'high range'.

[193] Further, DP World submitted it is relevant that in a number of other decisions of this Commission, presentation at work with proscribed substances in one's system, in breach of an employer's drug and alcohol policy (including DP World's AOD Policy), has been held to be 'serious misconduct'.

[194] Finally, DP World submitted that Reg 1.07 of the *Fair Work Regulations 2009* (Cth) provides an instructive (although non-exhaustive) list of conduct that will be 'serious misconduct' and submits that Mr Witherden's conduct is plainly captured by the examples set out in Reg 1.07. It is clear Mr Witherden's misconduct amounted to serious misconduct, both for the purposes of Reg 1.07 of the Regulations, and for the purposes of the Commission's holistic assessment of whether the dismissal was 'harsh, unjust, or unreasonable'.

[195] I accept DP World's submissions that its operation at the Botany Terminal is a high turnover container terminal, that it is a safety-critical operating environment, that Mr Witherden's responsibilities on 27 May 2024 included operating equipment used to stack 40

tonne shipping containers around the Port, including on and off trucks and trains and there was a prospect that at any time, Mr Witherden could have been assigned to undertake any of the other stevedoring tasks for which he was qualified to perform.

[196] I accept that the severity of the misconduct is a relevant consideration under s.387(h) however it is not necessary for me to determine whether Mr Witherden's conduct is serious misconduct for the purpose of Reg 1.07 of the *Fair Work Regulations 2009* (Cth) as I am not considering whether DP World was entitled to summarily dismiss Mr Witherden under s.123(1)(b).<sup>121</sup>

[197] There have been a range of views expressed in decisions of this Commission as to whether breach of an employer's drug and alcohol policy may be characterised as serious misconduct. In *Hancock and Gauci*, which are referred to earlier, the Commission agreed with DP World that the respective applicants had engaged in serious misconduct and in each case referred to the applicant as testing in the high range which was regarded as serious misconduct under the AOD Policy. In addition, in *Gauci*, the applicant engaged in two breaches of the AOD Policy. In *Toms*,<sup>122</sup> the Full Bench agreed with the employer that the applicant's breach of the drug and alcohol policy was serious misconduct. In *Owen Sharp v BCS Infrastructure Support Pty Limited* (Sharp),<sup>123</sup> the Full Bench said that it was open to Vice President Catanzariti to find at first instance that the applicant's breach of the employer's drug and alcohol policy was serious misconduct. However, the Full Bench in that case then went on to make the following observations in relation to serious misconduct:

[34] It may be accepted that an assessment of the degree of seriousness of misconduct which has been found to constitute a valid reason for dismissal for the purposes of s.387(a) is a relevant matter to be taken into account under s.387(h). In that context, a conclusion that the misconduct was of such a nature as to have justified summary dismissal may also be relevant. Even so, it is unclear that this requires a consideration of whether an employee's conduct met a postulated standard of "serious misconduct". In *Rankin v Marine Power International Pty Ltd*. Gillard J stated that "There is no rule of law that defines the degree of misconduct which would justify dismissal without notice" and identified the touchstone as being whether the conduct was of such a grave nature as to be repugnant to the employment relationship. "Serious misconduct" is sometimes used as a rubric for conduct of this nature, but to adopt it as a fixed standard for the consideration of misconduct for the purpose of s.387(h) may be confusing or misleading because the expression, and other expressions of a similar nature, have been considered and applied in a variety of contexts in ways which are influenced by those contexts. In *McDonald v Parnell Laboratories (Aust) Pty Ltd* Buchanan J said:

"[48] The terms 'misconduct', 'serious misconduct' and 'serious and wilful misconduct' are often the subject of judicial and administrative attention as applied to the facts of particular cases but there is relatively little judicial discussion about their content and meaning. Naturally enough, when the term 'serious misconduct' is under consideration an evaluation of what conduct represents 'serious' misconduct is influenced by the (usually statutory) setting in which the phrase must be given meaning and applied. Frequently, for example, the question at issue is whether an employee is disentitled by reason of his or her conduct to a statutory entitlement (eg. in New South Wales, where



Ms McDonald was employed, see Long Service Leave Act 1955 (NSW) s 4(2)(a)(iii); Workers Compensation Act 1987 (NSW) s 14(2).<sup>124</sup>

(citations omitted)

[198] In *Goodsell*, the employer regarded the applicant's conduct in failing a drug test as serious misconduct, but this characterisation was not specifically examined by Deputy President Easton or on appeal. In *Gary Hilder v Sydney Trains*,<sup>125</sup> the Commission disagreed with the employer's characterisation of a breach of its drug and alcohol policy as serious misconduct and this finding was not overturned on appeal.<sup>126</sup>

[199] I note that not every breach of the AOD Policy is regarded as serious misconduct under the Policy. This is understandable as the Policy deals with a range of conduct which varies in degrees of seriousness. For example, the most serious conduct it deals with is conduct of a criminal nature such as the use and consumption of, possession of, storage or selling, supply, cultivation or manufacture of illicit drugs at work. Such conduct would obviously amount to serious misconduct.

[200] The AOD Policy provides that breaches of the Policy 'may' be considered serious misconduct which may result in instant dismissal, in particular, where there is a 'high range' level detected or where there is a second breach. This gives some indication of the type of conduct which DP World regards as serious misconduct. The effect of the AOD Policy is that a single breach may be considered misconduct, but not serious misconduct. Further, a high range level may be considered serious misconduct but not a level which is lower than high range.

[201] Earlier in this decision I have indicated that the fact that a 'high range' level of an inactive metabolite does not increase a person's risk of impairment is relevant to the objective seriousness of the matter. I therefore do not accept DP World's submission that Mr Witherden's conduct was serious misconduct on the basis that a high range of inactive metabolites was detected. What remains to be considered is whether Mr Witherden's breach of the AOD Policy, regardless of the 'range' detected, amounted to serious misconduct. I do accept that Mr Witherden worked in a high risk environment, that the AOD Policy is one of the strategies that DP World has adopted to minimise the risk of injury or death or damage to property which could be caused by a person impaired by alcohol or other drugs and that a breach of the AOD Policy is a serious matter. Applying the reasoning of the Full Bench in *Sharp*, I do not believe that I am required to make a finding about whether Mr Witherden's breach of the AOD Policy amounted to serious misconduct. I record that I regard Mr Witherden's conduct as a serious matter and one which weighs in favour of a finding that the dismissal was not unfair.

***Is the Commission satisfied that the dismissal of Mr Witherden was harsh, unjust or unreasonable?***

[202] I have made findings in relation to each matter specified in s.387 as relevant.

[203] I must consider and give due weight to each of these matters as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>127</sup>

**[204]** Mr Witherden's admitted breach of the AOD Policy establishes that there was a valid reason for the dismissal and is also relevant to my consideration under s.387(h). This weighs in favour of a finding that the dismissal was not unfair. My findings that I cannot rule out the possibility that Mr Witherden was not impaired by tiredness or hangover effects and in relation to ss.387(b), (c) and (d) also weigh in favour of a finding that the dismissal was not unfair. The matters ss.387(f) and (g) are neutral considerations and s.387(e) is not relevant.

**[205]** There are a number of additional matters that are relevant to my consideration under s.387(h) which weigh in favour of a finding of unfairness. Mr Witherden performs dangerous work in a safety critical environment. The performance of that work by a person impaired by alcohol or other drugs could have catastrophic consequences. Despite this, DP World has not sought to mandate that any breach of the AOD Policy will result in dismissal. It specifies some circumstances in which instant dismissal may occur, namely a second breach of the policy and a high range positive result. It also contemplates providing employees with rehabilitation assistance and target testing employees who test positive for a 12 month period. These aspects of the AOD Policy demonstrate that DP World acknowledges that alcohol and other drugs issues can be health related and therefore many require a supportive rather than punitive approach and that there are measures available, other than dismissal, to mitigate the risk posed by employees who test positive.

**[206]** In Mr Witherden's case, there is no dispute that he was not intoxicated by cocaine when he attended work as there was no cocaine detected in the drug test relied upon to dismiss him. It is not clear on the evidence whether Mr Eadie was aware of this when he dismissed Mr Witherden as the letter of termination focused on the high range of inactive metabolites detected which is deemed serious misconduct in the AOD Policy. However, as noted above, the expert evidence establishes that a 'high range' level with respect to an inactive metabolite does not increase a person's risk of impairment. The AOD Policy led Mr Eadie to attribute a greater level of seriousness in relation to Mr Witherden's conduct that simply was not available when the expert evidence is considered. This is a matter which weighs in favour of a finding that the dismissal was unfair.

**[207]** There is no indication in the evidence that Mr Eadie considered whether rehabilitation was appropriate although it was available under the AOD Policy. It may have been that Mr Eadie considered the elevated levels of metabolites so serious that rehabilitation was not an option. However, the matters which Mr Witherden raised with Mr Eadie about his mental health and its connection to his drug consumption made him a suitable candidate for rehabilitation, particularly having regard to his long and satisfactory employment history. This is also a matter which weighs in favour of a finding that the dismissal was unfair.

**[208]** There is no indication in the evidence that Mr Witherden deliberately attended work with inactive metabolites in his system on 27 May 2024. Although it was reasonable for DP World to expect employees to be familiar with the AOD Policy, the information available to Mr Witherden and other employees about the AOD Policy was inadequate. Employees should have been informed that they will be tested for inactive metabolites and that detection of these will result in a positive test even after the parent drug has left the employee's system and the person is not regarded as being intoxicated. Further, employees should have been explicitly advised that the AOD Policy is intended to manage risks associated with hangover effects in addition to intoxication. This weighs in favour of a finding of unfairness.

[209] In Mr Witherden's case, the personal circumstances which weigh in favour of a finding of unfairness are his length of service, minimal previous disciplinary issues, cooperation with the disciplinary process and remorse. I also note that unlike some applicants in other matters before the Commission where dismissals for breaching a drug and alcohol policy were found to be not unfair, Mr Witherden did not consume cocaine on the day he attended work,<sup>128</sup> nor was he involved in any safety incidents.<sup>129</sup>

[210] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Mr Witherden was harsh and unreasonable because the seriousness of Mr Witherden's breach of the AOD Policy is outweighed by the following matters:

- Mr Witherden was not intoxicated by cocaine;
- DP World relied upon a 'high range' level with respect to inactive metabolites to attribute a greater level of seriousness in relation to Mr Witherden's conduct which was not available when the expert evidence is considered;
- There is no indication in the evidence that DP World considered whether rehabilitation was appropriate although it was available under the AOD Policy;
- The information available to Mr Witherden and other employees about the AOD Policy was inadequate, particularly that it tests for inactive metabolites and that detection of these will result in a positive test even after the parent drug has left the employee's system and the person is not regarded as being intoxicated;
- Employees should have been explicitly advised that the AOD Policy is intended to manage risks associated with hangover effects in addition to intoxication;
- Mr Witherden's mental health issues; and
- Mr Witherden's lengthy period of satisfactory service.

[211] I am therefore satisfied that Mr Witherden was unfairly dismissed within the meaning of s.385 of the FW Act.

### **Remedy**

[212] Being satisfied that Mr Witherden:

- made an application for an order granting a remedy under s.394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the FW Act, order Mr Witherden's reinstatement, or the payment of compensation to Mr Witherden.

### ***Is reinstatement of Mr Witherden inappropriate?***

[213] Mr Witherden is seeking reinstatement and submitted that reinstatement is appropriate.

[214] DP World submitted that reinstatement is inappropriate because, amongst other factors:

- Mr Witherden's conduct was 'serious misconduct';

- Mr Witherden attended work despite having been made aware that employees were not to attend for work with an elevated level of a proscribed substance in his system;
- Mr Witherden's conduct in performing a safety critical role at a container terminal with an elevated level of a proscribed substance in his system potentially put at risk both the safety of himself and others, but also the reputation of DP World's business.

[215] DP World submitted that based on these matters, it is understandable that it has lost trust and confidence in Mr Witherden's ability to conduct himself appropriately in the workplace such that DP World can be confident that the safety of its operations at the Botany Terminal are not undermined.

[216] A Full Bench of the Commission has helpfully identified the following propositions relevant to the impact of a loss of trust and confidence on the appropriateness of an order for reinstatement:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based, and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.<sup>130</sup>

[217] The Full Bench conclude that, "[u]ltimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party."<sup>131</sup>

[218] I have difficulty in accepting Mr Eadie's evidence that he has lost trust and confidence in Mr Witherden because of a single breach of the AOD Policy. I believe that Mr Eadie's view in this regard is likely to have been influenced by Mr Witherden's high range test result which had no bearing on the seriousness of Mr Witherden's conduct. The reality is that Mr Witherden has complied with the AOD Policy on every occasion that he has attended work since it was introduced in 2012, apart from on 27 May 2024. This means that Mr Witherden has complied with the AOD Policy on literally thousands of occasions which should give DP World

confidence that the events of 27 May 2024 are a ‘one off’ transgression. DP World already has measures in place to ensure that the safety of its operations at the Botany Terminal are not undermined by employees who have alcohol and other drug dependence issues such as target testing and rehabilitation programs which it can require Mr Witherden to participate in.

[219] Mr Witherden is a long serving and experienced employee who has been trusted by DP World to act up in higher roles. DP World has not relied upon any other performance or conduct issues, apart from Mr Witherden’s single breach of the AOD Policy to submit that reinstatement is inappropriate.

[220] I have considered whether reinstatement is inappropriate because of Mr Witherden’s incorrect answers to the Commission about the Hunterlink appointments.

[221] Having regard to all the matters referred to above, I consider that reinstatement is not inappropriate and have decided to consider Mr Witherden’s incorrect evidence in determining whether orders for lost remuneration/or continuity of service are appropriate.

***Reinstatement – to what position should Mr Witherden be appointed?***

[222] Section 391(1) of the FW Act provides that an order for Mr Witherden’s reinstatement must be an order that Mr Witherden’s employer at the time of the dismissal reinstate Mr Witherden by:

- (a) reappointing Mr Witherden to the position in which Mr Witherden was employed immediately before the dismissal; or
- (b) appointing Mr Witherden to another position on terms and conditions no less favourable than those on which Mr Witherden was employed immediately before the dismissal.

[223] Section 391(2) of the FW Act provides that, if:

- (a) the position in which Mr Witherden was employed immediately before the dismissal is no longer a position with Mr Witherden’s employer (as at the time of dismissal); and
- (b) that position, or an equivalent position, is a position with an associated entity of the employer,

the order for reinstatement may be an order to the associated entity to:

- (c) appoint Mr Witherden to the position in which Mr Witherden was employed immediately before the dismissal; or
- (d) appoint Mr Witherden to another position on terms and conditions no less favourable than those on which Mr Witherden was employed immediately before the dismissal.

[224] In the absence of any evidence to the contrary, I am satisfied that it is open to me to make an order reappointing Mr Witherden within 21 days of the date of this decision to the position in which Mr Witherden was employed immediately before the dismissal.

*Is it appropriate to make an order to maintain continuity and/or lost pay*

[225] Section 391(2) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to maintain the following:

- (a) the continuity of the person's employment;
- (b) the period of the person's continuous service with the employer or, if applicable, the associated entity.

[226] Section 391(3) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to cause the employer to pay to Mr Witherden an amount for the remuneration lost, or likely to have been lost, by Mr Witherden because of the dismissal.

[227] DP World submitted that the Commission should not order lost remuneration or continuity of service as to do so would be plainly inappropriate and have the effect of depriving Mr Witherden's misconduct of any meaningful consequence.

[228] An order to restore lost pay does not necessarily follow an order for reinstatement. The Commission may only make an order if it considers it appropriate to do so and only make an order that the Commission considers appropriate.<sup>132</sup> Where an employee has engaged in misconduct, the Commission may refuse to make any order to restore lost pay.<sup>133</sup>

[229] In my view, it is appropriate that there is some consequence for Mr Witherden in relation to the breach of the AOD Policy and also because of the inaccurate evidence that he gave to the Commission in relation to the Hunterlink appointments. If Mr Witherden had not provided inaccurate evidence to the Commission, I would have been inclined to make an order for lost remuneration albeit at a reduced amount because of Mr Witherden's breach of the AOD Policy. However, there should be significant consequences for Mr Witherden in failing to ensure that the evidence that he provided to the Commission was accurate. In the circumstances I have decided not to make an order in relation to lost remuneration but to make an order maintaining continuity of service as I consider it appropriate to do so. Continuity of service will provide Mr Witherden with a degree of security of employment and recognise his lengthy period of service. The effect of this order is a nine-month suspension without pay which is a significant penalty and appropriate in all of the circumstances of the case.

**Conclusion**

[230] I have found that there was a valid reason for the dismissal because Mr Witherden breached the AOD Policy when he attended work on 27 May 2024 and tested positive for benzoylecgonine and ecgonine methyl ester.

[231] I have also found that Mr Witherden was not intoxicated by cocaine, the ‘high range’ test results were not indicative of impairment, there is no indication that DP World considered whether rehabilitation was appropriate and that the information available to Mr Witherden and other employees about the AOD Policy was inadequate.

[232] Based upon these findings, and Mr Witherden’s long and satisfactory period of service, I have concluded that the dismissal was harsh and unreasonable. I have made orders reappointing Mr Witherden to the position in which Mr Witherden was employed immediately before the dismissal and maintaining the continuity of Mr Witherden’s employment within 21 days of the date of this decision.

[233] An order giving effect to this decision has been separately issued in [PR783928](#).



DEPUTY PRESIDENT

*Appearances:*

Mr K. *Bond*, CFMEU Legal Officer, for the Applicant  
Mr L. *Witherden*, the Applicant

Mr J. *McLean*, Counsel, for the Respondent  
Mr B. *Milne*, Instructing Solicitor from Kingston Reid, for the Respondent

*Hearing details:*

2024  
4 October  
In person, Sydney

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<sup>1</sup> Witness Statement of Lee Witherden dated 6 September 2024 [6], Digital Hearing Book (DHB) 90

<sup>2</sup> Witness Statement of Scott Eadie dated 20 September 2024 [31], DHB 256

<sup>3</sup> Ibid [1]-[2], DHB 247

<sup>4</sup> Ibid [4], DHB 248

<sup>5</sup> Ibid [5], DHB 248

<sup>6</sup> Ibid [6], DHB 248-249

<sup>7</sup> Ibid [7], DHB 249

<sup>8</sup> Ibid [8]-[9], DHB 249

<sup>9</sup> Ibid [11], DHB 250

<sup>10</sup> Ibid [12], DHB 250

<sup>11</sup> Ibid [14], DHB 252

<sup>12</sup> Ibid [16], DHB 252-253

<sup>13</sup> Ibid, [31(g)(3)], DHB 258

<sup>14</sup> Ibid [17], DHB 253

<sup>15</sup> Ibid, [31(g)(2)], DHB 257-258

<sup>16</sup> Ibid, [31(b)], DHB 256

<sup>17</sup> Ibid, [31(c)], DHB 257

<sup>18</sup> Witness Statement of Lee Witherden dated 6 September 2024 [11], DHB 90

<sup>19</sup> Ibid [12]-[13], DHB 90-91

<sup>20</sup> Witness Statement of Scott Eadie dated 20 September 2024 [31(e)], DHB 257

<sup>21</sup> Witness Statement of Lee Witherden dated 6 September 2024 [14]-[15], DHB 91

<sup>22</sup> Ibid [16], DHB 91

<sup>23</sup> Ibid [17], DHB 91

<sup>24</sup> Witness Statement of Scott Eadie dated 20 September 2024 [19]-[20], DHB 253-254

<sup>25</sup> Ibid [31(f)], DHB 253-254

<sup>26</sup> Witness Statement of Lee Witherden dated 6 September 2024 [19], DHB 91

<sup>27</sup> Ibid [20]-[21], DHB 91-92

<sup>28</sup> Ibid [22], DHB 92

<sup>29</sup> Ibid [23], DHB 92

<sup>30</sup> Ibid [24], DHB 92

<sup>31</sup> DHB 177-178

<sup>32</sup> Witness Statement of Lee Witherden dated 6 September 2024 [25], DHB 92

<sup>33</sup> DHB 182-183

<sup>34</sup> Witness Statement of Lee Witherden dated 6 September 2024 [26], DHB 92

<sup>35</sup> Witness Statement of Scott Eadie dated 20 September 2024 [23], DHB 254

<sup>36</sup> Ibid [25]-[26], DHB 255

<sup>37</sup> Ibid [27], DHB 255

<sup>38</sup> Ibid [28]-[29], DHB 255-256

<sup>39</sup> DHB 334

<sup>40</sup> DHB 335

<sup>41</sup> DHB 335-336



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<sup>42</sup> Witness Statement of Scott Eadie dated 20 September 2024 [31(i)], DHB 258

<sup>43</sup> Witness Statement of Lee Witherden dated 6 September 2024 [28], DHB 92

<sup>44</sup> Ibid [29], DHB 92-93

<sup>45</sup> Ibid [30], DHB 93

<sup>46</sup> Ibid [31], DHB 93

<sup>47</sup> Ibid [32], DHB 93

<sup>48</sup> Ibid [33], DHB 93

<sup>49</sup> DHB 267

<sup>50</sup> DHB 268

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> DHB 269

<sup>55</sup> Ibid

<sup>56</sup> Ibid

<sup>57</sup> DHB 270

<sup>58</sup> Ibid

<sup>59</sup> DHB 273

<sup>60</sup> DHB 273-274

<sup>61</sup> DHB 275

<sup>62</sup> DHB 277

<sup>63</sup> DHB 278

<sup>64</sup> Ibid

<sup>65</sup> Witness Statement of Professor Robert P Weatherby, DHB 192-193

<sup>66</sup> Statement of Dr John Lewis dated 20 September 2024, DHB 230-231

<sup>67</sup> Statement of Dr Michelle Williams dated 20 September 2024, DHB 224

<sup>68</sup> Witness Statement of Professor Robert P Weatherby [3], DHB 195

<sup>69</sup> Statement of Dr Michelle Williams dated 20 September 2024, DHB 216

<sup>70</sup> Witness Statement of Professor Robert P Weatherby [4], DHB 195

<sup>71</sup> Witness Statement of Professor Robert P Weatherby [5], DHB 195

<sup>72</sup> Statement of Dr Michelle Williams dated 20 September 2024, DHB 224

<sup>73</sup> DHB 222

<sup>74</sup> Ibid, DHB 223

<sup>75</sup> Statement of Dr John Lewis dated 20 September 2024 DHB 242

<sup>76</sup> Witness Statement of Professor Robert P Weatherby [6], DHB 195

<sup>77</sup> Statement of Dr John Lewis dated 20 September 2024 DHB 242-243

<sup>78</sup> Ibid, DHB 244

<sup>79</sup> Statement of Dr Michelle Williams dated 20 September 2024, DHB 223

<sup>80</sup> Ibid

<sup>81</sup> Witness Statement of Professor Robert P Weatherby [9], DHB 196

<sup>82</sup> Ibid

<sup>83</sup> Witness Statement of Professor Robert P Weatherby [10], DHB 196-197

<sup>84</sup> Witness Statement of Professor Robert P Weatherby [11], DHB 197

<sup>85</sup> Statement of Dr John Lewis dated 20 September 2024 DHB 244

<sup>86</sup> Statement of Dr Michelle Williams dated 20 September 2024, DHB 225

<sup>87</sup> *Sayer v Melsteel Pty Ltd* [\[2011\] FWAFB 7498](#), [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

<sup>88</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

<sup>91</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7].

<sup>92</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

<sup>93</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWC FB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWC FB 533](#), [55].

<sup>94</sup> [\[2023\] FWC 3209](#)

<sup>95</sup> [\[2024\] FWC FB 401](#)

<sup>96</sup> *Ibid.*, [2]

<sup>97</sup> *Ibid.*, [5]

<sup>98</sup> *Ibid.*, [4]

<sup>99</sup> *Ibid.*, [5]

<sup>100</sup> [\[2023\] FWC 3209](#), [136]

<sup>101</sup> [\[2014\] FWC FB 6249](#)

<sup>102</sup> *Ibid.*, [25]

<sup>103</sup> [\[2023\] FWC 3209](#)

<sup>104</sup> *Ibid.*, [116]-[118]; [142]-[145]

<sup>105</sup> [\[2024\] FWC FB 401](#), [133]

<sup>106</sup> [\[2023\] FWC 3209](#), [163]

<sup>107</sup> [\[2024\] FWC FB 401](#), [153]

<sup>108</sup> DHB 304

<sup>109</sup> [\[2023\] FWC 3209](#), [95]-[99]

<sup>110</sup> *Ibid.*, [116]

<sup>111</sup> [\[2022\] FWC 1406](#) (upheld on appeal in [\[2022\] FWC FB 142](#))

<sup>112</sup> [\[2024\] FWC 2351](#)

<sup>113</sup> [\[2022\] FWC 1406](#), [147]

<sup>114</sup> [\[2024\] FWC 2351](#), [50]

<sup>115</sup> [\[2024\] FWC 2351](#), [61]

<sup>116</sup> *Ibid.*, [55]

<sup>117</sup> *Ibid.*, [56]

<sup>118</sup> [\[2022\] FWC 1406](#), [202]; [\[2024\] FWC 2351](#), [144]

<sup>119</sup> [\[2024\] FWC 2351](#), [139]

<sup>120</sup> *Ibid.*, [94]

<sup>121</sup> *Owen Sharp v BCS Infrastructure Support Pty Limited* [\[2015\] FWC FB 1033](#), [37]

<sup>122</sup> *Harbour City Ferries Pty Ltd v Christopher Toms* [\[2014\] FWC FB 6249](#), [28]

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, [34]

<sup>125</sup> [\[2019\] FWC 8412](#)

<sup>126</sup> *Sydney Trains v Gary Hilder* [\[2020\] FWC FB 1373](#)

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<sup>127</sup> *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](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

<sup>128</sup> See for example *Liam Hawken v Patrick Stevedores Holdings Pty Limited* [\[2024\] FWCFB 463](#); *Kieran Woodgate v Queensland Rail Transit Authority T/A Queensland Rail* [\[2024\] FWC 3165](#)

<sup>129</sup> See for example *Harbour City Ferries Pty Ltd v Christopher Toms* [\[2014\] FWCFB 6249](#); *Kieran Woodgate v Queensland Rail Transit Authority T/A Queensland Rail* [\[2024\] FWC 3165](#)

<sup>130</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFB 7198](#), [27].

<sup>131</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFB 7198](#), [28].

<sup>132</sup> *Aurora Energy Pty Ltd v Davison* [PR902108](#) (AIRCFCB, Watson SDP, Williams SDP, Holmes C, 8 March 2001), [25].

<sup>133</sup> See, eg, *Regional Express Holdings Ltd v Richards* [\[2010\] FWAFB 8753](#), [29].