DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Roland Barber
v
Veolia Recycling and Recovery Pty Ltd
(U2024/9197)

COMMISSIONER MCKINNON SYDNEY, 12 FEBRUARY 2025

Application for an unfair dismissal remedy – whether dismissal harsh, unjust or unreasonable

[1] Mr Roland Barber was employed on a casual basis from 2008 and then as a full-time garbage truck driver by Veolia Recycling & Recovery Pty Ltd (Veolia) and its predecessors from approximately September 2014. On 16 July 2024, he was dismissed for repeated safety breaches. At the time of dismissal, Mr Barber was working at Veolia's West Botany Street site in Arncliffe, NSW.

[2] On 6 August 2024, Mr Barber applied in time for an unfair dismissal remedy under section 394 of the *Fair Work Act 2009* (the Act). Mr Barber is protected from unfair dismissal because he had completed a minimum employment period of at least 6 months with Veolia; was covered by a modern award; and his annual rate of earnings was below the high-income threshold. The dismissal was not a case of genuine redundancy, and Veolia is not a small business employer, so the Small Business Fair Dismissal Code did not apply.

[3] The question is whether I am satisfied that the dismissal was harsh, unjust or unreasonable, and the answer is 'No'. For the reasons below, Mr Barber has not been unfairly dismissed.

Relevant history

[4] Mr Barber is a member of the Transport Workers' Union of Australia (NSW/QLD Interim Governance Branch) (TWU). He has been a union delegate for approximately 11 years and an elected Health and Safety Representative (HSR) for approximately 7 years.

[5] On 9 October 2023, Mr Barber had an accident while driving a side loader. He turned too quickly and hit the bumper bar of another vehicle.

[6] On 11 October 2023, Mr Barber was involved in a second accident, when a blocked sensor caused the automatic retraction mechanism on the truck's side arm to fail. The side arm stayed raised and Mr Barber did not look to confirm that the arm had retracted before driving

forward. He hit a utility vehicle parked on the street, causing damage to the value of approximately $3000.

[7] On 17 October 2023, there was a meeting between Veolia management and Mr Barber in relation to the accidents on 9 and 11 October 2023. Mr Barber had a support person in the meeting. He accepted responsibility for the accident on 9 October 2023 but not for the accident on 11 October 2023.

[8] On 27 October 2023, Mr Mark Beasley, Collections Manager (Sydney South), approached Mr Barber and said he needed to speak to him about the recent incidents and give him a warning letter. Mr Barber said he would not be speaking to Mr Beasley and that he "would not accept" the letter. Mr Beasley told him that the warning still stuck and would be placed in Mr Barber's pigeon-hole. Mr Barber says the letter was handed to him in the yard, but I reject this. Mr Barber had refused to accept the letter. I prefer Mr Beasley's evidence that he did what he said he would do by placing the warning letter in Mr Barber's pigeon-hole.

[9] On 7 February 2024, members of Veolia's Road Safety Team spoke with drivers in the Arncliffe yard about limits on driving while seated on the left of the vehicle (the "operator/pickup side"). Drivers were told they should only drive on the operator/pickup side when picking up a bin. They were also told not to drive long distances on the operator/pickup side.

[10] Presumably, the Road Safety Team's presentation was directed at what appears to have become a practice of at least some of the drivers at the Arncliffe yard. Mr Barber gave evidence that he felt it was often safer, quicker and easier to stay driving on the operator/pickup side on the way to, through and from his run, and that others did the same. I accept that he is not the only driver to have adopted this practice. I also accept Veolia's evidence, acknowledged by Mr Barber, that the practice was inconsistent with its clear and well understood safety rules about when a driver can drive on the operator/pickup side.

[11] On 14 February 2024 at approximately 2.50am, Mr Barber left the Arncliffe yard and drove toward West Botany Road and the Princess Highway while seated on the operator/pickup side of his truck and not yet in his run. Mr Barber says that he drove in this position because otherwise he would have had to get out of the vehicle into live traffic, which would have been very dangerous. I reject this and prefer the evidence of Mr Beasley. Given the distance to be travelled, I am reasonably satisfied that there would have been somewhere for Mr Barber to stop and change sides. Between the yard and commencing collections, there are many off-streets (off the main roads), garages or similar where a driver can pull over safely and change sides. Even on Mr Barber's evidence, there were at least a few places to stop on his route.

[12] On 15 February 2024 at approximately 3.30am, Mr Barber was again seen leaving the yard driving toward West Botany Road and the Princess Highway on the operator/pickup side of his truck while not in his run. There is a dispute about the direction he was driving, and whether it was on this day, or at this time. The dispute is not necessary to resolve because Mr Barber admits driving on the operator/pickup side at or around this time and says it would have been unsafe for him to change sides due to the traffic flow. For the same reasons as above, I am not satisfied that there was no safe place for Mr Barber to stop and change sides before commencing his run.

[13] At approximately 10.00am on 28 February 2024, Mr Barber was observed speeding (travelling at more than 10kph). Veolia alleges that Mr Barber also sped on multiple prior occasions. Mr Barber denies speeding in the yard but admits to driving at approximately 20kph on the public road adjacent to the yard which is used to access the depot. Veolia requires its drivers to limit their speed on this road to 10kph. Signs posted by Veolia along the road, including on a council gate opposite the yard and further along near the side entrance to the yard, confirm the 10kph speed limit.

[14] There is a dispute about when the council gate sign was put up. Mr Barber produced a photograph said to show that the sign was not there at the time of the alleged speeding incident in February 2024. The evidence does not establish the time of taking of the photograph produced by Mr Barber, or the reason for it, although Mr Barber says it was taken "at the time". The gate in the photograph is open at an angle and cannot be seen in full. There does not appear to be a sign on the gate, but I am uncertain: both about whether the sign was on the gate and when the photograph was taken. A separate photograph produced by Veolia shows the sign up on the fence. Mr Beasley says he put the sign up himself in January 2024. I accept this evidence because of its connection to a memorable point in time ("Because we were moving in not long after that and the trucks were coming over and I wanted the speed signs up"). The two photographs must have been taken at different times: there are different vehicles in the background and differences in the area surrounding the gate. On balance, I conclude that the sign had been on display for some weeks before Mr Barber was taken to task for speeding in February 2024.

[15] The point is somewhat academic in circumstances where there is at least one other 10kph sign posted along the yard gate. Further, I am satisfied on the evidence that Mr Barber was aware of the 10kph speed limit. Veolia requires its drivers to limit their speed to 10kph both on the public road (from where it meets the site) and in the yard. The requirement is regularly communicated to drivers at toolbox talks. Veolia signs displaying 10kph are posted on the council gates at the point where the public road and the site meet, and on the entrance gates to the yard which run alongside the public road. The signs are physical manifestations of a reasonable and lawful direction given by Veolia to its drivers to limit their speed in and around the entrance to the yard in connection with ensuring the safety of both employees and members of the public.

[16] In this context, the submission that Mr Barber was not speeding "in the yard" because it is separate to the adjacent public road is unpersuasive. There is no dispute that the adjacent road is a public road and accessible to members of the public – for people to go fishing "down the back" or for walking, cycling and driving. It is also true that the road is not technically "in the yard" of Veolia, and that the speed limit applicable to the road (as set by the NSW Government) is more than 10kph.

[17] But the public road is regularly used by Veolia and its drivers to access the yard. When Mr Barber was accused of speeding, he asked how Mr Beasley would know. Implicit in this response was an acknowledgement of the existence of the speed limit. Importantly, neither Mr Barber nor Mr Ho Lau, the TWU Organiser acting on his behalf, took issue with what the speed limit was, or where the alleged speeding occurred, or what was meant by "in the yard". In my view, reference to the yard in these discussions included reference to the adjacent public road,

which is the access point to the yard. Indeed, Mr Barber appears to have described the road as the "driveway" in a list of safety issues provided to Veolia on 10 April 2024. For all practical purposes, that is what it is: a driveway into the Arncliffe site. Mr Barber accepts that he was driving at approximately 20kph down the public road. This conduct was not unlawful. But it was inconsistent with Veolia's reasonable and lawful direction.

[18] On 28 February 2024, there was a meeting between Mr Barber and Veolia to discuss the incidents of 14, 15 and 28 February 2024 as well as other undated allegations of speeding. Mr Lau was present at the meeting as Mr Barber's support person. Responding to the incidents of 14 and 15 February 2024, Mr Barber said it was common practice to drive on the operator/pickup side as there was barrier between the driver and operator sides of the vehicle. In response to alleged speeding, Mr Barber did not admit the allegations but agreed not to speed in the yard.

[19] Mr Barber denies speaking in this meeting. This evidence is inconsistent with his earlier evidence (Exhibit 1) in which Mr Barber states that he explained in the meeting that he did not understand why he was being disciplined for conduct that was common practice in the yard. Although nothing turns on it, the inconsistency undermines the quality of Mr Barber's evidence. The evidence in Exhibit 1 is consistent with the evidence of Mr Beasley and the contemporaneous record of Mr Barber's response to the allegations described in the letter of 19 March 2024. On balance, I find that Mr Barber did speak in the meeting on 28 February 2024. Mr Lau also spoke, advising that the matter was in dispute under the *Suez and TWU (Operations) Agreement 2019* which applied to Mr Barber's employment at the time.

[20] On 19 March 2024, Mr Barber was issued a second written warning relating to the matters discussed on 28 February 2024. He was reminded of the expectation to operate the vehicle on the driver side while on transit to his runs, and to adhere to the speed limit of 10kph while operating a heavy vehicle inside a yard. He was advised that any future breaches of Veolia or client policy or procedure may result in further disciplinary action being taken up to and including termination of his employment. He was directed to complete further training by 28 March 2024, including on Veolia's *Life Saving Rules* and *Code of Conduct*. There is no record of this training having been completed in training records produced for the period after 19 March 2024.

[21] On 10 April 2024, there was a stop work at the Arncliffe site on safety grounds. At 3.26am, Mr Shane O'Connor, Operations Supervisor, called Mr Ken Donley, NSW/ACT Municipal Manager, to say that Mr Barber was discouraging drivers from leaving the yard and asking 3 drivers who had already left to return for the safety meeting. Mr Donley arrived at the yard at approximately 4.30am. He saw Mr Barber standing among other drivers. He asked if he could stay and listen, and Mr Barber agreed. Mr Barber spoke to a few matters that Mr Donley deemed insignificant. The meeting ended after about 10 minutes and Mr Donley asked if the drivers would be going back to work now. Mr Barber said "No" and told him that their meeting would continue until 7.00am and not when "management decides".

[22] At approximately 6.15am, Mr Barber came into the office and gave Mr Donley a list of safety concerns. Mr Donley looked at the list and asked if there was anything on the list that presented an imminent risk to any worker. Mr Barber replied that "everything did". Mr Donley disagreed, noting items on the list including "Toilets with a working light" and "truck washing".

Mr Donley advised Mr Barber that as the issues were not imminent risks, employees should return to work and the issues could be dealt with in due course. Mr Barber restated that drivers would be returning to work when he said, "at 7.00am" and not before. Mr Donley replied: "if it is safe for them to return to work at 7.00am, it must be safe for them to return to work now". Mr Barber insisted that it was his meeting. He then left to speak again with the other approximately 50 drivers waiting in and around the yard.

[23] At 6.45am, Mr Barber returned to the office and told Mr Donley that he would be having another urgent safety meeting on 12 April 2024. Mr Donley decided an investigation was warranted into the events of the day and Mr Barber's involvement in them. He arranged for Mr O'Connor to stand Mr Barber down.

[24] On 12 April 2024, Mr Barber arrived at work at 3.45am and was called into a meeting with Mr O'Connor. Mr Kevin Thomson joined the meeting as Mr Barber's witness and support person. Mr Barber was told that he had been issued a stand down letter and that Mr O'Connor would read through it. As Mr O'Connor was reading the words of the letter to the effect that it was confidential, Mr Barber replied: "I will not be keeping this confidential, and I will be letting everyone know".

[25] During the meeting, Mr Barber said to Mr O'Connor, in words to the effect: "you will be losing your house over this. That's what happened to the last person that stood down a Health and Safety Representative". He also said, in words to the effect: "If Veolia tries to pay any fines for you, it will also be fined". Mr Thomson intervened, telling Mr Barber that Mr O'Connor was just delivering the message. Mr O'Connor repeated his earlier advice to Mr Barber that the matter was confidential and that he should go straight home. Mr Barber replied, in words to the effect: "I won't be going home, I will be going straight to the solicitors." Mr Barber asked where Mr Beasley was, and then said, in words to the effect: "Mark will be losing his job as the last time this happened, the manager was sacked". Again, Mr Thomson tried to intervene to calm Mr Barber.

[26] The meeting ended shortly after it began at 3.52am. Mr Barber walked out into the yard and said: "I have just been stood down". A minute later, he walked back into the office to use the photocopier. He made a single copy of the stand down letter and asked Mr O'Connor to show him how to use the copier. Mr O'Connor asked what he was doing, and Mr Barber responded, in words to the effect: "I'm making 50 copies to put into the pigeonholes to inform them of what you've done." Mr O'Connor replied, in words to the effect: "You are not using the photocopier to do this. It's confidential" and removed the letter from the photocopier. Mr Barber asked if Mr O'Connor was refusing him use of the photocopier, and Mr O'Connor responded by saying "if it is to photocopy the letter, then yes."

[27] There is a dispute about who snatched the letter from who. I am reasonably satisfied from the sequence of events that Mr O'Connor took both the original and a copy of the letter from the photocopier and Mr Barber respectively. Mr Barber then took them back from Mr O'Connor. He went back outside and again said loudly "They have stood me down". Mr O'Connor followed him and asked him to leave the site. Mr Barber continued walking down the yard and saying that he had been stood down. He gave a copy of the letter to Mr Thomson.

[28] All of this occurred just before 4.00am, at a time when about 50 drivers were ready to commence work. Mr O'Connor rang Mr Donley and told him what had happened. Mr Barber returned to the office and said: "You can't be doing this" before walking back out. Mr O'Connor called Mr Donley again and said Mr Barber would not leave. Mr Donley said he was coming in.

[29] After trying to call Mr Barber, Mr Donley sent him a text message at 3.57am. The message said: "Roland, you can't be on-site. The letter is quite clear you have been suspended and need to leave. Staying onsite and speaking with others about this is not allowed." Mr Barber says he received the message as he was "walking out of the yard gate". But on the evidence, it appears that Mr Barber did not walk out of the yard until after 6.30am – some 2.5 hours later. This seems a long time after the message was sent by Mr Donley. Again, little turns on the discrepancy except to the extent that it undermines the quality of Mr Barber's evidence. Whenever it was that he saw the text message, Mr Barber did not recognise the number and responded: "Who is this?".

[30] Mr O'Connor spoke to the drivers and told them they were able to leave as it was past their start time and the gates were open. No-one moved or said anything. At 4.13am, Mr O'Connor went out again and asked the drivers to leave for their runs. Again, no-one moved. At approximately 4.45am, Mr Donley arrived and went to speak to Mr Barber, who was standing on a chain wire fence rocking backwards and forwards and talking to the TWU on the phone. He called out to Mr Donley: "Get away from me, stay away from me." Mr Donley told Mr Barber that he needed to leave the site and told the driver group to start work. After some discussion, trucks were moved, and a pathway was formed for drivers to leave. A few drivers left to start work while the majority remained in the yard.

[31] At 5.26am, Mr Donley called Mr Lau of the TWU and was unable to get through.

[32] At 6.37am, Mr Lau called Mr Donley. Mr Donley explained that Mr Barber had been stood down and needed to leave the site. After the conversation ended, Mr Donley spoke to Mr O'Connor. He told him to again ask Mr Barber to leave and go home. Mr O'Connor did as he had been asked and this time, Mr Barber agreed. After Mr Barber left, Mr Donley spoke to the drivers. He was told they would not be leaving until Mr Thomson received a call from the TWU. Just before 7.00am, the call came through. Mr Thomson told the drivers that "Ho said well done, good job, and he will be here on Monday morning to address all staff", and that they were now to leave and go to work, which they did.

[33] Mr Barber denies much of this exchange but also does not recall much of the details. The lack of recall is unsurprising given what appears to have been Mr Barber's agitated emotional state on the day. The best evidence of the events of the morning is that of Mr O'Connor, which is taken directly from contemporaneous notes he made at the time, first in his own hand and then translated into an email to Mr Vivek Subramanian, General Manager, Human Resource Partnering, the following day. This evidence withstood cross-examination at the hearing, where Mr O'Connor fervently rejected the proposition that Mr Barber might not have told him that he would "lose his house". Mr O'Connor's evidence was also corroborated by the evidence of Mr Donley and I accept it. To the extent that it conflicts with the evidence of Mr Barber, Mr O'Connor's evidence is more reliable and is preferred.

[34] On 23 April 2024, Mr Barber was issued with an "Allegations Letter" about the events of 12 April 2024. Veolia alleged that he had failed to follow a reasonable and lawful direction "not to discuss the details of this matter and/or engage with any other person in the workplace" when he left the meeting and announced at the door that he had "just been stood down". He was invited to respond to the allegations in writing by 26 April 2024. He was advised that the matter was being take seriously and that the allegations, if substantiated, were a breach that may result in disciplinary action up to and including termination of employment without notice.

[35] On 26 April 2024, Mr Barber provided his response to the Allegations Letter. He said his actions were consistent with an agreement at the time that he could tell his colleagues he was stood down but that he could not discuss the reasons why. He denied discussing the reasons he had been stood down with colleagues. He blamed word getting out about what had happened on Mr O'Connor, who he described has having been very vocal and aggressive toward him when he tried to photocopy the letter after the meeting, in front of other staff, with the door open to the yard. Mr Barber acknowledged that the process could have been handled better on both sides and that he should not have tried to make the photocopy. He deflected responsibility by saying that the meeting could have been conducted at a different time or place to avoid a show in front of other employees. He apologised for the situation from his side and said that he always adhered to the confidentiality of disciplinary meetings.

[36] There is no support in the evidence for the assertion that Mr Barber and Mr O'Connor agreed he could tell other drivers he was stood down after the meeting. Mr Barber agreed at the hearing that he was told he could not talk about the stand down with anyone. There is no mention of any agreement in the account given by Mr O'Connor about the events of 12 April 2024. The existence of such agreement was expressly denied by Mr O'Connor. For the reasons above, I accept and prefer the evidence of Mr O'Connor about the events of 12 April 2024.

[37] On 9 May 2024, Veolia issued Mr Barber with a final written warning for the events of 12 April 2024 after finding the allegations of 23 April 2024 substantiated. The warning advised Mr Barber that failure to meet the standards required could result in further disciplinary action, up to and including termination of employment.

[38] On 20 June 2024, Mr Barber met the Premier, Mr Chris Minns and they took a photo together. Whether this was during the day or later when Mr Barber attended a TWU dinner function is not established. The time of the dinner function is also not established. Mr Barber says he drank 6 beers and ate a meal at the function. He says he stopped drinking at 8.00pm, went to bed at 10.00pm and woke at 2.30am to get ready for work. The effect of this evidence is that he had no more than 4.5 hours sleep.

[39] On 21 June 2024, Mr Barber arrived at work ahead of his rostered shift which was due to commence at 4.15am. The time of arrival at work is not in evidence, but Mr Barber lives in Menai and works in Arncliffe, approximately 22 kilometres (and more than 15 minutes) away. Veolia had organised for drug and alcohol testing of its drivers to occur that morning. At 3.58am, Mr Barber took the first of two alcohol breathalyser tests and returned a low-level positive test for alcohol (0.013%). A second test taken at 4.22am was also positive (0.007%). In between the two tests, and despite a direction to remain outside the testing room for 15 minutes, Mr Barber walked around the yard.

[40] Mr Barber's evidence that he was allowed to walk around the yard until he was needed back for the second test is inconsistent with Mr Beasley's evidence that he told Mr Barber not to go anywhere. It is also highly improbable. Testing was being conducted by SafeWorkHealth, a NATA accredited laboratory for compliance with ISO/IEC 17025 (as required by Australian Standard 3547:2019) and in accordance with Australian Standard 4760:2019. Multiple drivers were being tested at the same time. An initial positive test required a second confirmatory test to be carried out 20 minutes after the initial test. Allowing the test subject to leave the test environment was likely to cause delay in meeting this timeframe (as it did in fact) and was inconsistent with maintaining a controlled testing environment. I prefer the evidence of Mr Beasley and find that a direction was given to Mr Barber not to leave the testing area.

[41] After the second test, Mr Barber was told he could not drive a truck. He was asked to show another casual driver how to perform his run for the day and did so. He was then directed to clean the yard and surrounding areas while Mr Beasley sought advice. He was eventually told to go home approximately 2 hours later.

[42] On 23 June 2024, Mr Barber was sent a letter about the test results. The letter confirmed his stand down with pay and a requirement to remain available to attend meetings.

[43] On 27 June 2024, Mr Barber met with Veolia to discuss the results of the drug and alcohol test. Mr Lau attended as his support person. Mr Barber was given a 'show cause' letter, which noted previous written warnings issued on 27 October 2023, 19 March 2024 and 9 May 2024 and advised that Veolia was contemplating termination of his employment. Mr Barber was invited to respond to the letter by 1 July 2024 (later extended to 2 July 2024).

[44] On 2 July 2024, Mr Barber responded to the show cause letter stating that he did not dispute the test results but that the second result was "below the company policy of 0.00". He emphasised that safety was his utmost priority and that operating a heavy vehicle with a blood alcohol over 0.00 was never his intention. He said he understood the serious implications this could have on both safety and performance. Noting that he had been asked to clean the yard after his test results, Mr Barber asserted that neither he nor Mr Beasley believed there had been a breach of company policy because if they had, Mr Beasley would have followed the policy rule that he was "not permitted to return to work and must leave the workplace when practicable in a safe and lawful manner". He said this had taken a toll on himself and his family, as a HSR and a delegate in the yard; that he felt he had been targeted on minor issues lately; and that they should work together to provide the necessary training and support to all team members as standing him or any future employee down for a 0.007% result was extreme as it was "below the 0.00". Finally, Mr Barber said he was committed to improving his performance and contributing positively to the team.

[45] On 16 July 2024, Mr Barber's employment was terminated during a meeting at Veolia's Chullora depot. Mr Lau was present at the meeting as his support person. The reason given for termination was repeatedly showing disregard for Veolia's lawful and reasonable requirements and breach of his obligations as an employee. The events relied on in support of this reason were those of: 9 and 11 October 2023 (leading to a first written warning); 12 April 2024 (leading to a second written warning); 15, 14 and 28 February 2024 (leading to a final written warning); and 21 June 2024 (resulting in an opportunity to show cause). Mr Barber was paid 5 weeks' wages in lieu of notice.

Relevant contracts, policies and procedures

[46] Mr Barber's contract of employment with Veolia was made with SUEZ Recycling & Recovery (No.1) Pty Ltd (SUEZ) on or about 24 April 2017. The contract continued in operation when SUEZ and Veolia merged in 2022. Under the contract, Mr Barber was required to be familiar with and comply at all times with company policies relating to the workplace:

> "You are required to be familiar with and to comply at all times with all SUEZ's policies relating to the workplace including any policies which are altered or introduced after the commencement of your employment. You should take this requirement very seriously as certain breaches of SUEZ's policies can result in the termination of your employment. A copy of the SUEZ Policy Manual is available from your Manager or HR representative. A number of key SUEZ policies are included with this letter and it is your responsibility to keep up to date and seek information about SUEZ all policies and procedures."

[47] In relation to Alcohol and other Drugs, the contract said this:

> "It is a condition of your employment that you do not commence or undertake work under the influence of drugs and/or alcohol. A breach of this condition will constitute serious misconduct and may result in disciplinary action including the termination of your employment.
>
> You agree to undergo any reasonable medical examination or testing if and when required by SUEZ during the term of your employment."

[48] In relation to environment, quality and safety, the contract said:

> "SUEZ is committed to ensuring a safe and secure place of work for our employees; and acting in an environmentally responsible manner. You must comply with all occupational health, safety and environment legislation and SUEZ EQ&S policies. This includes adhering to all on-site safety procedures at all times and includes the wearing protective clothing as required."

[49] Veolia's Code of Conduct is issued under the SUEZ banner. It sets out standards of behaviour for employees and provides "a broad framework that will help you decide on an appropriate course of action when you are faced with an ethical issue". All employees are expected to take responsibility for their own conduct and work cooperatively with colleagues to "establish consultative and collaborative workplaces where people are happy and proud to work". Employees are expected to read and follow the Code of Conduct, which covers Work, Health and Safety and Drugs and Alcohol among other matters and are responsible for ensuring safe work practices at all times. The Code of Conduct confirms a zero tolerance to alcohol and other drugs in the workplace. Drivers must not report for work or drive a company vehicle if their performance is affected by drugs or alcohol where it could present a risk to themselves or others or property. They must inform their supervisor or manager if they feel unfit for work or suspect someone is unable to safely perform their job due to the effects of alcohol or drugs.

[50] Veolia's policy on Workplace Behaviours, Grievances and Misconduct defines misconduct as including damage and theft of company property; unsafe and reckless behaviour; being under the influence of drugs or alcohol; refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment; and breaches of conditions included in an employee's employment contract, Veolia's Code of Conduct or any other Veolia Standard. Under the policy, employees can be stood down in cases of alleged misconduct which can either be invested or the subject of an information gathering interview with the employee. Employees are entitled to have a support person with them at any meeting regarding misconduct. Where misconduct is established, a range of disciplinary measures can be applied, including a verbal warning, written warning, training to address the misconduct or termination of employment.

[51] The SUEZ Performance Management and Misconduct Policy is a separate guide for conducting disciplinary action when an employee is not performing their job to the standard required or has engaged in misconduct. It recognises that each situation is unique, and disciplinary action should be assessed having regard to the circumstances, such that managers are not bound to the policy and can implement any process which is appropriate to address an individual situation. It gives examples of misconduct and disciplinary action that can be taken.

[52] Veolia also has a set of "non-negotiable" Life Saving Rules. Mr Barber was trained on these rules on 12 December 2023. They include two rules of relevance to this case: "I always drive free from drugs, alcohol and fatigue" and "I signal, slow down and check surroundings, before turning and reversing."

[53] Veolia produced the SUEZ Driver Operator Manual for side loader compaction and bin lifter, which applied to Mr Barber's employment. It contains general safety requirements and refers to Chain of Responsibility laws that emphasise "Safe drivers" as "licensed, trained, fit for duty, not fatigued and drive safely to the prevailing laws, road conditions and under the speed limit". The manual explains that an "easy way for a driver to meet" their chain of responsibility obligations is to do all their duties with safety in mind, for example by ensuring "you are fit for duty and not affected by fatigue, drugs or alcohol", and driving safely and complying with road rules.

[54] According to the Driver Operator Manual, the National Heavy Vehicle Driver Fatigue Laws (NHVL) apply to vehicles with a gross vehicle mass (GVM) of more than 12 tonnes. The GVM of vehicles driven by Mr Barber was more than 13.9 tonnes. Under the NHVL, drivers must ensure that non-work activities and lifestyle do not impact on their ability to safely perform driving and non-driving activities. It is the responsibility of the driver to ensure they have adequate sleep during their non-working time – noting that drivers are at increased risk of accident when driving between midnight and 6.00am. Drivers have a duty to alert management to situations where they report for duty without having had sufficient sleep or are in an unfit state for any reason.

[55] The Driver Operator Manual provides that workers must not attend work or drive a company vehicle if their performance is affected by drugs and/or alcohol. A worker considered by their supervisor or manager to be unfit to safely perform their duties due to the effects of drugs and/or alcohol will not be permitted to remain at the workplace.

[56] On "Driving Vehicles", the manual says: "When operating or driving you must keep a safe and proper look out by effectively scanning your surroundings and using all situational awareness aids such as cameras, side view mirrors, etc at all times to avoid hitting pedestrians, vehicles or property."

[57] On "Speeding", the manual explains that the effect of speed on cornering stability, braking distance and impact forces are all made worse by increased speed. Cornering forces don't just double when the vehicle speed doubles, they increase four times. The manual states that drivers should take corners at or below the speed indicated on the advisory sign, and always observe the speed limit in depots, parking lots, rest areas, customer's premises and work.

[58] The SUEZ Safe Operating Procedures relating to "DriveCam", a driver behaviour management system, also deal with driving safely and defensively. They include requirements to "always check mirrors and other safety equipment before you leave a curb or change the vehicle's direction or lane" and "keep a proper lookout – be aware of your surroundings and keep a proper safe distance away from pedestrians and vehicles, especially cyclists and motorbikes".

[59] The Safe Operating Procedures relating to Side Loader Compaction and Bin Lifters include general safety rules, including:

- Pay particular attention to the MGB retrieval system including the hydraulic extension arm and the movement in relation to persons or obstructions (e.g. cars, trees, and poles) and confined areas.
- ALWAYS use your mirrors and cameras to check the surrounding areas minimise where possible turning your neck.
- When driving your vehicle during normal travel, you must drive from the designated driving seat situated on the right hand side. The left side of the vehicle is for Kerbside bin collections only and under no circumstance should it be used as the normal travel position. When changing driving position from left to right and vice versa, exit via the door, using three points of contact. NEVER CLIMB ACROSS IN THE CABIN UNLESS THE CABIN IS A WALK THROUGH CABIN.
- When serving bins prior to moving the vehicle from a stationary position or leaving the kerb drivers must ensure that the surroundings are effectively scanned prior to moving off.
- Caution: Drivers of Side Loading vehicles should take extra care due to their left hand seating position to ensure it is safe to move off following each and every stop to service a bin, regardless of frequency of stops.
- Regularly scan the camera monitor: clear of obstacles; pedestrians; bin contaminants.
- Do not drive forward or backward with bin lifter arm extended. You may drive forward or backward, slowly and carefully, with the body raised when at a disposal facility, ensure you are on solid even ground.

[60] Related Operating Instructions relating to Side Loader Compaction and Bin Lifters include that:

- You must drive from the normal driving position, on the right hand side, whilst travelling in a non-collection mode including to or from the disposal facility or the depot to the first collection point. Change driving sides via the door, never via the cabin using three points of contact.

- You are to occupy the left-hand kerbside driving position only when engaged in actual collections.
- It is the operators' responsibility to ensure that mechanical equipment is operated in a safe manner at all times to guard against personal injury to yourself or others. Ensure that the appropriate personal protective equipment including gloves is used whilst servicing bins.
- NOTE: THE VEHICLE SHOULD NEVER BE DRIVEN WITH SLIDE OR BIN LIFTERS EXTENDED FROM THE SIDE OF THE VEHICLE AS THIS CONSTITUTES AN OVER-WIDTH CONDITION. SLIDE CAN BE 1800-2400MM OUT FROM SIDE OF TRUCK.
- NOTE: IN ORDER TO AVOID THE POSSIBILITY OF THE BIN RETRIEVAL SYSTEM BEING ACCIDENTALLY LEFT EXTENDED/PARTIALLY EXTENDED AS THE VEHICLE TRAVELS TO THE NEXT COLLECTION SITE, AN IN-BUILT SENSOR AUTOMATICALLY RETRACTS (AUTOPAK) THE LIFTER TO THE STOW POSITION AT VEHICLE SPEEDS IN EXCESS OF 3 TO 8KPH. (DOES NOT APPLY TO ALL SUEZ SIDE LOADER VEHICLES. MANUAL ATTENTION MAY BE REQUIRED)
- The bin lifter must be stowed before moving ahead.
- It is the driver's responsibility to check that the lifter is in a safe position prior to moving truck forward or reversing.
- Always obey disposal facility management rules and speed limits; only unload in the designated areas.

[61] Veolia produced two Drug and Alcohol Procedures – one under the SUEZ banner (issued 1 April 2010 and revised 12 November 2019) and one under the Veolia banner (issued 3 May 2022). Only the SUEZ policy ("POL009") is referred to in the show cause letter issued to Mr Barber in connection with an alleged breach of the policy. It appears to remain in operation alongside the later Veolia policy which also applied at the time of the test taken by Mr Barber on 21 June 2024.

[62] The SUEZ policy adopts a 'zero tolerance' towards drugs and alcohol presence in workers, including having higher than 0.00mg/ml Blood Alcohol Concentration (BAC) conducted by a breathalyser device indicating equal to or above the relevant cut-off levels in the policy and Australian Standard AS/NZS 4760:2019. Similarly to Mr Barber's contract of employment, the SUEZ policy makes participation in the testing program a condition of employment.

[63] Under the SUEZ policy, all alcohol testing using a breathalyser must be conducted by a qualified and trained tester who has completed a certified training course that is in compliance with Australian standards AS/NZS 4760:2019 and AS/NZS 4308:2008. Alcohol testing is to be done by use of an Accredited Breath Test device. The device must be calibrated and meet the minimum requirements of AS3547:2019 'Breath alcohol testing devices'.

[64] A worker is considered to have not passed their BAC test if their test result indicates they have more than the prescribed concentration of 0.00 mg/ml (zero reading). Workers who do not pass the initial alcohol test, i.e. register above 0.00 BAC are required to cease work and be retested 20 minutes after initial test. The second reading is read as the final test. No food or drink must be consumed within this period. Where a worker is retested and does not pass the

alcohol test, they are not permitted to return to work and must leave the workplace when practicable in a safe and lawful manner. All reasonable assistance is to be afforded to ensure the affected worker can make their way from the workplace to a safe location. The worker is not allowed to return until they produce a negative test result. The relevant Manager must immediately notify the individual's employer if a positive alcohol test (FAIL) is reported. The individual must be suspended from worksites and activities.

[65] Prior to returning to any worksites or activities, the individual is required to supply the relevant Manager with written confirmation of a negative result (PASS) from a Medical Practitioner or NATA accredited laboratory. SUEZ reserves the right to immediately terminate the contractual arrangements with non-employees for serious breaches of company policy. For employees, a positive alcohol test will lead to performance management in accordance with the Performance Management and Misconduct Policy.

[66] Under the SUEZ policy, workers to be sent home as determined by the Site Manager will be given options to get home safely including: a taxi at the employer's cost or contacting a family member or friend to collect the worker. All consideration must be given to the health and safety of the worker being sent home. Under no circumstances will the person be allowed to re-enter the working area.

[67] External Testing Providers conducting drug and alcohol testing must:

- be appointed by SUEZ under an agreement to perform such work
- be a testing laboratory accredited by the National Association of Testing Authorities (NATA)
- comply with all relevant Australian Standards, including, but not limited to: AS/NZS 4308:2008 - Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine, AS/NZS 4760:2019 - Procedures for Specimen Collection and the Detection and Quantification of Drugs in Oral Fluid and AS/NZ 3547:2019 (Breath Alcohol Testing Devices)
- distribute test results only to the nominated HR Representatives as directed by SUEZ
- provide and comply with the Chain of Custody for drug collection and management

[68] Breathalyser Devices must meet the following requirements:

- provided by the nominated national supplier as per the supplier agreement
- comply with the Australian and New Zealand Standard: AS/NZ 3547:2019 (Breath Alcohol Testing Devices)
- calibrated in accordance with manufacturers specification and in accordance with SUEZ internal calibration procedures
- for handheld breathalysers, only the Authorised Officer is permitted to use the device to carry out testing (other than voluntary self-testing which can be performed by any worker)
- must be maintained in good working order
- must keep adequate supplies of approved accessories such as mouthpieces.

[69] The Veolia Drug and Alcohol Procedure strictly prohibits reporting to work with a detectable BAC of more than 0.00. It provides for random and blanket testing of workers at all

Veolia entities across Australia and New Zealand (ANZ) throughout the Solid Waste, Water and Industrials and Energy lines of business.

[70] Under the Veolia policy, alcohol testing is to be conducted by the collection and analysis of a breath specimen utilising a breathalyser that meets and is calibrated in accordance with AS 3547:2019 or successor standards. An initial positive test will require a second confirmatory test to be carried out 20 minutes after the initial test. The result of the confirmatory test will confirm a positive or negative result for the purposes of this standard.

[71] Upon returning a second breath test with a positive result, the worker will be informed of the result and not permitted to commence/return to duties. No further breath tests will be undertaken, and the candidate will be stood down for a minimum period of 48 hours without pay. The candidate will be offered transport from the place of testing to their home address/accommodation. The employee will be directed to attend an initial interview with their direct manager. The initial interview will assist the manager to determine an appropriate course of action based on the circumstances of each individual case. Considerations may include but not be limited to the inherent requirements of the person's role, including the level of risk involved, the seriousness of consequences resulting from a safety breach, the person's cooperation at interview, performance and conduct over the period of employment and contrition and commitment to reform.

[72] Following the initial interview, the manager may decide to take certain steps including conducting a disciplinary investigation or returning the employee to work on the basis of their written commitment to not return a positive result in the future. Disciplinary action may be applied for a breach of the procedure and may include a warning or termination of employment. Both workers and managers have responsibilities under the procedure. In the case of workers, the primary responsibility is to present for work without detectable levels of drugs and alcohol in their system. This includes abstaining from any activity or behaviour even when not on duty for Veolia that results in a breach of the procedure at the time of their next period of employment duty. Managers have responsibility for adhering to, and applying, the procedure correctly, fairly and consistently and leading investigations into breaches while ensuring confidentiality.

Was the dismissal harsh, unjust or unreasonable?

Was there a valid reason for the dismissal related to capacity or conduct, and was it notified to Mr Barber?

[73] *The two crashes*: Mr Barber agrees that he drove into vehicles in two separate incidents on 9 and 11 October 2023. Each was an accident caused by Mr Barber's lack of caution: on the first occasion, by taking the corner too quickly; and on the second, by not checking that the loader's side arm had retracted before moving forward. Mr Barber is an experienced garbage truck driver. He can be taken to know to slow down around corners while operating a heavy vehicle and to check his vehicle and surroundings before moving forward. These are basic safety rules about which he had received training over the course of his employment. Mr Barber was aware that the automatic retraction systems sometimes failed. It had not happened to him before, but it was always a possibility. Regular, basic safety checks were an important part of his duties in the course of his run.

[74] *Operating on the wrong side of the vehicle:* Mr Barber agrees that he drove his truck on the operator/pickup side in February 2024 on more than one occasion. There is no dispute that he knew this to be contrary to Veolia's instructions. Drivers at the Arncliffe depot had been briefed expressly on the requirement one week earlier by Veolia's Road Safety Team. Mr Barber's explanation for the conduct that his approach was safer, quicker and easier suggests that he did not take the policy seriously and was likely to continue driving on the wrong side of the vehicle when not in his run. I accept that avoiding a change of sides on the way to the run may have been quicker and easier, but I am not satisfied that it was safer. The rule against driving on the operator/pickup side existed solely for safety reasons – that is, to ensure the safe operation of garbage trucks on public roads.

[75] *Speeding*: Mr Barber concedes that he drove over the 10kph limit required by Veolia on the public road adjacent to the Arncliffe yard. This was inconsistent with Veolia's reasonable and lawful direction that drivers limit their speed to 10kph in and around the yard. I am satisfied that Mr Barber was aware of the direction at all relevant times.

[76] *Conduct in connection with stand-down*: Mr Barber agrees that he told other drivers he had been stood down after leaving the meeting on 12 April 2024. If that were all there were to the events of 12 April 2024, disciplinary action would likely have been an overreaction in the circumstances. But the events of that day were much more volatile than the resulting warning letter discloses. When Mr Barber was told he was being stood down, he threatened his manager with the loss of his house, and his manager's manager with the loss of his job. He refused more than one reasonable and lawful direction to leave the site. The commotion that followed caused work to be delayed for all drivers in the yard for up to three hours. The related photocopier incident only occurred because of Mr Barber's attempt to defy an earlier reasonable and lawful direction about confidentiality by trying to make 50 copies of his stand down letter to put in each driver's pigeonhole.

[77] *The positive alcohol test*: When Mr Barber returned a positive alcohol test on 21 June 2024, he advised Veolia that he did not dispute the test results. At hearing, the test results were put in contest. For the reasons below, I am reasonably satisfied on the evidence that the test results are reliable. Adjusted to account for the maximum permissible error of 0.005%, Mr Barber remained above the accepted level of 0.00% BAC by the time his second test was taken at 4.22am. The result was a low-level positive and it would not have been unlawful for Mr Barber to drive a side loader under the *Road Transport Act 2013* (NSW) at the time, because the result was below the applicable road user limit of 0.02%. But that was not the relevant benchmark. Veolia's policies on drugs and alcohol at work set the tolerance level at zero and it was against this standard that Mr Barber's result was measured.

[78] Expert witness was adduced about the reliability of the breathalyser test results and the likely impairment of Mr Barber. Dr Michelle Williams was an impressive witness and her evidence was more persuasive than that of Dr Michael Robertson, whose evidence was successfully challenged under cross-examination in a number of respects and otherwise generally aligned with that of Dr Williams. Of particular note, I accept the evidence of Dr Williams that "any device that is calibrated is assumed to have met the Australian Standard". The device used to test Mr Barber was within its calibration date and the test result can be taken to have been valid and correct.

[79] Mr Barber submitted that his application of "David Beckham Cologne" (at home) and hand sanitiser (on arrival at the yard) could have affected the validity of the test results. I reject the submissions. The cologne theory can be immediately discounted. It was not seriously in dispute among the two expert witnesses that any ethanol traces would have evaporated after approximately 15 minutes. As earlier noted, Mr Barber lives more than 15 minutes away from work.

[80] Dr Williams gave evidence that the use of cologne and hand sanitiser would have no impact on an "active mode test" as was used in the case of Mr Barber. She explained that this was known because the test gave a numerical result. Dr Williams noted a possible exception in the case of "deliberate adulteration": that is, "putting an alcowipe inside the straw", or Mr Barber placing his hand on the breath collection tube or on his face either at the time of the test or immediately after applying hand sanitizer. There is no evidence that Mr Barber interfered with the test or otherwise acted in this way, just as there is no evidence about the precise location of the hand sanitiser used by Mr Barber in the context of his movements on site that morning.

[81] The test was conducted by an external accredited Collector from SafeWorkHealth in accordance with the *Australian Standard Procedure for specimen collection and the detection and quantification of drugs in oral fluid*. On the evidence, such tests are usually conducted with hands away from the testing tube. The Collector certified that the collection and onsite testing of Mr Barber was conducted in accordance with AS/NZS4760. On balance, I am not satisfied that hand sanitiser had any material effect on the test results.

[82] It was further put for Mr Barber that the breathalyser test was not performed consistently with AS3547:2019 and so was contrary to Veolia policy. The submission is misconceived. AS3547 is about the requirements for performance, testing and marking of breath alcohol testing devices for uses including workplace purposes. In other words, it sets the standards that must be met when calibrating and testing a device used to undertake breath testing. In this case, the expert witnesses agree that the device used to test Mr Barber was already calibrated at the time of Mr Barber's test and was within calibration date. It was operated by an accredited Collector. Its results can be accepted as "valid and correct" within the range of maximum permissible error for such tests.

[83] Mr Barber gave evidence that when he arrived at work on 21 June 2024, he was not the least bit affected by alcohol. This was his opinion, but what was it based on? He knew he had drunk 6 beers the night before, and there is no evidence that Mr Barber had elected to undergo self-testing before attending for work that morning (as the SUEZ policy permitted him to do). Dr Williams' clear evidence to the contrary was that **"**the literature tells us that there is no safe level for there not to be impairment". While acknowledging the effect of weight on a person's metabolism rate, Dr Williams stated that "while there is alcohol in the body, there is impairment." Mr Barber may not have felt the effects of alcohol by the time he arrived at work, but the possibility of impairment cannot be excluded.

[84] I accept that it is unlikely that Mr Barber intended to attend for work while affected by alcohol. On the other hand, Mr Barber knew at the time of his drinking the night before that he was rostered to commence driving a heavy vehicle at 4.15am the next morning. He knew when he went to bed how little sleep this meant he was likely to get. In the circumstances, there was a degree of recklessness about the decision to attend work the next morning and not at least

disclose his circumstances to Veolia in case his own personal capacity assessment was incorrect.

[85] The case of *Sydney Trains v Gary Hilder*[1] (Hilder) is a useful reminder that the question of whether there was a valid reason for dismissal cannot be resolved by turning attention only to whether certain conduct was in breach of company policy. The relative importance of any policies breached must also be considered, as well as whether the conduct, considered in totality, was of sufficient gravity to constitute a sound, defensible, well-founded and so valid reason for dismissal.

[86] This case is not the same as *Hilder*, where the question was whether breach of the employer's drug and alcohol policy was itself a valid reason for dismissal. In this case, the drug and alcohol policy breach was one of several incidents over a period of 9 months involving conduct by Mr Barber that was inconsistent with Veolia's policies or instructions and which, taken together, are said to found valid reason for dismissal.

[87] *Conclusion on valid reason*: In each of the incidents described above, Mr Barber acted in a manner that was inconsistent with important policies of Veolia including: the Code of Conduct; the Life Saving Rules; the Driver Operator Manual; the Safe Operating Procedures and related Operating Instructions; and the Drug and Alcohol Policy. These policies contained a series of reasonable and lawful directions that had a purpose of ensuring Mr Barber's safety as well as the safety of others. To the extent that they were intended to protect against serious injury or damage (as they mostly were) they are capable of being characterised as "safety critical". Separate to the safety breaches, Mr Barber threatened his managers with adverse consequences in connection with his stand down on 12 April 2024 and on the same day repeatedly refused to do what he was asked: that is, to keep the disciplinary matter confidential and leave the site.

[88] Mr Barber's experience over many years as a garbage truck driver for Veolia and its predecessors included operating heavy vehicles while interacting regularly with members of the public in and around public roads. He had received training on the matters covered in the policies identified above, including most recently on the Life Saving Rules and a briefing from the Road Safety team. He was a union delegate and workplace health and safety representative of long standing and can be taken to have had at least a general understanding of the existence of these policies, his obligation to comply with them, and where to find them if needed.

[89] None of the matters about which Mr Barber was warned would, in isolation, warrant or justify his dismissal. But when understood in their full context and considered in totality, I am satisfied that by the time the events of 21 June 2024 unfolded, Mr Barber's too frequent breaches of Veolia's policies and directions were of sufficient gravity to constitute a sound, defensible and well-founded reason for dismissal. They showed a repeated disregard for safety and an unwillingness to cooperate with Veolia's instructions or to follow its safety policies and procedures. I find valid reason for the dismissal.

[90] The valid reason for dismissal was notified to Mr Barber in advance in the show cause letter of 27 June 2024.

Was there an opportunity to respond to any capacity or conduct related reason?

[91] I am satisfied that there was a reasonable opportunity for Mr Barber to respond to the conduct issues raised against him and which ultimately led to his dismissal. Mr Barber took up the opportunities provided by responding to each of the incidents that led to written warnings as well as to the show cause letter. The final decision to dismiss Mr Barber was made after he had been given an opportunity to respond. Although by this time dismissal was a likely consequence, I do not accept the submission that it was a 'fait accompli'.

Was there any unreasonable refusal to allow a support person to be present to assist at any discussions relating to dismissal?

[92] There was no unreasonable refusal by Veolia to allow a support person to be present to assist at any discussions relating to the dismissal of Mr Barber.

Was Mr Barber warned about relevant unsatisfactory performance?

[93] As detailed above, Mr Barber was warned three times about compliance with Veolia's safety policies and procedures: on 27 October 2023 (first written warning), 19 March 2024 (second written warning) and 9 May 2024 (final written warning). On 27 June 2024, Mr Barber was issued a show cause letter and given an opportunity to respond before the decision to dismiss him was made.

Degree to which the size of the employer's business and any absence of dedicated human resources management specialists or expertise in the business would be likely to impact on procedures followed in effecting the dismissal

[94] Veolia is a business of significant size and had access to dedicated human resources and related specialist expertise to assist in the process leading to the dismissal of Mr Barber.

Other relevant matters

[95] *Personal circumstances:* Mr Barber worked for Veolia and its predecessors for approximately 16 years. He is aged in his mid-50s. He still has mortgage responsibilities and family commitments which he shares with his wife. His eldest two adult children live at home but are employed. His youngest child remains in school. Following the termination of his employment, Mr Barber felt loss, hopelessness and stress. He lost focus and sleep and started seeing a clinical psychologist. There is no evidence about whether Mr Barber has a diagnosed mental health condition, or how long it will take him to work through the transition away from Veolia. I accept that it would have been distressing to lose his job, at his age, after so many years. There is, however, every reason to be hopeful that he will find alternative employment. Experienced drivers are sought after in the Australian labour market and Mr Barber is likely to find other employment in the transport and/or waste management industry.

[96] *Industrial context:* A sub context of the case put by Mr Barber is that his role in bargaining was the true reason for his dismissal. For some time prior to the dismissal, the parties had been bargaining for an enterprise agreement. Mr Barber was on the union bargaining committee and it appears that bargaining was not always harmonious. At the time of dismissal, bargaining had all but concluded. The access period for the agreement was open and voting on

the enterprise agreement was about to commence. I find no evidence in support of a conclusion that Mr Barber was dismissed because of his involvement in industrial activity. The conduct of Mr Barber that placed him in conflict with his obligations to Veolia was personal to him, as distinct from his conduct in the capacity of union representative. The one possible exception relates to the events of 12 April 2024, which occurred in the context of heightened tension after what might have been unprotected industrial action two days earlier. There is insufficient material before me to properly understand whether the stop work on safety grounds was indeed unprotected industrial action or whether any legal consequences arose from the events of that day. I make no findings in that regard but nor is it necessary to do so. Nothing in his representative role required Mr Barber to respond to being stood down by threatening his manager or refusing to cooperate with Veolia: by trying to photocopy a confidential letter so that he could distribute it to 50 other drivers; and not leaving the site after being stood down despite multiple directions to do so.

[97] *Practice of driving on the left-hand side:* I made the observation earlier in this decision that there appears to be a practice among drivers at the Arncliffe yard of driving on the operator/pickup side of side loader vehicles when not in their runs. The evidence does not establish how common the practice is. It goes without saying that safety rules should be enforced equally as against all drivers. The evidence falls short of establishing that Mr Barber was singled out in this regard or that Veolia has turned a blind eye to other drivers engaging in the same practice.

[98] *Fairness of treatment in relation to positive alcohol test:* A similar point is raised about the consequence for Mr Barber of a positive alcohol test (dismissal) compared with that for two other employees (alternative sanctions). For privacy reasons, I will refer to the two employees as Mr C and Ms D:

1. Mr C returned a high-level positive alcohol reading (final result 0.67%) on 3 November 2022. He explained the circumstances affecting him at the time and expressed remorse. He was issued a written warning on 1 December 2022 and required to self-test in the presence of another before the start of shift for a 3-month period.
2. Ms D returned a positive BAC at levels similar to Mr Barber (final result 0.009%) in May 2022 after admitting to drinking the night before. She was very apologetic over the incident and was issued a final written warning, with advice that she would be subject to random breath testing in the future.

[99] I accept that the outcome in each case was more favourable for Mr C and Ms D than for Mr Barber because neither Mr C nor Ms D lost their job. But their circumstances were also different: neither appear to have had any similar disciplinary history of safety and related breaches to that of Mr Barber. Mr Barber was not treated unfairly compared to other employees in the same position, because he was not in the same position as the other employees.

[100] *Failure to follow its own drug and alcohol policies*: it was submitted that Veolia failed to comply with its own drug and alcohol policy in his case, resulting in unfairness to Mr Barber. Whether or not a respondent has failed to comply with its own policies and procedures can ultimately have some bearing on whether or not a dismissal is unfair. Any such failure has to be considered in the particular circumstances of each case and weighed against all of the other factors of relevance to whether the dismissal was harsh, unjust or unreasonable.

[101] A summary of the two drug and alcohol policies above highlights the significant overlap between them. The SUEZ policy is the more prescriptive of the two in most respects. Each requires workers to have a 0.00 BAC while at work and provide for a range of testing methods, including random and blanket testing. Each provides that participation in testing for drugs and alcohol at work is a condition of employment and requires breathalysers to be calibrated to the minimum requirements of Australian Standard 3547. The SUEZ policy requires testing to be carried out by a qualified and trained tester. The Veolia policy is less prescriptive but contemplates random testing by third party Collectors according to the Collector's chosen methods.

[102] Each policy provides that in the event of an initial positive alcohol test, a second test must be taken 20 minutes later. If an initial positive test is returned, the SUEZ policy expressly requires employees to cease work and be retested. The same cease work expectation can be implied from Veolia policy's requirement for a second test 20 minutes after the first. In the event of a second positive test, employees are not permitted to return to work under the SUEZ policy and must leave when it is practicable for them to do so in a safe and lawful manner. They must be suspended from worksites and activities and not allowed to return until they produce a negative result. Under no circumstances will the person be allowed to re-enter the working area. The Veolia policy requires employees to be informed if they return a second positive test and not permitted to commence or return to duties, with a minimum stand down period of 48 hours without pay.

[103] Each policy deals with how an employee who returns a positive alcohol test leaves the workplace. Under the SUEZ policy, reasonable assistance is required to ensure they can leave work and arrive at a safe location. This includes being given options to get home safely including: a taxi at the employer's cost or contacting a family member or friend to collect the person. Under the Veolia policy, employees must be offered transport home. The next step under the Veolia policy is for the employee to be directed to attend an initial interview with their direct manager, to assist the manager in determining the appropriate course of action. Both policies give the relevant manager discretion about how to deal with breach of policy. Disciplinary action may be applied including a warning or termination of employment.

[104] The SUEZ policy has specific requirements in relation to the use of third-party testing providers and calibration of breathalysers. I am satisfied those requirements were met in this case. SafeWorkHealth was appointed by Veolia (as can be inferred from the fact that they were onsite with Veolia's permission to conduct testing of its employees). SafeWorkHealth is an accredited testing laboratory as noted above. Its accreditation and expertise means SafeWorkHealth can be assumed to have complied with relevant standards and procedures in the absence of evidence to contrary. There is no evidence that its distribution of test results was contrary to the instructions of Veolia, while chain of custody requirements were not relevant because the test was conducted by breathalyser rather than by the taking of a fluid sample. The requirements in relation to use of a calibrated breathalyser were also met for the reasons set out above. There is no evidence that the breathalyser was not in good working order or lacking in approved accessories.

[105] I agree that Veolia did not follow the SUEZ and Veolia drug and alcohol policies when it:

- allowed Mr Barber to conduct a handover and perform yard work for approximately two hours after returning a second positive test,
- paid him during the stand down period, and
- asked if he was "right to get home" but failed to offer him transport home.

[106] The failures identified above in relation to compliance with the drug and alcohol policies operated both for and against Mr Barber:

1. Although not allowed to commence his ordinary duties, Mr Barber was asked to perform other more limited duties (handing over his run and cleaning the yard). The request was made in the context of Mr Beasley seeking advice from management about what to do next. It was prudent of Mr Beasley to seek advice, but he should have known not to allow Mr Barber to commence any work while he was doing so. The irony in seeking to ensure he acted correctly was that his direction to Mr Barber in the meantime was incorrect. It caused Veolia to act inconsistently with its policies, which required that Mr Barber not be allowed to enter the working area or to commence work.
2. Mr Barber was paid for the stand down period when the policy provided for unpaid stand down. This operated more favourably to Mr Barber than a strict application of the policy would have permitted.
3. Mr Barber was not offered transport home. He was asked if he was "right to get home", and presumably he indicated that he was because there is no evidence of any discussion about any difficulty in this regard. At all times, Mr Barber was under the public road user limit of 0.05% and accordingly was permitted to drive his own vehicle once he left the workplace.

[107] Whether Veolia also failed to apply the Veolia policy by not directing him to attend an initial interview with his direct manager depends on whether the reference to "direct manager" means Mr O'Connor (Operations Supervisor) or Mr Beasley (Collections Manager). There is no requirement for the initial interview to be conducted on the day of the positive alcohol test. But it must be the first 'next step' and be conducted by a manager with authority to determine the appropriate course of performance management or disciplinary action because that is the purpose of the interview.

[108] Mr Beasley's role was to assist supervisors in managing employee issues. He was responsible for dealing with disciplinary matters involving Mr Barber, such as occurred when he sought to engage with Mr Barber about a warning following the accidents in October 2023. This is consistent with Mr O'Connor's evidence that if he was dealing with an employee matter where it may involve formal consideration of disciplinary action, he would usually escalate that to his manager (Mr Beasley). After being stood down, Mr Barber was directed to meet with Mr Beasley and Mr Donley. The purpose of the meeting was to inform Veolia management about the relevant circumstances so that it could determine the appropriate course of action. On balance, I consider this to have met the policy requirement for Mr Barber to be directed to attend an initial interview with his direct manager.

[109] In the circumstances, I consider Veolia's failures to comply with its drug and alcohol policies of marginal significance to the fairness or otherwise of Mr Barber's dismissal. They had no bearing on the fact of a positive alcohol test. They do however indicate a need for managers to be given additional training in how to respond if an employee returns a positive

test, including that employees not be allowed to undertake any duties and offered transport home.

[110] *Expressions of remorse:* Mr Barber expressed remorse in these proceedings for attending work with a BAC above zero and said that he will never drink again in the evenings before work. On 23 April 2024, he apologised for his "side" of the situation on 12 April 2024, although a fair reading of his response is that he accepted only limited responsibility for events largely caused by his errors of judgement that day. He did not otherwise apologise or express remorse for any of the disciplinary matters raised against him, although he accepted responsibility for the first crash. Having observed the witnesses and read the materials, I have some difficulty accepting the genuineness of Mr Barber's remorse. It came only after the event and in the context of his seeking a remedy from the Commission. Mr Barber's long history of employment, training and responsibility for others as union delegate and health and safety representative all indicate that he either knew, or should have known, about the risk of drinking on the night before an early morning shift long before the events of June 2024.

Barber was not unfairly dismissed

[111] There was a valid reason for dismissal and the process was procedurally fair. Dismissal was a reasonable and proportionate response in the circumstances to Mr Barber's repeated safety breaches and failure to follow numerous reasonable and lawful instructions over a 9-month period. The dismissal caused distress and financial loss for Mr Barber, as was to be expected in the case of job loss after such a long period of service. Even so, there is reason to be hopeful about his future. He has a home and family to support him and skills that are valuable in the labour market.

[112] The evidence did not establish adverse action as a reason for dismissal in connection with Mr Barber's industrial activity. Nor was I satisfied on the evidence that Mr Barber was targeted or singled out when he was subject to disciplinary action for driving on the wrong side of the vehicle or returning a positive alcohol test. Veolia's own failure to follow the drug and alcohol policy was of marginal significance to the fairness or otherwise of the dismissal in the circumstances, and for the reasons above I am not persuaded that Mr Barber genuinely feels remorseful for any of the matters that contributed to his dismissal. When these matters are weighed in the balance, I am not satisfied that the dismissal was harsh, unjust or unreasonable.

[113] I find that the dismissal of Mr Barber was not unfair.

[114] The application is dismissed.

COMMISSIONER

Appearances:

Mr P Boncardo for the applicant.
Mr J McLean for the respondent.

Hearing details:

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