DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Karl Mckeown
v
The Smith's Snackfood Company Pty Ltd
(U2022/7668)

DEPUTY PRESIDENT LAKE BRISBANE, 10 FEBRUARY 2023

Section 596(2) – Application for permission to be legally represented in unfair dismissal – permission to be legally represented granted. Application for an unfair dismissal remedy – whether the Applicant was not unfairly dismissed – summary dismissal following a series of extended breaks – time theft – application dismissed.

Background

[1] Mr Karl McKeown (the Applicant) filed an application with the Fair Work Commission (the Commission) alleging that he was unfairly dismissed from The Smith's Snackfood Company Pty Ltd (the Respondent).

[2] The Applicant was working at the Tingalpa manufacturing location for the Respondent as a maintenance technician. The Respondent terminated the Applicant's employment for exceeding his allotted break time per '*The Smith's Snackfood Company, Queensland – Enterprise Agreement 2020'* on 10 different occasions spanning 5 different days and the Applicant's use swearing and disrespectful behaviour when questioned about his excessive breaks. The Applicant contends that elongated breaks were not intentional and apologised for the oversight. The Applicant contends that swearing was the result of a meeting feeling like an interrogation and was not directed at management but was a description of the situation itself.

[3] The Applicant was represented by Mr Dermott Peverill, an Industrial Officer with the United Workers Union (UWU) and the Respondent has sought to be legally represented by Mr Mark Rodgers of Mapien pursuant to s.596 of the *Fair Work Act 2009* (Cth) (the Act). The UWU opposed representation for the Respondent and so I determined that as a preliminary matter to be heard.

REPRESENTATION

Section 596(2) of the Act

[4] Section 596(2) of the Act relevantly provides:

> "(2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:
>
> (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
>
> (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
>
> (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

Legal Principles

[5] Granting permission to be represented under s.596 requires the satisfaction of two elements.[1] The first pre-requisite is that s.596(2) does not immediately invoke the right to representation. Granting permission to be represented "involves an evaluative judgment akin to the exercise of discretion."[2] Once that first step is satisfied, the second step "involves consideration as to whether in all of the circumstances the discretion should be exercised in favour of the party seeking permission."[3]

[6] While not determinative, the Commission need only find that one of the sub-sections above is satisfied to exercise its discretion to grant permission for a party to be legally represented.

[7] The principles to be applied when determining s.596 applications were considered in *Warrell v Walton* (*'Warrell'*)[4] and subsequently adopted by a Full Bench of the Commission in *New South Wales Bar Association v McAuliffe*.[5]

[8] In *Warrell*, Flick J said at [24]:

> "A decision to grant or refuse *"permission"* for a party to be represented by *"a lawyer"* pursuant to section 596 cannot be properly characterised as a mere procedural decision. It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted. It is apparent from the very terms of section 596 that a party *"in a matter before FWA"* must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law, namely where only one or other of the requirements imposed by section 596(2) have been taken into account and considered. The constraints imposed by section 596(2) upon the discretionary poser to grant permission reinforce the legislative intent that the granting of permission is far from a mere *"formal"* act to be acceded to upon the mere making of a request. Even if a request for representation is made, permission may be granted *"only if"* on or other of the requirements in section 596(2) is satisfied. Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequence exercise of the discretion conferred by section 596(2): i.e., *"FWA may grant permission…"*. The satisfaction of any of the requirements set forth in section 596(2)(a) to (c) thus need not

of itself dictate that the discretion is automatically to be exercised in favour of granting *"permission"*.

The appearance of lawyers to represent the interests of parties to a hearing runs the very real risk that what was intended by the legislature to be an informal procedure will be burdened by unnecessary formality. The legislative desire for informality and a predisposition to parties not being represented by lawyers emerges, if not from the terms of s 596, from the terms of the Explanatory Memorandum to the Fair Work Bill 2008 which provided in relevant part as follows:

> "2291. FWA is intended to operate efficiently and informally and, where appropriate, in a non-adversarial manner. Persons dealing with FWA would generally represent themselves. Individuals and companies can be represented by an officer or employee, or a member, officer or employee or an organisation of which they are a member, or a bargaining representative. Similarly, an organisation can be represented by a member, officer or employee of the organisation. In both cases, a person from a relevant peak body can be a representative.
>
> 2292. However, in many cases, legal or other professional representation should not be necessary for matters before FWA. Accordingly, cl 596 provides that a person may be represented by a lawyer or paid agent only where FWA grants permission. …
>
> 2296. In granting permission, FWA would have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties."

[9] The Applicant was represented by Mr Dermott Peverill of the United Workers Union (UWU). The Applicant opposed the representation for the Respondent who had requested permission to have Mr Rodgers from Mapien appear on their behalf. As there was opposition from the Applicant to the matter of representation, I requested submissions to be filed to determine the question of representation at the hearing held on the 14 October.

Applicants' submissions on representation

[10] The Applicant asserted that this matter was not complex as it involved two allegations of misconduct which were routine in substance to satisfy s596(a). They state that the issues in question regarding the alleged dishonesty, CCTV and access card evidence, and the remedy of reinstatement do not support an argument of complexity legal or otherwise, necessitating an external paid agent. They submit that the matter is clearly not beyond the knowledge or skill of the Respondent's own human resources and operational professionals, and its own in-house legal department. The Applicant argues that the substantive proceedings are entirely routine and therefore would not assist with efficiency.

[11] Furthermore, the Respondent is a large employer with considerable in-house resources that include experienced legal and human resources staff who are be able to advocate effectively

without resorting to a paid agent would counter s596(b) in that it would not be unfair not to be represented.

[12] The Applicant reasserts that there is no unfairness which would be created by the refusal of representation in the preliminary hearing. Furthermore, the Respondent has already benefitted from the assistance of the paid agent who has prepared written submissions and witness statements putting the Respondent on fair footing with the Applicant.

[13] Further, the Applicant puts forth the view that the Fair Work Commission is well equipped and competent to oversee the processes of the hearing in adducing evidence and there are no novel legal arguments or jurisdictional matters which would make the matter complex.

[14] The Applicant's argument in brief is that the matter, is absent of any factors that establish such complexity that would exceed the ordinary purview of unfair dismissal proceedings in the Commission would displace the legislative intent. Further, the Applicant argues that permission to represent should be dismissed without any compelling argument that supports an unfairness in the Respondent not being able to effectively represent their case, or an unfairness between the persons in the same matter.

Respondents' submissions on representation

[15] The Respondent asserted that the matter would be dealt more efficiently with a paid agent considering the complexity of the matter. The Respondent argues that the matter has sufficient complexity given the contested facts and the requirement of cross-examination from five witness of which three were to be cross examined by the Respondent to adduce its evidence satisfying s596(a) and s596(b).

[16] Furthermore, the Respondent states that it would be unfair not to allow the Respondent to be represented per s596(c) stating that the staff available to represent the Respondent did not have industrial advocacy experience or any skills in cross examination in comparison to Mr Peverill who has many years of industrial advocacy experience. The Respondent argues this is not a run of the mill unfair dismissal as it involved a union delegate being dismissed for serious misconduct, with several witness from either side and where matters of witness credibility would be paramount in determining the matter.

Consideration

[17] In addressing s596(a) of the *Act* regarding the efficiency of dealing with the matter, I regard the significant amount of cross examination required that the matter would proceed more efficiently with experienced advocates from both sides prosecuting their cases with due vigour and precision regarding legal matters and factual evidence in order to satisfy my decision making.

[18] The Applicant's consideration that the matter is not complex has been factored, but it is only one of the factors that must be taken into consideration. I consider that there may be some complexity in unravelling the narratives and evidence of each party and building a factual basis upon which I can apply the requisite law. In this subsection, I find some support for the notion

that the matter would be more efficiently managed by granting representation of the Respondent.

[19] In addressing s596(b), both parties were able to seek representation and therefore I have considered this to be a neutral consideration.

[20] In addressing s596(c), the requirement under this section is that it would be unfair not to allow one party to be represented by a lawyer or a paid agent, taking into account fairness between that party and the other party in the same matter.

[21] I refer to Commissioner Cloghan's decision in *Woodward v Greyhound Australia Pty Ltd* [2015] FWC 2015 at [13]– [17] regarding the approach in determining representation. He notes the advocacy experience of a Union official compared to a Human Resources person unfamiliar with dismissal proceedings from an employer.

> *"[17] For s.596(2)(c) of the FW Act to become operative, it is necessary to consider whether it would be, in the circumstances of this application, unfair not to allow the Employer to be represented by a lawyer or paid agent.*
>
> *[18] If I adopt the statutory definition of "unfair" as set out in Part 3-2 - Unfair dismissal, at s.385 of the FW Act, it is a dismissal which is, "harsh, unjust or unreasonable".*
>
> *[19] Alternatively, if I adopt the definition in the Australian Concise Oxford Dictionary "unfair", is a situation which is, "not equitable or honest or impartial...".*
>
> *[20] In this case, if permission was not granted for the Employer to be represented by a lawyer, an inequity or disparity would exist between representation by an experienced TWU advocate for the Applicant, and a Human Resource person unfamiliar with dismissal proceedings in the Commission, for the Employer. If I did not allow representation by a lawyer or paid agent for the Employer, the Commission would be affirming that the above situation was just and reasonable. I am not able to come to that conclusion.*
> *…*
>
> *[24] Before concluding, it is notable that the Applicant's submission did not particularly address the requirements of s.596(2)(c) of the FW Act. I do not intend to speculate on the reasons why the Applicant did not address this requirement, but the Employer's submission was plain to read.*
>
> *[25] Having been satisfied that the requirements in s.596(2)(c) of the FW Act have been met, it is not necessary to consider the remaining requirements in s.596(2)(a) and (b) of the FW Act.*

CONCLUSION

> *[26] For the reasons set out above, I am satisfied that the requirement in s.596(2)(c) of the FW Act has been met. I am also satisfied, in the circumstances, that I should exercise my general discretion in s.596 of the FW Act, and give the Employer leave to be represented by a lawyer in the hearing on 13 April 2015."*

[22] The Respondent has several HR employees who deal with human resource related matters. The human resources function is one that covers a broad field - payroll, recruitment, policy development, administration of benefits, engagement and diversity programs, workcover management, learning and development and in some cases employee relations. The employees put forth by the Union as resources for the advocacy for the matter were not in fact properly regarded as available for the Respondent, but part of the larger enterprise with little to no knowledge of this matter, unskilled or tested in industrial advocacy and based at a corporate office or at other operations. The best resource available for the Respondent was in fact a central witness for the Respondent and although having had limited involvement with matters in the Commission, the witness might have been capable of advocating for the Respondent.

[23] Although Mr Peverill was not legally qualified, he is a UWU official who has significant advocacy experience in the Fair Work Commission. The Respondent is unable to provide someone of similar experience and skills in industrial advocacy, noting that they are a very different skill set to those of an experienced HR manager, the skills are not interchangeable and quite specific. I weigh this factor in favour of granting representation to the Respondent.

Conclusion

[24] On balancing the considerations, I exercised my discretion and granted permission pursuant to s.596(2) to the Respondent, as I was satisfied that the matter would be dealt with more efficiently and effectively, considering the complexity of the matter and the capabilities of the parties.

MERITS OF THE MATTER

Initial matters to be considered

[25] Section 396 of the Act requires that I be satisfied of four matters before considering the merits of the Applicant's application which are whether the application was made within time, the Applicant was protected from unfair dismissal, whether the dismissal was consistent with the Small Business Fair Dismissal Code and whether the dismissal was a case of genuine redundancy.

[26] Neither party disputed the four matters in their application. I am satisfied, that the Applicant made his application within the 21-day period required by s.394(2) of the Act, that he was a person protected from unfair dismissal (as he earned less than the high-income threshold and is a national system employee) his dismissal was not a case of genuine redundancy and that the Respondent is not a small business where the Small Business Dismissal Code is applicable.

Events leading to Applicant's dismissal

[27] The Applicant was a full-time employee of the Respondent who had been engaged to work as a Maintenance Technician and had been with the Respondent since 20 October 2014. He is a member and a delegate for the United Workers Union (UWU).

[28] The Applicant was called to a meeting with Mr Vuniwaqa at approximately 10:20 am on 21 June 2022 and was shortly joined by Mr Khan. The meeting concerned the length of the Applicants break time on 17 June 2022. The matter at hand was the length of the first break of the day which the Applicant had taken. The Respondent asked whether he had permission to go off site and whether he took his break upon his return, as it would have exceeded his 30 minutes paid break time under the Agreement. The Applicant stated that he was that he was getting lunch for himself and several colleagues off site and that he did this most Fridays and it was accepted that they all had lunch together as a team. The meeting then ended abruptly with the Applicant walking out and stating "*this is bullshit"* or "*fucking bullshit"*. The Applicant was asked to return to the meeting by his supervisor to which he did not reply and continued walking away from the meeting. The Applicant did not return.

[29] Following this meeting, the Respondent's management reviewed CCTV footage for the previous week and identified that the Applicant had been late from his breaks on all of the occasions that they reviewed footage. He was advised verbally by his supervisor on 5 July 2022 that he would be suspended on pay whilst an investigation into his break times was undertaken.

[30] The allegations of his conduct during the meeting on 21 June 2022 and the extended breaks were put to the Applicant in writing on the 6 July 2022. The Applicant provided a written response on 8 July 2022. The allegations were also put to the Applicant in a meeting on the 11 July 2022. At the meeting on 11 July 2022, the Applicant and his representative disputed the use of CCTV to monitor his movements and after a break in the meeting no longer pursued that argument and stated that the Applicant was unaware that he was late and if he was late then he was apologetic.

[31] A show cause letter was issued to the Applicant on 13 July 2022 that indicated that both allegations had been substantiated and reasons were provided. Further, the Applicant was advised that the Respondent was considering termination of his employment due to the seriousness of his misconduct and was invited to show cause on why his employment should not be terminated. The Applicant wrote a letter to the site manager the same day apologising for taking excessive breaks and acknowledging that he did not realise the length of the breaks. The Applicant promised not to repeat the conduct.

[32] The Applicant attended the show cause meeting on 14 July 2022 with his union delegate and an industrial officer of the union. The Applicant was provided an opportunity to provide further information or mitigating circumstances. Following a break in the meeting where the Respondent considered the disciplinary outcome, the Respondent determined that it was improbable the Applicant did not know that his breaks were well in excess of the site agreement and that it was not inadvertent but rather deliberate conduct as it was repeated behaviour. Furthermore, the Respondent also considered the conduct of swearing and leaving the meeting. The Respondent summarily terminated the Applicants employment effective 14 July 2022.

The case for the Applicant

[33] In summary, the Applicant's case is that there have been a series of significant procedural errors in the process leading up to the termination and that the reasons provided for the termination were disproportionate to his conduct. He accepts that he used bad language in the first meeting, and he is also apologetic that he was over his time limit for his breaks. He asserts that he was not deliberately taking an extended break and the lunch run on two of the five days where he had extended breaks were known by management and accepted as a team building activity and would be longer than the site agreement allowed.

[34] The Applicant asserts that termination was too harsh a punishment as he worked diligently and responsibly for the Respondent and given his age and skills and taking into consideration that he is unable to readily secure alternative employment. He further asserts that he was targeted by Management and that termination of his employment was unreasonable and disproportionate consequence for his actions. On that basis, he asserts that he was unfairly dismissed and seeks reinstatement.

[35] The Applicant gave evidence on his own behalf. He also called Mr Neil Zuidema and Mr Steve Ball as witnesses to provide evidence in support of the Applicant's claim.

Evidence of the Applicant

[36] The Applicant says he has been a loyal and dedicated employee and had no previous conduct issues or performance issues. He thinks some people have an agenda against him

[37] In respect of the incident of the "seek to understand" meeting on 21 June 2022, the Applicant was called by Mr Vuniwaqa. The meeting started informally until Mr Khan entered the meeting. The Applicant stated that it 'felt it became an interrogation'. The Applicant states he felt they were firing questions at him in a short period of time and accusing him of being off-site without permission. He felt under pressure and did not have a support person with him.

[38] The Applicant asserts that he went to the Vietnamese bakers almost every Friday to get banh mi's for himself and a number of colleagues including Mr Vuniwaqa on occasions. The Applicant states this was a team custom starting after 2019 to improve team morale and facilitated communication which followed from the discontinued Thursday team barbecue by previous management that had been in place for over 10 years prior to 2019.

[39] The Applicant states that he felt bullied by the constant questions focused on his movements on that day. The managers asserted that he had been absent for a much longer period than his break time and at one stage Mr Khan suggested that his pay should be docked by 30 minutes. However, Mr Vuniwaqa disagreed that the Applicant's pay should be docked stating that was not the way that the Company handled these matters. The Applicant felt that the meeting was going in circles, and he felt frustrated and anxious. He stood up and left the meeting saying this is "bullshit". He felt that he was a victim for an event that had been previously approved and acknowledged by Management and that this investigation was an attempt to 'dig up mud to throw against [his] name'.

[40] The Applicant asserts that the meeting could have turned out differently had it been dealt with on a professional basis and not as an interrogation. The Applicant asserts that he doesn't recall being late and if indeed he was, he apologises as he was not aware he was taking too long.

[41] The Applicant further asserts the CCTV should not have been used to monitor his breaks and that if there was a problem with him taking longer breaks why he was not spoken to regarding the issue rather than suddenly escalating the matter. He thought that there might be a hidden agenda.

[42] The Applicant contends that swearing does occur in his workplace considering it is a manufacturing location and that he did not swear at either of the management representatives. He states he swore out of a sense of frustration with the discussion. He states that he has worked for the Respondent for eight years and during this time his timekeeping and professionalism has never been questioned, that he has frequently cut short or missed or delayed breaks in order to get a job done and that he felt victimised in this process.

Submissions

[43] The Applicant accepted that he did say "*this is bullshit*" but he denies that he said "*fucking bullshit.*" The Applicant accepted that he was late in returning to work. However, the lateness on that Friday was a result of him purchasing lunch for other workers for a ritual Friday lunch and did not intend to have taken longer breaks but was apologetic for the instances.

Swearing

[44] The Applicant says that he only swore as a result of being treated in a bullying fashion by the two managers and that he felt cornered as they were asking the same questions repeatedly. He thought the meeting and the questions asked by the managers were pointless. It was out of frustration he stood up and walked out whilst stating that this was "*bullshi*t". He states he did not threaten or stand over the managers and he was not directing his frustration at the managers but rather the process. He admits to walking out and when asked to remain and keep discussing the matter he refused.

[45] He admits on reflection that he could have chosen a different action in dealing with his frustration, but he felt that the meeting had felt like a disciplinary meeting because of the interrogation by the managers. He felt provoked. The Applicant notes that no CCTV footage was provided nor other witnesses outside the meeting room that would support the Respondent's version that he said the words '*fucking bullshit'*.

[46] The Applicant concedes that he acted out from feeling pressured and reacted to the situation but not to the managers. The swearing was not vulgar, crude or obscene – he said "bullshit", not anything more offensive or colourful – and the language was not directed to or used toward Mr Vuniwaqa or Mr Khan but rather at the situation the Applicant had found himself in.

[47] The Applicant asserts that Mr Vuniwaqa was aware, prior to the meeting, that he had sought approval to go off-site from Mr Zuidema. The calling of the Applicant into a meeting and depriving him of a support person and involving another manager the Applicant

characterises this meeting as a disciplinary one.The Applicant asserts that this meeting was in fact an ambush and an interrogation. The Applicant out of frustration stood up and left the meeting and out of frustration said this is bullshit in reference to the way the meeting was carried out.

[48] The Applicant submits that his response should be viewed considering all the surrounding circumstances. In particular, he was called in for 'a chat' by Mr Vuniwaqa and not given the context of the meeting. Mr Vuniwaqa's approach and handling of the incident was inappropriate. The situation could have been defused by approaching the Applicant and warning him that he had taken a longer lunch break and that he should in future observe the break times strictly. He also believed that Management had an ulterior motive for raising the matter.

[49] The Applicant submits that the Respondent cannot look at swearing in a vacuum and ensure that a measured approach is taken stating multiple Fair Work Commission decisions.[6] The Applicant submits that use of robust language and swearing at the company was not unusual or uncommon and was not accompanied by threatening behaviour directed at an individual or group of individuals at any time in circumstances.

[50] The Applicant relies on *Gary Matthews v San Remo Fisherman's Co Operative* [2019] FWC 4877 stating that the swearing was in frustration and not directed aggressively or as a threat. The Applicant states that the word "bullshit" was used regarding in the context of the disciplinary process and was not targeted, threatening or aggressive.

~~**[51]**~~ The Applicant states that the Commission has held in several cases that the mere act of swearing at work is not sufficient to terminate someone's employment. Further, the context, environment and type of workplace will also impact on the circumstances must be considered when evaluating the severity of the transgression. Similarly, extremely crude and obscene language is to be treated differently to common swear words~~.~~

[52] The Applicant contends that the Respondent's grounds of dismissal based on swearing was harsh and unreasonable given the circumstances and was not serious misconduct as grounds for dismissing him.

Extended breaks

[53] The Applicant says that the two occasions on a Friday were known by management as a ritual where he would get lunch for a group of employees and then sit down and eat with them. Although this extended his break time significantly, Management was aware of the practice and on occasions even ordered the Banh Mi's from him as well. It was a ritual on a Friday following the Thursday BBQ that had been previously held.

[54] The Applicants understands that the Respondent notes five dates; 10 June, 15 June, 17 June, 20 June and 21 June 2022 where the Applicant was taking excessive breaks.

[55] The Applicant purports that on two of the occasions on 10 and 17 of June 2022, that he had approval firstly from Mr Steve Ball on 10 June 2022 and Mr Neil Zuidema email on the 17 June 2022 to go off-site. The Applicant states that the Respondent saying it would constitute

misconduct was not credible. If two of those dates are ruled out, then the Applicant was only late on 3 other days which were 15, 20 and 21 June 2022.

[56] The Applicant asserts that the CCTV footage that the Respondent relied upon as evidence that he was not at work when he was supposed to was not provided to him prior to termination. The Applicant states the CCTV footage provided in the Respondent's submissions did not provide a comprehensive view of the site and the suggestion that every time the Applicant leaves the workshop that he is going to canteen is not credible.

Evidence of Neil Zuidema

[57] Mr Zuidema is employed by the Respondent as a Maintenance Team Coordinator. He states there are three shifts and also a weekend day and a weekend nightshift. The day shift commences 6:30am and concludes at 2:30pm. He states that the maintenance technicians are always available for equipment breakdowns. If they are on a break when this occurs, the break is stopped until repair is concluded and then they can continue with the rest of the break. His witness statement confirmed that there had been a barbecue lunch each Thursday prior to 2019 and several of them had started a 'lunch run' since this had been discontinued by management.

[58] Mr Zuidema asserted that on Friday 17 June 2022, the Applicant had sought permission to leave the site for a lunch run from himself. On 21 June 2022, Mr Vuniwaqa asked about anyone leaving site on Friday, 17 June 2022. Mr Zuidema said he could not recall during the meeting. However, he later sent Mr Vuniwaqa a text message at 7:30 am confirming that the Applicant had requested permission to leave site.

[59] On Tuesday 12 July 2022, Mr Zuidema emailed Ms Templeman his explanation for what occurred on 17 June 2022 and confirmed the Friday practice of lunch along with his delay in informing Mr Vuniwaqa of the Applicant's departure from site. He also confirmed that he never had a problem with the Applicant taking breaks that were excessive in length. He also said that he has not heard the term 'seeks to understand' and he confirmed that swearing is not uncommon on the site. He also believed that the Applicant had been treated differently by management. He also stated that the Applicant had been a reliable and diligent maintenance technician and would have no problems in him returning to site should he be reinstated.

Evidence of Steve Ball

[60] Mr Ball is a Maintenance Team Coordinator at the Tingalpa site and has worked there since 2008. Mr Ball confirmed that he is responsible to delegate jobs to each maintenance technician. He also gave evidence that frequently maintenance technicians would have their rostered breaks interrupted because of work requirements and that he would expect the maintenance technicians to complete their break once they returned. He explained this is due to wanting to ensure continuity of production.

[61] Mr Ball confirmed that for many years employees had had a barbecue each Thursday afternoon and they commenced a lunch run. Since that had been discontinued, the Applicant would frequently take lunch orders from other employees and that he made a practice obtaining approval to leave site.

[62] On 21 June 2022, Mr Ball stated that the Applicant had shared with him what happened in the meeting with Mr Vuniwaqa and Mr Khan. Mr Ball concurred with the Applicant that there had been a hidden agenda and Mr Vuniwaqa already knew that permission had been granted for the Applicant to leave site. He also confirmed as they worked in a blue-collar production environment occasionally there is swearing, and this is not uncommon on the site. Finally, he stated that the Applicant was a reliable and diligent maintenance technician and was responsive to calls and that he would have no problems if the Applicant returned to site.

Evidence of the Applicant

[63] The Applicant accepts that he stated 'bullshit' in the meeting with Mr Vuniwaqa and Mr Khan. He states he did not swear at either of the management representatives. He claims it was an exclamation made following a sustained interrogation where he had no knowledge of the reason for the meeting and he felt the meeting was motivated for capricious, fanciful, spiteful and prejudicial.

[64] The Applicant asserts that the use of robust language and swearing at the site was not unusual and the Applicant was not directing his swearing at individuals, nor was it accompanied by other threatening behaviour. The use of the word 'bullshit' was used by the Applicant describing in his mind a meeting with a contrived purpose and further the exclamation was out of frustration with the meeting and in his opinion showing a complete lack of procedural fairness.

[65] The Applicant contends that any objective view of the circumstances and what was said to the management representatives do not meet the standard of serious misconduct. The *Fair Work Regulations* state that serious misconduct includes wilful or deliberate behaviour inconsistent with the continuation of the contract of employment and conduct that causes risk to health or safety of persons or to the reputation, viability or possibly of the employer's business.

[66] The second allegation was that the Applicant took excessive breaks on 10, 15, 17, 20 and 21 June 2022. The Applicant denies this conduct and purports that no probative or cogent evidence in the discipline process was put to the applicant with respect to taking excessive breaks which deprived him of the opportunity to respond.

[67] The Applicant argues that the Respondent did not demonstrate how it reached a conclusion that he had engaged in serious misconduct to the standard required following the principles outlined in *Briginshaw v Brignshaw* (1938) 60 CLR 336 at [362]-[363].

[68] The Applicant alleges that the evidence supporting the conclusion that he had engaged in misconduct was never presented to him when requested.

[69] The Applicant asserts that in the event the Commission determines the conduct did occur, taking excessive breaks was not wilful and did not constitute serious misconduct and if disciplinary action is warranted that it should have been dealt with a warning.

[70] Furthermore, the Applicant asserts that he was not informed by the Respondent in explicit and plain or clear terms of the reason for his dismissal and asserts that the Respondent failed to notify the Applicant of the reason for his dismissal.

[71] The Applicant contends that he requested several documents related to his alleged conduct to enable him to provide a response, as well as the CCTV footage or screenshots of the same and that the Respondent refused this request. Thus, the Applicant had no choice but to respond without these materials being provided by the Respondent. The Applicant asserts that by not providing any statements or reports or CCTV footage regarding the allegations that this amounts to a denial of natural justice and the Applicant was unable to respond appropriately detracting him from a 'fair go all round'.

[72] The Applicant further asserts that during the meeting of 21 June 2022 and on 5 July 2022, the Respondent unreasonably refused the person to have a support person. The Applicant submits that the refusal to allow union representatives at meetings related to dismissal have been considered unreasonable by the Commission in past decisions.

[73] Regarding other matters, the Applicant asserts that he experienced differential treatment, and that summary dismissal was disproportionate response to the alleged conduct. Furthermore, the Applicant states that there had been procedural fairness issues as the Respondent failed to provide the CCTV footage when requested. Another matter which the Applicant raises is that the dismissal had an effect on his personal or economic situation and the sole breadwinner for his family.

[74] In light of all of the facts and circumstances of this case, the Applicant claims that to dismiss him was harsh, unjust and unreasonable because that penalty was disproportionate to the alleged breaches.

The case for the Respondent

[75] The Respondent's case is that theyhad a valid reason for terminating the Applicant's employment and undertook the proper processes in dismissing him. The Respondent states that they did not give the Applicant permission to extend his breaks when he was offsite. The Respondent asserts there are two substantiated allegations they considered. Firstly, his disrespectful behaviour and inappropriate conduct during the meeting with his manager's. Secondly, his excessive breaks which he knowingly and wilfully took. The Respondent states the Applicant's behaviour was dishonest lacked integrity and struck at the heart of the employment relationship and resulted in them irretrievably losing trust and confidence in the Applicant.

Evidence

[76] The Respondent relied upon the evidence of Mr Mitchell Bruce, Mr Atu Vuniwaqa, Mr Muhammad Salman Khan, Mr Alastair Woods and Ms Felicity Templeman.

Evidence of Mr Mitchell Bruce

[77] Mr Bruce was employed as a Senior Maintenance Planner and has been with the Respondent since 30 December 1998. He gave a witness statement, when requested by the Senior Human Resources Advisor, describing the events he saw involving the Applicant on 21 June 2022.

[78] The witness says that during the incident on 21 June 2022, he was working at his standing desk which was nearby the entrance of the meeting room. He saw Mr Vuniwaqa and the Applicant enter the Ellis room. He saw Mr Khan enter the room a shorty while later. He did not hear the conversation between the parties however he attests that a short time later the applicant exited the room and said words to the effect of this is 'fucking bullshit' He noted that the Applicant walked straight past him without making any comment.

Evidence of Mr Muhammad Salman Khan

[79] Mr Khan was employed by the Respondent as a Frontline Manager in maintenance and had been employed at the site since 17 January 2022. He had been employed previously with the Respondent at a site in Pakistan since 2009.

[80] Mr Khan states that Mr Vuniwaqa had said to him that another manager had observe the Applicant leaving the site on Friday 17 June 2022 and that we needed to discuss with the Applicant to see if he had gotten approval. Mr Vuniwaqa requested that Mr Khan join him for the meeting, and they agreed to conduct a meeting on Tuesday, 21 June 2022.

[81] Mr Khan states that he joined Mr Vuniwaqa and the Applicant in the Ellis Room around 10:40 am. Mr Vuniwaqa asked the Applicant if he went off-site the previous Friday and Applicant responded that he did so in order to purchase food. The Applicant asked if he was allowed to purchase food off-site and Mr Vuniwaqa replied that [the Applicant] could but needed to seek permission. Mr Vuniwaqaasked again "did you seek permission from anyone to go out?" The Applicant replied he was not sure. Mr Vuniwaqa asked how long he was off-site to which the Applicant responded from about 8 to 8:30 [AM]. The Applicant was then asked, "did you have your breakfast break after returning offsite?" The Applicant replied that he did have his first break of approximately 30 minutes. The Applicant was then asked by Mr Vuniwaqa if he had taken any other breaks that day and the Applicant stated to Mr Vuniwaqa that he taken another break of around 20 to 25 minutes.

[82] Mr Khan asked why the Applicant did not ask for his permission to go off-site that morning and the Applicant said that he could not locate him.

[83] The discussion then addressed the Applicant exceeding the allocated break timethat day. Mr Khan queried whether he should be adjusting the applicant's time due to the extended break and whether the Applicant should receive a pay deduction. Mr Vuniwaqa advised that this was not company practice. The Applicant asked again if he was allowed to have food from off-site to which Mr Vuniwaqa responded by confirming that he could purchase food from off-site but that he needed permission from his supervisor to leave the site and that the Applicant needed to comply with this allocated break times. The Applicant then stood up and opened the door, stood outside the door and said words to the effect of 'I'm fed up with this, this is fucking bullshit'.[7]

[84] Mr Khan states that Mr Vuniwaqa requested that the Applicant return to the meeting and the Applicant did not return.[8] Mr Khan confirmed that at no stage did the Applicant request to have a support person. Following this meeting, both Mr Vuniwaqa and Mr Khan had a discussion with Mr Thomas King, the Technical Manager, and they agreed that they should involve the Human Resources department and Mr Vuniwaqa would follow up with the matter.

[85] On 5 July 2022, Mr Khan was informed that Human Resources had investigated the Applicant's breaks and identified the Applicant had taken several extended breaks. He was also informed that the Applicant was to be stood down pending an investigation into his extended breaks. Mr Khan was not involved further in the investigation process after the discussion on 21 June 2022.

[86] Mr Khan provided a statement in relation to the Applicant's conduct during the meeting of 21 June 2022 and on 12 July 2022 to Ms Templeman. Mr Khan was not involved in the show cause meeting or the termination.

[87] Mr Khan rejects the notion that the meeting was aggressive, an interrogation, an attack or an ambush on the Applicant. The meeting involved asking questions to understand why the Applicant did not seek permission to go off-site and then to query the length of his breaks were that day. At no time was the conversation unprofessional or aggressive and the Applicant was provided time to respond to the questions

[88] Mr Khan states that the Applicant has never requested approval to leave site from himself and is not aware of instances where this permission was obtained from team coordinators. He also notes that swearing may occur, however it would not be accepted practice to swear in a conversation with management. Mr Khan further confirmed that break times may be interrupted for breakdowns and there is flexibility in that case. He claimed that he did not witness any instances where an employee has not had a break in response to Mr Ball's statement that on some shifts, employees did not get a break.

Evidence of Ms Felicity Templeman

[89] Ms Templeman is employed as a Senior Human Resources Advisor for the Respondent and has been employed since July 2021. Ms Templeman confirmed that the Applicant's employment is covered by the *Smith's Snackfood Company, Queensland, Enterprise Agreement 2020* (the agreement). She states that under this agreement, employees are entitled to a paid meal break of 30 minutes during an eight-hour shift (clause 6.3.1) and a rest pause of 10 minutes duration during the first and second half of each ordinary working day (clause 6.4.1). Further by agreement, the two 10-minute rest pauses may be combined into one 20-minute rest break. Thus, the applicant would have had a total entitlement of 50 minutes paid breaks each day.

[90] In November 2020, Ms Templeman assisted developing a presentation to highlight requirements across various topics for the maintenance team. A section of the presentation was devoted to break times. These presentations were presented to the maintenance team as briefing meetings and all attendees signed an attendance record. The Applicant attended this meeting on 23 November 2022.

[91] The Respondent states that require employees to comply with the Pepsi Code of Conduct which states:

- *"Respect and follow PepsiCo's Code of Conduct*
- *Always do what is right*
- *Lead by example and empower others to deliver*
- *Behave in a transparent and authentic way*
- *Be accountable for your own actions"*

[92] In addition to the Code of Conduct, the PepsiCo way which provide values and other underlying principles which guide employees' actions and behaviours:

- *Act with integrity*
- *act as owners*
- *voice opinions fearlessly*
- *be consumer centric*
- *celebrate success*
- *raise the bar on talent and diversity; and*
- *focus and get things done fast*

[93] Ms Templeman gave evidence regarding the use of CCTV surveillance in the workplace and the document which summarised the circumstances when the CCTV may be used is below.

> '*The company reserves the right to use CCTV during investigations if required.*
>
> *It can be used as a vital piece of evidence for example inequality issues. The CCTV footage is not intended to continuously monitor individuals for the purposes of performance management.*
>
> *Access to CCTV footage is controlled. The following positions have the CCTV software available on the computers:*
>
> *Production manager*
> *Quality manager*
> *OHS manager*
> *LD & T manager*

[94] Ms Templeman states the employees of the Respondent are provided a unique swipe access card which is used for entry and exits from the site and also for some access points within the site.

[95] Ms Templeman attests that that she received a call from Mr Thomas King who was the Technical Manager on 17 June 2022. Mr King was advised by Mr Alistair Woods who was the who is the Logistics Distribution and Transport Manager regarding a potential breach of both the process of obtaining off-site permission and employees exceeding paid break times. She informed Mr King that the appropriate person to contact would be Mr Vuniwaqa.

[96] On 20 June 2022, Mr Vuniwaqa had discussions with Ms Templeman regarding the two matters occurring on the 17 June 2022. Ms Templeman confirmed that the swipe access records indicated that the Applicant had left site that day.

[97] She suggested a 'seek to understand' conversation with the Applicant to determine if he received prior approval. On 21 June 2022, Mr Vuniwaqa contacted Ms Templeman following the meeting and relayed that the Applicant could not recall who he received permission from that day. Mr Vuniwaqa stated the Applicant had terminated the meeting unexpectedly and exited stating this is 'fucking bullshit'. When requested to return to the meeting, he did not reply and continued to walk away.

[98] Ms Templeman states that Mr Vuniwaqa told her that the Applicant is having his break in addition to the time he is off-site. Ms Templeman asked what had been communicated to the Applicant regarding his [extended] breaks. Mr Vuniwaqa replied that permission to leave the site was not permission for him to extend his break.

[99] On 22 June 2022, Ms Templeman and Mr Vuniwaqa met to discuss the meeting that had occurred the previous day. Mr Vuniwaqa stated that he received a text message from the Applicant following the meeting that said '*I just remembered, I did get permission to leave site last week. Neil was here till 1030 and he also asked me to get him lunch when I asked him.'*

[100] Mr Vuniwaqa confirmed to Ms Templeman that Mr Zuidema was able to approve leaving site. Mr Vuniwaqa stated that he had a text message from Mr Zuidema stating he knew that the Applicant had gone off-site but not that he had given the Applicant permission to extend his break. Ms Templeman understood that the approval was acknowledging the Applicant was off-site in accordance with health and safety practices, not approval to extend break time.

[101] On 24 June 2022, Ms Templeman met with Mr Woods to review CCTV footage. Mr Woods stated to Ms Templeman that he had observed, whilst reviewing footage for another purpose (someone had incorrectly parked in the disabled parking place) that the Applicant's car had changed parking spots that day. He further commented that the Applicant had a distinctive high-end vehicle that set it apart from the other vehicles in the parking lot and was readily identifiable. Mr Woods scanned through the CCTV footage and identified that the Applicant left site at 8:03am and returned at 8:25am and then identified the Applicant heading in the direction of the canteen at 8:28am The footage then showed the Applicant leaving the canteen at 8:58am. Ms Templeman concluded that the Applicant had not been working and had been on a break for of approximately one hour.

[102] Following this observation, Ms Templeman investigated the previous Friday to see if he if the Applicant also took an extended break on that day. On a review of the footage from Friday 10 June 2022, they identified the Applicant left site at 8:09am returned at 8:29am then walked in the direction the canteen at 8:33am.They located the Applicant at 9:20am heading to the workshop. Ms Templeman stated they viewed footage from multiple CCTV cameras located throughout the site confirming that the Applicant was not in any other location working, they did not identify any other location and consequently concluded that the Applicant was in the canteen.

[103] During this review, Ms Templeman sought to understand if the Applicant had taken any more breaks that day and continued to review the footage of the CCTV. They identified the Applicant at 11:38am where he was observed heading in the direction of the canteen, they could not identify him in any other location on site and identified him heading away from the canteen towards the maintenance workshop at 12:25pm. This confirmed the Applicant had taken a second break of 47 minutes. She noted that the Applicant did not take any further breaks that day.

[104] Ms Templeman was concerned that the Applicant may have also taken a second break on 17 June 2022 and reviewed this footage with Mr Woods on 27 June 2022. In reviewing the footage of 17 June 2022, they identified that the Applicant left the production hall at 8:00am and observed again the break that the Applicant took from 8:00am to 8:58am. On the same day, the Applicant was observed at 11:23am leaving the production hall and heading towards the canteen. He was then observed at 12:11am entering the production hall. Ms Templeman concluded that the Applicant was absent from work on a second break that day which was for 48 minutes.

[105] Ms Templeman thought there was a possibility that the Applicant was having extended breaks on other days of the week. Mr Woods and herself then reviewed the footage from Tuesday 21 June 2022. The Applicant did not go off-site that day and was identified at 8:41am walking through the tunnel towards the canteen. A review of multiple cameras could not identify that he was in any other location other than the canteen. He was then identified at 9:24am heading in the direction of the maintenance workshop. His first break was of 43 minutes duration. Mr Woods and Ms Templeman continued to review footage and identified the Applicant at 11:24am heading to the canteen and then again at 12:02pm heading in the direction of the maintenance workshop. No other camera had located him in any place other than the canteen. The conclusion was that the Applicant took a second break for 38 minutes. This finding concerned Ms Templeman and they arranged another date to review more footage.

[106] On 30 June 2022, Mr Ward and Ms Templeman met and reviewed footage from Wednesday 15 June 2022 to determine if the Applicant's break pattern was consistently extended. The footage identified the Applicant leaving the workshop and heading in the direction of the canteen at 8:25am. The footage from various other site locations could not observe him in any of the other locations other than the canteen. He was then identified at 9:25am heading towards the maintenance workshop. The Applicant was absent from work in the first break for one hour. They continued to observe all the Applicant's movements that day and he was identified at 12:03pm leaving the workshop heading in the direction of the canteen. He was next observed at 12:53pm heading in the direction of the workshop this would make his second break of the day 50 minutes.

[107] They reviewed the Applicant's breaks on Monday 20 June 2022. The Applicant was seen at 8:24am leaving the maintenance workshop heading towards the canteen. No other camera identified the Applicant until 9:08am which was 44 minutes until captured again on CCTV. On the same day, they identified the Applicant at 11:20am walking upstairs to the canteen where he was again seen at 12:10pm heading towards the workshop having taken a break of 50 minutes.

[108] Mr Woods and Ms Templeman concluded that they had reviewed sufficient footage to demonstrate the Applicant was undertaking a deliberate and intentional pattern of extended breaks. Ms Templeman asked Mr Woods to download the various snippets of the footage onto a USB storage device. Following this, Ms Templeman met with Mr King, Mr Vuniwaqa and Ms Kristen Andrews – Human Resources Manager and advised them there was a pattern of the Applicant being absent from work on extended paid breaks on 10 June, 15 June, 17 June, 20 June and 21 June 2022.

[109] On 1 July 2022, Ms Templeman reviewed the Applicant's swipe card access records and reviewed the time and attendance records of Kronos (payroll system) from 10 June to 21 June 2022. The reports showed the Applicant's scheduled shifts, timesheets of when he clocked in and out, and how long his shift was in order to determine the Applicant taking extended breaks to confirm whether the Applicant had been working his normal shifts during this period.

[110] Ms Templeman discussed with Mr Vuniwaqa regarding the general break pattern for maintenance employees and was informed 8:30 to 9:00am and 11:30am were the allotted time for a lunch and smoke break. Mr Vuniwaqa confirmed that employees had proactive maintenance plans or cleaning duties to perform when not on a callout. Ms Templeman also confirmed the Applicant was not carrying any tools or wheeling a toolbox when seen on the CCTV footage in the tunnel. Further, Mr Vuniwaqa confirmed that there was no scheduled maintenance during these times that time in the tunnel. Ms Templeman then had a meeting with Mr Vuniwaqa, Mr King, Ms Andrews to discuss standing down the Applicant based on the information gathered to then allow for a fulsome investigation.

[111] On 5 July 2022, Ms Templeman provided Mr Vuniwaqa with a stand down notice to be provided to the Applicant. Mr Vuniwaqa stood the Applicant down. Ms Templeman then drafted an allegations letter and in doing so reviewed the summary table of the break periods and linked that with the CCTV footage thus confirming the break times. On 6 July 2022, Mr Vuniwaqa sent the allegation letter to the Applicant's personal and work email address.

[112] The Allegation letter states:

> *"Dear Karl,*
>
> *On 5 July 2022, you were suspended from your normal duties with full pay, whilst the Company investigated serious concerns relating to your conduct.*
>
> *It is alleged:*
>
> 1. *On 21 June 2022, during a meeting with your manager and maintenance manager you displayed disrespectful behaviour with offensive language, stating "fucking bullshit", prior to abruptly ending the meeting by walking out.*
> 2. *You repeatedly took excessive breaks well in excess of those allowed under the Enterprise Agreement ('The Smith's Snackfood Company, Queensland - Enterprise Agreement 2020- 2023'} on the dates and times detailed below. In so doing your conduct was willfully and deliberately dishonest in that you were being paid for time that was not worked:*

a. 10th June 2022
i. 1st Break-1 hour 17 minutes
ii. 2nd Break -38 minutes
b. 15th June 2022
i. 1st Break -1 hour
ii. 2nd Break - 50 minutes
c. 17th June 2022
i. 1st Break -1 hour
ii. 2nd Break 49 minutes
d. 20th June 2022
i. 1st Break -43 minutes
ii. 2nd Break - 50 minutes
e. 2lst June 2022
i. 1st Break -45 minutes
ii. 2nd Break -36 minutes

You are required to attend a meeting on Monday, 11th July 2022 at 3.00pm where you will be given the opportunity to fully explain your behaviour and respond to the above allegations.

The Company will give full consideration to your explanations and responses before any decisions on appropriate action, if any, are taken. However, you must understand that these concerns are serious, and should the Company believe that disciplinary action is appropriate, such action will be taken, that may include the termination of your employment.

You are reminded that you are encouraged to bring a support person with you to our meeting. If you choose to have a support person present, you are requested to advise me of the name of this person by 5pm, Friday 8th July 2022.

This situation should not be discussed with any other individual associated or employed with PepsiCo apart from your support person if you choose to have one.

You may like to make use of our confidential Employee Assistance Program during this time. The number to call is 1800 818 728.

Yours sincerely,
Atu Vuniwaqa
Maintenance Manager"

[113] The specific dates and times of the breaks were listed in the allegations document noting that a **total** break time of 50 minutes paid time a day was the site agreement (30 minutes and two 10 minutes breaks a day)

[114] On 8 July 2022, Ms Templeman received the Applicant's written response to his allegations the Applicant raised the following matters:

a. Procedural fairness in relation to the seek to understand discussion with Mr Vuniwaqa on 21 June 2022.

   i. Specifically in relation to the absence of a support person in that he stated: *"I got a phone call from Atu and asked to come for a chat. I wasn't asked to bring a witness as is the usual Smiths procedure during a disciplinary meeting."*

   ii. That he was only advised of one occasion where he had a longer break in this discussion

b. He responded to the allegations in that he, inter alia, stated:

   *i. "Firstly, I wish to apologise for the misunderstanding to what was believed I had said after becoming frustrated and anxious after the meeting that I was called to attend on Tuesday 21 June. I never said 1******* bullshit'. I said, 'this is bullshit'. It was obviously misheard."*

   ii. "What proof is there that I was having breaks for that long because I don't remember doing so, and if proven then I apologize because I wasn't aware that I was taking that long."

   iii. "It seems to me that this has been escalated because Atu thought that I had swore in the meeting when I walked out due to being under duress. I apologize for walking out and can assure you that this will not happen again nor if I may have mistakenly taken longer breaks than the gazetted time. I will make sure that in future I will take the correct times."

   *iv."I have often been in the presence of workers of all levels (including managers within this company) swearing. I fully understand that it can be offensive, and I would fully respect anyone who completely reframes from doing so. Because profanities no matter to what level tend to be part of the working environment, it can prove difficult to not use such express such as Bullsh**t when such meetings are not carried out in a professional manner"*

c. That extended breaks had not been raised with him earlier in that he stated:

   i. "If there was a problem with me taking longer breaks which I don't remember doing, and if I did then definitely not on purpose, then why wasn't I spoke too before it got out of hand and not escalated to this degree. Is there a hidden agenda?"

d. Use of CCTV footage in that he stated

   "Although I am sure that the cameras could not have been used as this practise was refuted in the last EBA meetings by the manufacturing manager at the time."

Allegations meeting 11 July 2022

[115] Ms Templeman considered the responses raised by the Applicant and determined to provide him a further opportunity to respond regarding the issues raised. Prior to the meeting on 11 July 2022, Ms Templeman gathered the relevant evidence which included the USB with CCTV footage, the swipe card access report and the Kronos time and attendance record. The meeting commenced on 11 July 2022 at 3:00pm. The Applicant was supported by his union representative Mr Mick McKeown from the United Workers Union.

[116] Mr Vuniwaqa put to the Applicant the first allegation that he said 'fucking bullshit'. The Applicant stated he did not say 'fucking bullshit' but only said 'bullshit' and walked out. He said he did not use the word 'fucking'. The Applicant further noted that swearing is common in the workplace. The Applicant was informed that it was one thing to swear on the floor however in the context of a meeting with your manager and to walk out mid-meeting and refuse to return was disrespectful conduct which was not acceptable.

[117] Mr Mick McKeown commented that the Applicant did not have a support person during the seek to understand meeting. Ms Templeman replied the discussion was inquiry based and not a disciplinary one and therefore did not require a support person. He suggested that the Applicant felt bullied and victimised for these allegations and the Applicant was frustrated in the meeting which is why he responded the way he did.

[118] The Applicant stated he had permission to leave site by Mr Zuidema on 17 June 2022. Ms Templeman and Mr Vuniwaqa confirmed that the leaving site and approval to do so was not in question. Mr Vuniwaqa then raised the second allegation regarding a series of extended breaks taken repeatedly, well in excess of those allowed in the Enterprise Agreement and that it was wilfully and deliberately dishonest in that the Applicant was paid for time that he did not work.

[119] Mr Mick McKeown asked how the Respondent had determined that the breaks were extended to which he was informed that it was done through viewing CCTV footage. The Applicant stridently contested that the Respondent could not use this footage and that a further a union representative is required to review the footage with management. The Respondent stated they have the right to view footage when an event is triggered. As this was a highly contested issue, the union organiser requested a break to get confirmation of the Respondents use of CCTV.

[120] Mr Mick McKeown and the Applicant returned from break and no longer contested the use of the CCTV footage in this matter. The Applicant stated *"I was not aware I was taking such extended breaks. This was not intentional, and I just can't believe it. I can't remember taking that long of breaks.*[9] The Applicant further mentioned that frequently the maintenance technicians are interrupted in during their breaks in the canteen, however he did not provide any further evidence regarding this claim.

[121] Ms Templeman determined that the Applicant had acknowledged the extended breaks and no longer disputed them but rather apologise stating it was not intentional and that the Respondent did not need to take the Applicant through the CCTV footage, swipe card records or Kronos data to pinpoint the extended breaks.

[122] Following this, Mr Vuniwaqa reminded the Applicant that there had been a toolbox meeting which outlined the requirements of taking breaks an extract of the presentation specifically mentioning the requirements for breaks. The Respondent provided records which indicated that he had attended this meeting in November 2021.

> ***Breaks:***
>
> a. *Breaks - 50 mins in an 8-hour shift*
> b. *This time can be divided by 1 x 30 min and 2 x 10 mins, or 1 x 30 min and 1 x 20min.*
> c. *Please ensure that you are adhering to these times.*
> d. *For breaks we need to ensure that operations still have required coverage. Please communicate your breaks with your team or shift FLM as required, to ensure coverage is maintained*
> e. *If breaks are taken together, must be prepared to be contacted and respond during the break*
> f. *Breaks are only to be taken in the designated areas, which is staff canteen and the tearoom.*

[123] Ms Templeman stated to the Applicant that he was significantly exceeding the allotted break times on repeated occasions from five days of records. The Applicant replied that he was not aware of the excessive timings of his break and that he may have had people talk to him in the canteen about work. Ms Templeman regarded this circumstance as highly improbable given the frequency and the lengthy and significant departures from the site conditions.

[124] The Applicant then stated that he was completely unaware that his breaks were of extended length, he apologised and said it won't happen again. In summary the Applicant's response was:

> a. *That he didn't swear but believes he stated 'this is bullshit' before walking out*
> b. *'This is bullshit' was in regard to the process, was not personal against anyone*
> c. *That swearing is part of the culture/workplace*
> d. *Karl did not recall the length of breaks and apologises if they were over the allocated time.*[10]

[125] The meeting concluded and the parties on Ms Templeman's account, accepted that the above points were an accurate summary of the meeting.

[126] Management met to discuss the outcomes from the meeting. Ms Templeman states that they discussed each allegation individually. In relation to allegation one, she states that responses from the Applicant regarding swearing, abruptly ending the meeting and walking out and refusing to return when requested was an inappropriate conduct and that allegation was substantiated.

[127] In relation to allegation two, Ms Templeman and others considered the conduct to be repeated, there was consistency in the elongation of the breaks, that the Applicant knew he was

not working and that he was aware the length of the paid breaks. The Applicant had offered an apology and did not raise any mitigating factors. Ms Templeman and others from the Respondent determined on the balance of probabilities that it was highly improbable that he was not aware of his behaviour as it occurred on each day that the CCTV had been reviewed and that his apology did not mitigate what occurred. Furthermore, the Applicant had attended a toolbox meeting in November 2021 which specifically stated the break requirements and expectations. Thus, they concluded that allegation two was also substantiated.

[128] On 12 July 2022, having received further witness statements in relation to the allegations Ms Templeman drafted the show cause letter with the findings on that basis for Mr Vuniwaqa to have a discussion of the Applicant.

> *"1. In the meeting on 21 June 2022 with your manager and maintenance manager it is not disputed that you walked out of the meeting whilst using inappropriate language. Three witnesses confirm that you stated, "fucking bullshit" and on the balance of probabilities the Company accepts that this is what you stated. However, even on your version the language used was inappropriate. Importantly it is the combination of your inappropriate language together with walking out of the meeting that is disrespectful and completely inappropriate.*
>
> *2. You have repeatedly taken excessive breaks well in excess of those allowed under the Enterprise Agreement ('The Smith's Snackfood Company, Queensland – Enterprise Agreement 2020-2023'). Your explanation for your conduct has been to the effect that you were not aware your breaks over the allocated time and that you "can't believe" and "can't remember" that the breaks were so long. The Company has rejected this response as being highly improbable given the length of your breaks and the fact that you were made aware in November 2021 of the importance of adhering to the allocated break times via a detailed toolbox session. Accordingly, the Company has concluded on the balance of probabilities that your conduct in taking excessive breaks was wilful and deliberate and as such is dishonest as you were aware and knew that you were being paid for that that was not worked"*

Show Cause meeting 14 July 2022

[129] On 14 July 2022, Ms Templeman and Mr Vuniwaqa conducted a meeting with the Applicant along with Mr Martin De Rooy his union representative and Mr Richard ChaCha his support person. Ms Templeman indicated in the show cause letter that the allegations have been substantiated on the balance of probabilities and the Applicant's conduct was dishonest and the Company was considering disciplinary action including the possible termination of his employment. However, the Respondent wanted to provide an opportunity to show cause and obtain further information prior to a decision being made. Mr De Rooy advised of the matters they wished to raise which included: a lack of procedural fairness in the seek to understand and stand down meetings as the Applicant was not accompanied by a support person. Furthermore, Mr De Rooy states the allegations were not provided to the Applicant at the time he was stood down.

[130] The Respondent replied that the first meeting was described as a 'seek to understand' where the purpose of the meeting was to gather information only and not a disciplinary meeting

and thus there was no requirement to offer or prompt the Applicant to bring a support person. Regarding the issuing of a stand down notice, the Applicant was informed that there was investigation regarding his breaks, and he would receive the formal allegations in writing shortly. Furthermore, the Respondent says the allegations letter was sent to the Applicant the next day, in advance of any disciplinary meeting.

[131] Ms Templeman states that Mr ChaCha said that extended breaks were a cultural issue with the maintenance staff and the maintenance team but did not dispute the breaks. The Applicant's support person asserted that termination would be a harsh outcome and a written warning would be more appropriate. The Applicant also stated that extended breaks were not intentional and that he was not aware that the breaks were excessive. She also states Mr Cha-Cha stated he did not deny the extended breaks happened, and he apologised again and stated that moving forward this will not happen. Ms Templeman then took a break to review the information arising from the meeting.

[132] Ms Templeman, Mr King and Ms Andrews then discussed matters raised in the meeting and noted that there had been no mitigating circumstances raised, that the Applicant had not provided any evidence to establish his extended breaks were due to performance of work during his regular breaks and although he apologised, that it was improbable that he didn't know the breaks were as long as they were. Ms Templeman, in consultation with the management representatives determined that the allegations were substantiated and his conduct in taking extended breaks was wilful and dishonest, particularly as it had occurred over the five days that they reviewed. Ms Templeman and the others agreed that termination of employment on the basis of serious misconduct would be the appropriate outcome

[133] Ms Templeman drafted a termination letter and when they reconvened Ms Templeman advised the Applicant that they had determined on balance that the allegations were substantiated and taking everything into account they had determined to terminate his employment. She further states in the letter that the Applicant's conduct in repeatedly taking excessive breaks was dishonest and constituted serious misconduct which was inconsistent with the continuation of his employment and that they had lost confidence and trust in him as an employee.

[134] Ms Templeman asserts that evidence was available on the CCTV footage. However, the Applicant did not dispute the breaks but rather stated it wasn't intentional and he was unaware his breaks were extended. Furthermore, the Applicant's representative stated words to the effect we do not dispute breaks and apologised. As a result, the material was not reviewed or provided to the Applicant or Applicant's representative. The Applicant's representative did not raise any concerns in relation to CCTV and Ms Templeman asserts that there was no request to view any of the footage or material that had been used to substantiate the second allegation.

Evidence of Mr Alastair Woods

[135] Mr Alastair Woods is employed as a Logistics, Distribution and Transport Manager and has been working for the Respondent since August 2002. In his role, he is authorised to view the CCTV on his computer.

[136] Mr Woods was reviewing CCTV footage of the staff car park on 17 June 2022 regarding reports that an employee had parked inappropriately in one of the disability parking places. As he was viewing the footage, he identified that over a short period of time the Applicant's car was observed in a different car park. This car was familiar to Mr Woods as it is a distinctive vintage red BMW. He identified that the Applicant left the car park at 8:03am and observed the same car return to site at 8:25am.

[137] Mr Woods had been involved in a previous matter regarding excessive breaks and general break time compliance, he contacted Mr Thomas King the Technical Manager and advised him that he had seen the Applicant's vehicle leave and then return to the site approximate 20 minutes later. Mr Woods continued reviewing CCTV footage as he understood that the first break should be 10 to 20 minutes in accordance with the Enterprise Agreement. By viewing footage from the numerous cameras located within the site, he observed the Applicant head in the direction of the canteen at 8:28am and then observed him head away from the canteen at 8:58am. Mr Woods contacted Mr King regarding what he had observed, and Mr King had decided to contact Human Resources in light of his observation.

[138] On 22 June 2022, Ms Templeman requested assistance of Mr Woods in reviewing the CCTV which they did on 24 June 2022.

[139] In reviewing the CCTV on 24 June 2022, Mr Woods displayed the footage of the Applicant's movements on the morning on 17 June 2022 where it showed the Applicant leaving the site at 8:03am and had him returning to site at 8:25am. He then showed footage of the Applicant heading towards the canteen at 8:28am and heading away from the canteen at 8:58am.

[140] Ms Templeman questioned whether this was specific to the day of the week being a Friday. Mr Woods reviewed the footage from Friday 10 June 2022 and observed the Applicant leave the car park in his Range Rover at 8:09am and he returned at 8:29pm. He observed the Applicant headed towards the canteen at 8:33am and was next observed heading in the direction the Maintenance Workshop at 9:20am. Ms Templeton noted this break exceeded his break allowance as it was over one hour and wanted to confirm if the Applicant had taken further breaks.

[141] On same day, they observed the Applicant leave the workshop at 11:38am heading in the direction of the canteen and was next captured at 12:25pm heading in the direction of the maintenance workshop. Mr Woods states Ms Templeton notes the second break was for 47 minutes. They were unable to view all the footage agreed to meet again on 27 June 2022.

[142] Once again, they reviewed the applicant's movements via footage from various cameras around the site which confirmed that the applicant had been taking breaks that exceeded the agreement on 17 June 2022.

[143] They met again on 30 June 2022 and reviewed footage on Wednesday, 15 June 2022 which confirmed that there was a pattern of breaks that significantly exceeded those paid breaks under the agreement that observed the movements of the Applicant on 20 June 2022 and once again noted excessive break times being taken.

[144] Mr Woods then downloaded CCTV footage that they had observed to a USB storage device.

Evidence of Mr Atunaisa Vuniwaqa

[145] Mr Atunaisa Vuniwaqa is employed as a Maintenance Manager at the site has been with the Respondent since March 2017.

[146] Mr Vuniwaqa confirmed that each employee has an obligation to inform a member of management if they leave site during the rostered shift to ensure health and safety for all employees on the site in case of an incident.

[147] In November 2021, Mr Vuniwaqa conducted a toolbox talk with all employees from maintenance team. This talk was to clarify the expectations of management relation to breaks, access areas, sick leave, SAP entry, clocking on and off, leave requests, proactive employment maintenance/cleaning and management on shifts. The Applicant attended one of these sessions on 23 November 2021.

[148] Mr Vuniwaqa confirmed that if maintenance employees take breaks together, they must be prepared to be contacted in case of breakdowns. If they are requested to attend an urgent breakdown during their break, they would be able to recommence their break after the breakdown has been attended to. He further states that maintenance employees do not receive an extension their allocated break time unless the employee leaves to attend a breakdown.

[149] Mr Vuniwaqa also stated that break times must be communicated with the Team Coordinator or Shift Manager to ensure there is coverage and thus communication with the Frontline Manager is important.

[150] Mr Vuniwaqa states that Mr King the Technical Manager spoke with him on 17 June 2022 and informed him that the Applicant had left the worksite that morning and Mr King asked Mr Vuniwaqa to check if anyone had given permission to leave site.

[151] On 21 June 2022, Mr Vuniwaqa contacted Mr Zuidema to identify if he had given any of the employee's approval to leave site the previous Friday. Mr Zuidema replied that he had not however in a subsequent text exchange he confirmed the Applicant went off site to get Banh Mi's. Mr Vuniwaqa understood from that exchange that the Applicant left the site but was still not clear whether approval was granted.

[152] Mr Vuniwaqa asked the Applicant to have a meeting later that morning in the Ellis room. Mr Vuniwaqa stated he engaged in casual conversation with the Applicant to ask about the tasks he was working on. Mr Khan joined shortly afterwards. Mr Vuniwaqa then changed the subject regarding the Applicant leaving the site on 17 June 2022 to which the Applicant replied that he had left at 8:00 am he left site and returned at 8:30am, and then went on his break before the monthly meeting at 9:00am. Mr Vuniwaqa asked if he had taken further breaks to which the Applicant confirmed he had from 11:30am for 20 to 25 minutes. Mr Vuniwaqa asked the Applicant if he asked permission to leave site and after a short series of exchanges the Applicant stated, *'I didn't receive direct approval'*.[11]

[153] Mr Vuniwaqa raised that the Applicant was taking longer breaks than allowed on that day, being a total of 85 minutes instead of 50 minutes. Mr Khan suggested the possibility of docking the time that he spent beyond what was permitted in the agreement and Mr Vuniwaqa said 'that is not a part of our process or something we do here'.

[154] At this point in the meeting the Applicant stood up left the room stating," *this is fucking bullshit"* and left.[12] Mr Vuniwaqa asked the Applicant to return to the meeting, but he did not.

[155] Later that day the Applicant sent a text stating "*I just remembered, I did get permission to leave site last week. Neil was here until 10:30 AM and he also asked me get him lunch when I asked him if I could go to the bakers."* Mr Vuniwaqa noted that whilst Mr Zuidema knew he was leaving the site, Mr Zuidema had not directly said he had given the Applicant permission to do so.

[156] From the period 24 June through to 30 June 2022, Mr Vuniwaqa was updated regarding investigation that Ms Templeman and Mr Woods were undertaking using the CCTV camera footage. On 4 July 2022, they agreed to suspend the Applicant whilst the investigation continued. The following day, Mr Vuniwaqa met with the Applicant in the morning and advised him he had been stood down pending a formal investigation. Mr Vuniwaqa noted that the Applicant did not make a request for support person. On 6 July 2022, Mr Vuniwaqa sent the allegations letter via email to the applicant which he did so via a work email and also a personal email address.

[157] On 11 July 2020, Mr Vuniwaqa was emailed the Applicant's written response to the allegations and later that day he attended a meeting with the Applicant and his union representative. The Applicant stated that he said *'this is bullshit'* and he denied saying *'fucking bullshit'*. Regarding the second allegation, the Applicant's representative maintained that they were unable to review CCTV footage without a union representative present. The Applicant's union representative called for a break to seek confirmation. Upon returning from the break, the Applicant states that he was not aware he was taking long breaks and apologised if that was the case.[13]

[158] Mr Vuniwaqa confirms that Ms Templeman had five days of footage that were reviewed which confirmed that the Applicant had exceeded his allocated break allowance on each day.[14] The Applicant provided no evidence that the breaks were due to the performance of work during his allocated break time and following the meeting into discussion with Ms Templeman, Mr King and Ms Andrews, they agreed there were no mitigating factors presented and they should proceed to a show cause meeting.

[159] On 14 July 2022, Mr Vuniwaqa, Ms Templeman, the Applicant's support person Mr Richard ChaCha and Mr Martin De Rooy his union representative met at the show cause meeting where Ms Templeman confirmed the allegations been substantiated on the balance of probabilities that was written in the Show Cause Letter dated 13 July 2022.

[160] Mr Vuniwaqa asserts that Ms Templeman gave the Applicant and representatives an opportunity to show cause as a result before any final decision was made regarding the disciplinary outcome and further stated that the company was considering all options including termination. Mr De Rooy responded that there were three issues regarding procedural fairness.

Firstly, in the first meeting that he was not provided support person. Secondly, standing down the Applicant with no support person present and no allegations were put to the Applicant when he was stood down.

[161] Mr Vuniwaqa stated that Ms Templeman responded saying that the first meeting was a 'seek to understand' discussion not a disciplinary meeting and did not require a support person. She also confirmed that a support person is not required for standing down an employee and finally that the allegations were provided to the Applicant in writing the day following the stand down.

[162] Mr ChaCha asserted that extended breaks were a cultural issue to which Mr Vuniwaqa and Ms Templeman stated that this was not acceptable behaviour, and they will take appropriate action if there is evidence of that occurring. Furthermore, Mr ChaCha said words to the effect of *we are not disputing the breaks but* [believe that everyone in maintenance was doing it].

[163] The Applicant advised the attendees in the meeting that the extended breaks were not intentional, that he was not aware they were excessive, and he apologised. He did not deny the breaks but asserted that they were not intentional and moving forward it would not happen again. The meeting was temporarily halted, and the Respondent participants had a further discussion amongst themselves.[15] Mr Vuniwaqa had a discussion with Ms Templeman and Mr King and they noted that the Applicant had not presented any new information from his written responses or verbal responses on 11 July 2022 and further he had not provided any evidence that his extended breaks were a result of the performance of work. They determined that based on the allegations having been substantiated and the responses provided in the current meeting and in the absence of any mitigating factors and the severity of the Applicants misconduct the appropriate disciplinary outcome would be termination of employment.

[164] They reconvened the meeting and Ms Templeman confirmed that the Applicant's conduct had resulted in a loss of trust and confidence with the Respondent and that he was in breach of the Code of Conduct and the PepsiCo way. The Respondent had determined that the appropriate discipline was to terminate his employment. Following the meeting, Mr Vuniwaqa escorted the Applicant to his locker to collect his belongings and then to leave the site.

Respondents' submissions

[165] The Respondent submits that there was a valid reason for dismissing the Applicant. Namely, the substantiation of the two allegations. The Respondent asserted that the disrespectful actions of walking out of a meeting/swearing and the extended paid for breaks over a repeated occurrence and wilfully done were serious misconduct that would on balance be a valid reason for dismissal.

[166] The Respondent submits that the Applicant and the witnesses are not credible sources of truth or provide relevant or probative evidence. The Respondent states that Applicant has sought to amend or bolster his evidence on the key issue; the request to view the CCTV footage. This request is not included in his initial application, his initial witness statement, or statement in reply. There is no corroboration on this claim by other witnesses and is an attempt to rewrite history.

[167] The Respondent says that its witnesses, by contrast provided detailed, unbiased and corroborative evidence that unequivocally clarified the facts that show the Applicant was not unfairly dismissed. The Respondent asserts that its witnesses provided evidence from reviewing not only multiple CCTV cameras but also cross referenced with swipe card access data and Kronos pay records which evidenced numerous significant breaches of the Enterprise Agreement provisions for paid breaks. Further, it contends that the disciplinary process was undertaken properly and meet the requisite standards for such a process and that the decision to terminate employment was a balanced and considered one.

Comments about the evidence

Evidence of the Applicant

[168] The Applicant prosecuted his case based upon the lack of the requested CCTV and that the Respondent had not provided conclusive proof of his misconduct. The Applicant provided self-serving testimony and made concessions grudgingly of explanations as to what he could have been doing. His testimony and evidence did not stand up to examination and fell short of providing a probative rebuttal to the Respondents evidence and testimony.

Evidence of Mr Neil Zuidema

[169] Mr Zuidema did not offer much probative evidence to support the Applicant's narrative, other than stating that employees do not seek permission rather they inform him they are leaving site.[16] He does not provide testimony supporting that the Applicant had permission to extend his break past the allocated time and he did support the view that it would be disrespectful to walk out of a meeting and swear and refuse to return as disrespectful.

Evidence of Mr Steve Ball

[170] Mr Ball gave evidence in a credible and factual manner. He attested to not giving permission for an extended break to the Applicant on the 10 June 2022, and that he was very busy. Therefore, he did not require employees under his supervision to check in with him when they took breaks,[17] that he relied upon employees being responsible and trusted them,[18] further he acknowledged that following the Toolbox talk in November 2021 that employees were aware of their break times.[19]

Evidence of Ms Felicity Templeman

[171] Ms Templeman presented her evidence in straightforward manner. She presented as a credible Human Resources practitioner and had in depth knowledge which she provided without any colouring. She attested to the detailed investigation of the video material over at least three separate meetings with Mr Woods and further the analysis of the swipe cards and Kronos data. She gave clear and direct answers under cross examination and did not waiver in her recollections of the meetings with the Applicant and his responses. Her notes of the meetings were not successfully challenged.

Evidence of Mr Atu Vuniwaqa

[172] Mr Ross provided his evidence in a thoughtful calm and credible manner and provided responses during cross examination that were similarly direct and were entirely consistent with Ms Templeman's evidence. He was clear that at no time did the Applicant request to view the CCTV footage.

Evidence of Mr Alastair Woods

Mr Woods was a forthright and credible witness; he gave detailed evidence regarding the CCTV footage and the investigation by himself and Ms Templeman over several days of reviewing footage from multiple cameras throughout the 5 days in question. He provided detailed explanations regarding the attempts to identify where the Applicant may have been when not visible on the CCTV footage giving confidence that the Applicant was not undertaking work during those extended breaks. He further gave his evidence regarding the vehicle that the Applicant drove in a plain and believable manner confessing that he was a 'car enthusiast". I regarded this witness as one that provided truthful testimony.

Mr Muhammad Salmon Khan

[173] Mr Khan was a calm and responsive witness who provided his testimony free from any colour and replied to the Applicants representative in a calm and steadfast and polite manner despite the forceful cross examination. I regarded him to be a witness of truth.

Findings

Request for CCTV Footage and other evidence

[174] The Applicant contends that if he did take longer breaks then it was unintentional, and he expresses contrition and states he will in future observe the break times strictly. The evidence that the employer relies upon is CCTV, swipe cards and Kronos time recording. The Respondent claims the evidence was not provided to the Applicant during the disciplinary process on the basis that the Applicant, once the matter of the use of CCTV for this purpose was agreed, no longer contested his lateness or length of breaks. The Applicant conceded that he was late and therefore did not require the evidence of his wrongdoing. The Applicant states he specifically requested the to view the footage but was never given the information.

[175] The assertion by the Applicant that he requested the footage during the disciplinary process did not appear in the F2 application form, nor in his first witness statement and neither in his witness statement in reply. Only in his testimony did the Applicant make the argument that he had requested the video footage on both the 11 July 2022 and the 14 July 2022 meetings.

[176] This was contradicted by both the Respondent witnesses who attended the meeting. Both Ms Templeman and Mr Vuniwaqa were clear that in the 11 July meeting that once the Applicant and representatives had clarified the use of the CCTV footage in the investigation then no further discussion regarding the CCTV or any other evidence was requested. The Applicant and his representatives did not seek to review the evidence that substantiated the allegations.

[177] There was no evidence provided by the Applicant apart from his own statements to support that he did indeed request the footage, no other witnesses were provided that attended the meeting in support of the Applicant were produced. Given a Union organiser and a delegate were also in that meeting I make a *Jones v Dunkel* inference that the lack of presenting witnesses whose evidence could be tested draws the inference that this assertion by the Applicant regarding his request for the footage is unlikely and an example of a self-serving assertion.

[178] Based upon the evidence and testimonies of each of the witnesses, I find that in fact no such request was made by the Applicant during either meeting. The material contained in Annexure 2 of the Applicant's submissions that attempt to explain his extended breaks is of little probative value. They are explanations that the Applicant says, "he could have been doing" and rely on recalling events many months later with no corroborative evidence.[20] I do not place any weight on this evidence.

[179] I find that on balance, the Respondents version of what occurred to be preferred. The Respondent's witnesses in the meeting were clear about the contest over the use of the CCTV footage and that once that issue was resolved that there were no longer any questions from the Applicant about viewing the footage. The Applicant took a course of action that explained the extended breaks by being unintentional and a lack of attention to time.

[180] Had the CCTV material been reviewed, it would have done no more than confirm what was being alleged, that he took significantly longer paid breaks and that he was doing it repeatedly. The more reasonable interpretation of what occurred was on realising that CCTV was able to be utilised to confirm his actions, the Applicant chose to admit to a lessor act of unintentional longer breaks. The risk for the Applicant in going through each of the day's events referencing his movements that was alleged may result in a larger and more detailed review of CCTV footage over a longer time frame which would uncover further evidence of repeated violations of break times. The alternative chosen by the Applicant was to acquiesce to the allegation and offer an apology.

Evidence to support the substantiation of the allegations of extended breaks

[181] The evidence that the Respondent based their disciplinary action upon included CCTV, swipe card and Kronos data. The material put forwards in the hearing was not exhaustive but rather the key CCTV sequences and summary swipe card data. The testimony of Ms Templeman and Mr Woods was that they reviewed each day over several hours and reviewed all the other possible cameras onsite that may have yielded an explanation for the breaks being extended. Ms Templeman further stated that she had then undertaken a review of the swipe access to determine if there might have been alternatives to the Applicant being in the canteen. On each of the Respondents reviews of the evidence, the conclusion they drew was clear that the Applicant had not been working and he had been undertaking extended breaks.

[182] The two witnesses from the Respondent who were at the centre of the investigation gave forthright answers to questions and they were witnesses of credit, providing further explanations when asked and independently verifying the actions to investigate the Applicant's movements. Of interest, they both confirmed a previous investigation had occurred with another employee whose movements they similarly verified through the CCTV and in that instance the relevant Union required that the evidence be reviewed. In the end, that employee was terminated

upon the basis of the CCTV evidence. This further supports the Respondent's narrative that they took a thorough and exhaustive review over several days inspecting not just footage from 1 Camera but all the other cameras to identify possible explanations for the movements of the Applicant. They could not identify the Applicant as being anywhere else in the factory other than in the canteen. After reviewing all the footage, they concluded and were confident that the allegations of extended breaks could be substantiated.

[183] As part of the submissions, the Respondent's did provide the relevant CCTV footage and swipe card data in support of their case. The Applicant had the opportunity to provide reasons and explanations in response. The Applicant provided a written submission regarding the CCTV footage and swipe card data. In his testimony, he proffered reasons as to alternative explanations to his whereabouts during the extended breaks.

[184] Upon viewing the CCTV footage, the Applicant has claimed to recall a number of specific jobs he was performing, he could not under cross examination recall what he was doing on the days either side of the day in question and nor did he provide that information during the show cause process. He provides reasons that range from specific conversations (Excerpt G and X) to having diarrhoea (excerpt R) and another assertion that he was working on a floor cleaner, later established under cross examination to be false.[21]

[185] The Applicant admitted under cross examination that Annexure 2 was what he could have been doing.[22] These explanations were based upon his alleged recollections of events many months past, and I find his explanations to lack credit. I reject the assertions of the Applicant regarding his alternative explanations

Evidence regarding the swearing

[186] The Applicant swearing is not contested, however the specific words are in dispute. The Applicant states that he said 'this is bullshit' during the 'seek to understand meeting' on 21 June 2022. The Applicant states he felt it was an interrogation and was tantamount to bullying. The Respondent asserts the words 'fucking bullshit" were used the Applicant. The evidence from Mr Vuniwaqa and Mr Khan was that the meeting was to understand the events of the previous Friday. They state that they asked questions in an appropriate manner and did not become abusive or threatening, rather they were persistent.

[187] In either case, it is not disputed that the Applicant ended the meeting prematurely by standing up and walking out and refusing to return when requested. Whether the word 'fucking' was part of his utterance or not, the totality of the Applicant's actions are disrespectful to management who were properly conducting a legitimate meeting with the Applicant to clarify and understand what had occurred the previous Friday. For the Applicant to walk out on the meeting, swear and refuse to participate is a wilful and disrespectful action by the Applicant. I find that he did indeed decide to end the meeting and swear. Either of the two alternative words used is not significant. He did not swear at the managers but rather calling the process bullshit is clear. The most likely explanation is that the Applicant felt under increasing pressure from the questions regarding his movements on the day in question, perhaps knowing that he could be exposed for what later was revealed; that he had not only taken paid time offsite to get the Banh Mi's, but also then took his meal break in addition to the time already clocked up offsite.

Both Respondents witnesses did not strike to me as people who would not have been overbearing or threatening. They presented themselves as respectful and straightforward.

[188] I prefer the evidence provided by Mr Vuniwaqa and Mr Khan regarding the meeting on how it was conducted on 21 June 2022. The Applicant prematurely ending the meeting as a precaution against his conduct was becoming apparent. He sought to terminate the meeting through walking out and allowed him to escape being examined on his movements and giving himself time to hopefully avoid scrutiny. The words uttered regarding either of the two alternatives is not significant in determining the evidence. The behaviour of walking out of a meeting and the swearing, whatever the words, and the refusal to return to the meeting was inappropriate and disrespectful.

Alleged lack of procedural fairness

[189] On the evidence, I am persuaded that that the 'seek to understand' meeting on 21 June 2022 conducted by Mr Vuniwaqa and Mr Khan was held in a professional manner and procedurally fair. The meeting was a legitimate meeting to ask questions about the whereabouts of the Applicant on the day in question. No allegations were put forward, the meeting was one of enquiry and within the purview of management, I find no unfairness to the Applicant arising from the meeting on the 21 June. Further, the Stand Down meeting was one that did not require a support person, it was the responsibility of the Supervisor to inform the Applicant of the decision and not one requiring a support person. In any event, there was no credible evidence put forward that the Applicant requested a support person for these meetings, nor was he denied support. These were not disciplinary meetings, although at a later stage the allegations became substantiated, and a disciplinary process was invoked, and the Applicant had support persons from the site and the Union present throughout the disciplinary process.

Was the Applicant's unfairly dismissed?

[190] Section 387 of the 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);
(b) whether the person was notified of that reason;
(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;
(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;
(e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal;
(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;
(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.

[191] I am required to consider each of these criteria to the extent they are relevant to the factual circumstances before me.[23]

(a) whether there was a valid reason for the dismissal

[192] The Act directs consideration of whether there was a valid reason for the dismissal related to the person's capacity or conduct. A valid reason is one that is "sound, defensible or well founded"[24] and should not be "capricious, fanciful, spiteful or prejudiced."[25]

[193] In cases relating to alleged misconduct, the Commission must make a finding on the evidence provided as to whether, on the balance of probabilities, the conduct occurred. It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason. Where allegations of misconduct are made, the standard of proof in relation to whether the alleged conduct occurred is the balance of probabilities.

[194] As Vice President Hatcher observed in *Raj Bista v Group Pty Ltd t/a Glad Commercial Cleaning*, establishing a factual basis for the reason for dismissal will not of itself demonstrate the existence of a valid reason.[26] It must, as s.387(a) makes clear, be a valid reason for dismissal. To be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[27] and should not be "capricious, fanciful, spiteful or prejudiced."[28] In *Smith v Bank of Queensland Ltd,* Deputy President Asbury stated a "dismissal must be a justifiable response to the relevant conduct or issue of capacity. Factually established conduct which might, for example, justify the issue of a reprimand or a warning may not necessarily justify dismissal."[29]

[195] In *Smith v Bank of Queensland Ltd*, Deputy President Asbury continued to consider Hatcher VP's decision in *Bista* in the following terms:

> "[125] Vice President Hatcher went on to observe that **it is well established that a dismissal for misconduct may be found to be harsh on the basis that the sanction of dismissal is a disproportionate penalty to the gravity of the misconduct, and that the issue of proportionality is usually considered having regard to all relevant circumstances of the dismissed employee and his or her conduct.** His Honour also noted that there is divergence in the authorities in relation to whether the gravity of the misconduct is considered separately from the factors subjective to the particular employee with the former consideration arising under s. 387(a) and the latter under s. 387(h). His Honour observed that proportionality of dismissal as discussed by Moore J in *Edwards v Giudice*, was not concerned with proportionality of dismissal in the sense where the gravity of the misconduct is weighed against a range of other potentially mitigating factors. **Rather it was concerned with whether the conduct in question, considered in isolation, was intrinsically capable of constituting a valid reason for dismissal** if it only involved a minor misdemeanour.
>
> [126] I do not understand that there is a rule that the gravity of the misconduct must be considered under s. 387(a) devoid of any mitigating factors a dismissed employee may raise. **While the gravity of the conduct must be considered and assessed, in my view, there are some mitigating factors which may also go directly to the validity of a reason for dismissal by mitigating the seriousness of the conduct for which a person was dismissed.** Examples of some of these factors may be lack of training or the dismissed employee being placed under undue pressure by some failure on the part of the employer, which contributed to the conduct for which the employee was dismissed.

> Those matters may go to the reasonableness of the dismissal on the basis that they mitigate the gravity of the employee's conduct. There are other mitigating factors which relate to personal circumstances of the dismissed employee and which may render the dismissal harsh, notwithstanding that the gravity of the employee's conduct justifies dismissal. The first category of mitigating factors falls for consideration under s. 387(a) of the Act and the second category under s. 387(h)." (citations omitted)[30]

[196] It is not the role of the Commission to "stand in the shoes of the employer and determine whether or not the decision made by the employer was a decision that would be made by the court."[31] However, the Commission must consider the entire factual matrix in determining whether an employee's termination is for a valid reason.[32]

[197] In *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6924, the Full Bench at [31] determined that repeatedly engaging in misconduct taken individually alone may not give rise to a valid reason to dismiss an employee. However, repeated cases of misconduct can constitute serious misconduct in the process leading to dismissal.

[198] In *Concut Pty Ltd v Worrell* (2000) 103 IR 160, Kirby J dealt with the ordinary relationship of the employer and employee at common law and said at paragraph [51]:

> *'The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust. At common law: "conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal. ...[T]he conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises."*

Language/Behaviour at 'Seek to Understand' meeting

[199] As to the language used by the Applicant, the context of the Applicant's employment in a food processing plant where the use of strong language amongst work colleagues that is not directed at a person and is general banter may be tolerated. The use of such a swear word as he left the meeting pre-emptively and called the process 'bullshit' and refusing to reengage with his supervisor and manager is misconduct. Using the word 'bullshit' itself may not have reached the standard where there was a valid reason for dismissal.

[200] However, a failure to follow an employer's lawful and reasonable direction can constitute a valid reason for dismissal under the Act, as found in *Grant v BHP Coal Pty Ltd (No 2)* [2015] FCA 1374, *King v Catholic Education Office Diocese of Parramatta* [2014] FWCFB 2194 at [26].

[201] The evidence of the Applicant's testimony is that he felt bullied and under attack, the evidence of the Mr Vuniwaqa and Mr Khan was that it was a civil and respectful conversation.

[202] I prefer and accept the Respondent's evidence. The Applicant was being asked about his movements by his supervisor and manager and the combination of walking out of a meeting with the swearing although not directed at the individual and refusing to return to the meeting places would have placed this action at the more serious end of misconduct. It was disrespectful and insubordinate, while refusing and challenging the managers and supervisors' authority to clarify the movements of the employee.

[203] The Applicant may have felt vulnerable to the questions and felt an increasing sense of unease as the Respondents sought clarification of his actions on the day in question. As the questions became more specific, the Applicant determined his response would be to walk out and avoid the scrutiny being placed on his movements. Indeed, it is understandable, given my finding regarding his conduct of taking extended breaks, the Applicant may have felt under pressure and sought to escape upon his actions.

[204] The language used by the Applicant, "this is bullshit" or the Respondent's version 'this is fucking bullshit" was disrespectful and challenged the authority of the supervisor regarding questions about the Applicant's movements. The supervisor was entitled to know about the Applicant's movements particularly as it related to a possible breach of the policies and the Enterprise Agreement.

[205] I find that the Applicant's conduct of walking out midway through a meeting with his supervisor and swore, using either the words 'bullshit' or 'fucking bullshit' is misconduct, but on its own would not be a valid reason for dismissal, however the Respondent had a further allegation regarding excessive paid breaks without approval which I detail below.

Excessive Breaks

[206] Based on my factual findings, I am satisfied on the balance of probabilities that the Respondent had a valid reason to dismiss the Applicant on the grounds of taking excessive breaks more than the prescribed breaks provided by the Enterprise Agreement and further weighting the seriousness of the misconduct, summary dismissal was warranted. I detail below.

[207] The United Workers' Union is covered by the Agreement per clause 1.4 (c) of the Enterprise Agreement. The Smith's Snackfood Company, Queensland - Enterprise Agreement 2020 states as follows

> ***"6.3 Meal Breaks***
>
> *6.3.1 During Ordinary Time*
>
> *(a) All crews shall be entitled to a paid meal break of 30 minutes during the course of an 8-hour shift.*
>
> *(b)The time of taking meal breaks may be altered by the Company, if it is necessary to do so, in order to meet operational requirements.*
>
> ***6.4 Rest Pauses***

6.4.1 Entitlement-

Each Team Member shall be entitled to a rest pause of 10 minutes duration during the first and second half of each ordinary working day. The rest pause shall be taken separately from the meal break and shall be at a time and in such a way as to not interfere with the continuity of operations.

6.4.2 Combined Rest Pauses-

Where the majority of Team Members in an area and the Company agree, rest pauses may be combined to provide one pause of 20 minutes in each ordinary working day, provided that the Union is satisfied that such arrangements have been reached through genuine agreement."

~~[208]~~ Ms Templeman and Mr Woods from the Respondent demonstrated their due diligence in the collation and analysis of CCTV movements of the Applicant, data of the swipe cards, and the Kronos timesheet data during all instances where the Applicant took an extended break. They were consistent with their evidence during their examination in chief and when they were cross-examined by the Applicant's representative. Their investigation was substantiated by matching the swipe card usage of the Applicant with his movements on the CCTV to confirm that he did engage in the misconduct on 10 separate instances.[33] 10 out of 10 occasions that the Respondent investigated the Applicant's movement, they found that the Applicant engaged in excessive breaks which were not approved.

[209] The Applicant was reminded of the requirements under the site agreement requiring adherence to the allocated break times in the toolbox meeting on 23 November 2021. Evidence shows that he attended this meeting. The Applicant was given several opportunities to explain his misconduct however he continued to state that the extended breaks were unintentional.

[210] In the Applicant's evidence, two of the breaks were argued to be a ritual on a Friday however no evidence other than assertions regarding a previous Thursday BBQ for staff was provided. One of the Applicants witnesses did confirm that in the past there had been Thursday BBQ however no further details were provided on the frequency and the conditions regarding such team building activity. Other reasons given on the other occasions were having diarrhoea, chatting with other co-workers in the canteen and undertaking work in the tunnel which was not captured by CCTV. However, this has been refuted by the Respondent's evidence.

[211] Upon considering the arguments and evidence raised regarding the excessive breaks, I calculate the time of the excessive breaks as follows over a 5-day period within the 2-week period.

[212] Upon calculating the excessive breaks taken, I calculate the excess breaks to be as follows:

<u>Calculations of excessive time taken</u>

Date	Allocated Break per EA	Break taken by Applicant	Excessive Time Taken
10 June 2022			
i. 1st Break	30 mins	1 hour 17 mins	47 mins
ii. 2nd Break	20 mins	38 mins	18 mins
15 June 2022			
i. 1st Break	30 mins	1 hour	30 mins
ii. 2nd Break	20 mins	50 mins	30 mins
17 June 2022			
i. 1st Break	30 mins	1 hour	30 mins
ii. 2nd Break	20 mins	49 mins	19 mins
20 June 2022			
i. 1st Break	30 mins	43 mins	13 mins
ii. 2nd Break	20 mins	50 mins	30 mins
21 June 2022			
i. 1st Break	30 mins	45 mins	15 mins
ii. 2nd Break	20 mins	36 mins	16 mins
Total Time of the Excess Breaks over the two week period:			4 hrs 8 mins

[213] In light of the factual findings, I am satisfied on the evidence before me that the Respondent did have a valid reason to dismiss the Applicant. The paid breaks that he took were significantly beyond the site agreement stipulations and they were frequent and repeated over a 5-day period. There were 10 instances of the Applicant taking breaks that spanned from 20 mins longer per day up to 50 minutes in excess of the Agreement. This was a deliberate and wilful flaunting of the trust the employer, Employees were relied upon to manage the breaks in accordance with the agreement. The Applicant's claim that he was unaware of the length of the break and suggested that he should have been warned prior does not provide an adequate or reasonable alternative. The Applicant was a union delegate and would have been well aware of his entitlements under the site agreement. He was not new to the workforce nor to the site, claiming ignorance and a lack of awareness of time is not credible and clearly disingenuous.

Serious Misconduct and Summary Dismissal

[214] The Applicant was summarily dismissed for the above reasons and argues that he should have been issued with a warning "before it got out of hand" instead of being dismissed without notice. The Applicant argues that his actions were not a valid reason for dismissal stating that he was unaware of taking excessive breaks. The Respondent argues that the breach was deliberate, and the reasons provided were not probable, being inadvertence and not being aware of the time because of the numerous excessive breaks.

[215] Had there **not** been repeated and excessive examples of time fraud, the Respondent's actions may be considered harsh, unjust and unreasonable. However, given the frequency and duration of the time theft the Respondent had a valid reason for termination of his employment. Theft in many instances in the Commission have constituted serious misconduct.[34] It is a serious allegation. The Respondent had clear and cogent proof that there was a reasonable ground for them to believe that the Applicant had been engaged in taking excessive breaks.

[216] I find that the Applicant engaged in time fraud on a repeated series of days which I regard as misconduct of a serious nature. There were no mitigating factors proposed that would otherwise explain the Applicants actions in taking excessive breaks. I regard the Applicants actions as deliberate and wilfully fraudulent. The Respondent had a valid reason to dismiss the Applicant.

[217] This finding alone is not determinative of the ultimate question before me of whether the Applicant was unfairly dismissed. It is but one matter to which I must have regard in determining whether the termination of the Applicant's employment was harsh, unjust or unreasonable.

(b) whether the person was notified of that reason

[218] The Applicant was stood down with pay on the 5 July 2022 and the following day was sent the allegations via email. The two allegations were specified and requested that he respond. The Applicant provided a written reply on the 8 July 2022 and a meeting was held between the Respondent and the Applicant and his representatives on 11 July 2022. At this meeting, the Respondent further confirmed and clarified the Applicants responses to the allegations.

[219] During the final meeting on 13 July 2022, the Respondent stated that the two allegations had been substantiated and that the disciplinary action was under consideration. After hearing from the Applicant regarding mitigating factors and anything else regarding what the Respondent should consider, after a period of consideration the Respondent then provided the decision to terminate his employment and a termination letter detailed the substantiated allegations. I am satisfied that the Applicant was notified of the reason for his dismissal.

(c) whether the person had an opportunity to respond

[220] The Applicant provided a written response to the allegations on 8 July 2022 and was afforded a face-to-face meeting which included a union representative and a delegate on 11 July 2022. The Applicant responded the 1st allegation and asserted that he had only stated 'Bullshit' not 'fucking bullshit'.

[221] The Applicant also responded to the second allegation. He contested the CCTV footage and its use. After talking with the Union Official, the Applicant no longer contested the use, of CCTV but adopted the argument that the extended breaks were inadvertent and not wilful. He offered no argument to the contrary, or other possible actions on his part. The was a conspicuous lack of providing any rebuttal that they were extended paid breaks. The Applicant was sent a show cause letter on 13 July 2022.

[222] The Applicant, during the hearing, sought to argue that he had asked to view or see the CCTV footage and was refused. As per my findings above, I do not accept that the Applicant made any request for the CCTV footage during the disciplinary process and nor was he denied access to the footage. He did not dispute the extended breaks during the disciplinary process and adopted a consistent and unwavering position that he said any extended break was unintentional.

[223] Furthermore, the Applicant was provided a show cause meeting on 14 July 2022 which involved Mr Vuniwaqa and Ms Templeman from the Respondent and Mr De Rooy who was a union official and Mr ChaCha as his support person. In this meeting, his representative and support person provided a response.

[224] I find that the Respondent had provided the Applicant multiple opportunities to respond to the claims against him and the Applicant did not use the opportunity to substantiate his response to the allegations made against him. I find this factor weighs against granting a remedy for unfair dismissal.

(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

[225] The Applicant was not unreasonably refused a support person during the formal disciplinary process.

[226] The Applicant made an argument that he did not have a support person with him during the ‘seek to understand’ or the ‘stand down’ meetings. In these meetings there was no evidence that he had been prevented from having a support person, at that stage no discipline process had been considered by the Respondent rather they were in the process of investigation.

[227] Once the Respondent had evidence and formulated the two allegations then the disciplinary process was engaged and at this point the Applicant had support and representatives attend the meetings on 11 July 2022 and the 13 July 2022 during the show cause meeting. There was no unreasonable refusal to allow a support person present. This factor weights against a finding of the dismissal being unfair.

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

[228] This factor is irrelevant to the present case.

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

[229] The Respondent is a large employer with a well-resourced human resources department. The Respondent followed its own procedures with respect to the information gathering process. An investigation and disciplinary process was followed. The decision to terminate his employment was then made by the appropriate individuals. Whether they properly exercised their discretion is a matter considered in respect of other factors.

(i) any other matters that the FWC considers relevant

[230] The other factors that the Applicant raises are differential treatment compared to other employees, summary dismissal, procedural fairness and impact of the dismissal on the employee's personal or economic situation. Other factors that are considered are his age and skillset.

Procedural Fairness

[231] Firstly, the Applicant argues that he was not provided procedural fairness because he was not given access to the CCTV. I find that the Respondent would have provided the material if requested. The material that was presented at the hearing demonstrated to me that the Respondent had in fact had all the data needed to support their allegations and that the Applicant and Representative had decided to concede to the allegations of the extended break without requesting and testing it. Furthermore, there was precedence that the Respondent would have provided all the data had it been requested. The Respondent referred to a previous instance where an employee had taken extensive breaks, and the employee, who was represented by the ETU, when confronted with the allegations, requested to use that footage which was made available to him. In the end the employee in that matter was terminated following the review of the CCTV.

[232] The Applicant's testimony regarding the 'requests for the evidence was not convincing. Had there been a paucity of evidence and had the Applicant provided reasonable reasons for the extended breaks and these could be convincingly provided; then this matter may have ended differently. The challenges to the Respondent's CCTV excerpts offered during the hearing regarding the possible explanations of the extended breaks did not provide a convincing or persuasive picture. His explanations were not corroborated and came after the opportunities that had been extended to him during the disciplinary process. He did not provide any explanations when the matters were first raised with him and merely stated that he was unaware that he had been taking extended breaks and apologised.

[233] The process of obtaining a result would have been longer had the Applicant requested and been provided the CCTV footage but would have not changed any outcome. I am not satisfied that the Applicant was denied procedural fairness in this instance. The evidence conclusively showed on balance that the Applicant had been taking significantly extended paid breaks over successive days amounting to time fraud.

Summary dismissal

[234] The Applicant was dismissed summarily, and the Applicant takes issue with that conclusion by the Respondent. The Applicant in his eyes views his misconduct as at the less serious spectrum of misconduct even suggesting a warning would have been an appropriate penalty.

[235] The Full Bench majority in *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 at [60] said as follows:

> *"It needs to be stated clearly that a determination of whether a given dismissal for the sending or receipt and storage of pornography is disproportionate to the misconduct such as to be 'harsh, unjust or unreasonable' involves a consideration of all of the circumstances and a weighing of the gravity of the misconduct against the various factors that mitigate against dismissal as a proportionate (fair) response to the misconduct, including, of course, factors subjective to the particular employee (such as age, length of service, service record etc) to determine whether those matters in combination rendered dismissal a disproportionate penalty for the misconduct such that it ought properly be characterised as 'harsh' notwithstanding the existence of a 'valid reason'."*

[236] I have found that on the evidence and testimony of the Respondent that the Applicant took excessive breaks, furthermore that the Applicant took extended breaks knowingly, he deliberately pursued a course of conduct that was deceptive, he claimed payment for time that was not worked by extending his paid breaks by between 30 to 60 minutes a day. On balance, in considering the severity and nature of the conduct which was wilful and deceptive, the termination decision by the Respondent on a summary basis was justified.

Personal and Economic Situation

[237] In considering his age, length of service, and financial consequences of his dismissal. The Applicant is 63 years old and says he is the sole breadwinner of his household. He states that the difficulties finding a new role and would like to return to his old role. There is acknowledgement that the loss of employment and his age would cause financial hardship as the sole breadwinner. The Applicant has worked with the Respondent for 8 years. These are factors that would find in favour of an unfair dismissal remedy.

Differential treatment compared to other employees

[238] The Applicant submitted that he received differential treatment compared to the treatment of employees and state that the Applicant was the only one dismissed for the conduct alleged despite the other employees engaging in the same conduct. I am not satisfied that the Applicant has established sufficient evidence to prove this claim. The evidence provided indicates a contractor taking an extended break and will not be considered. This does not weigh in favour of establishing an unfair dismissal.

Conclusion

[239] Accordingly, I am satisfied based on the evidence provided that in making the decision to terminate the Applicant's employment, and in taking account of the Applicant's

circumstances, the Respondent acted proportionately to the gravity of the Applicant's breach thus not rendering the dismissal harsh, unjust and unreasonable. The trust and confidence between the Applicant and the Respondent have been broken. Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the *Act*.

[240] I therefore order that the Applicant's application be dismissed.

DEPUTY PRESIDENT

Appearances:

D. Peverill for the Applicant
M. Rodgers for the Respondent

Hearing details:

18 October 2023
19 October 2023
28 October 2023
Brisbane

Printed by authority of the Commonwealth Government Printer

<PR749619>

---

[1] *Wellpacks Holdings Pty Ltd t/a ERGT Australia v Mr Kevin Grovender* [2021] FWCFB 268.

[2] *Asciano Services Pty Ltd v Zak Hadfield* [2015] FWCFB 2618, [19](3).

[3] *Wellpacks Holdings Pty Ltd t/a ERGT Australia v Mr Kevin Grovender* [2021] FWCFB 268, [48]

[4] [2013] FCA 291.

[5] [2014] FWCFB 1663.

[6] Cases cited include *Roderick Macdougall v SCT Pty Limited* [2013] FWC 1077; *Mark Baldwin v Scientific Management Associates (Operations) Pty Ltd* [2014]; *Gary Matthews v San Remo Fisherman's Co Operative* [2019] FWC 4877, *Symes v Linfox Armaguard Pty Ltd* [2012] FWA 4789; *Coffey v QBar Darwin Pty Ltd* [2017] FWC 1488; *Smith v Aussie Waste Management Pty Ltd* [2016] FWC 7648, *Illawarra Coal Holdings Pty Ltd T/A South32 v Gosek* [2018] FWCFB 1829.

[7] Statement of Mr Khan [26].

[8] Transcript of Hearing on 28 October 2022 PN3680.

[9] Witness Statement of Applicant (p181v), Witness Statement of Felicity Templeman [24].

[10] Applicant's Outline of Submissions at [47].

[11] Statement of Mr Vuniwaqa [35].

[12] Ibid 41.

[13] Ibid 101.

[14] Ibid 103.

[15] Ibid 127.

[16] Transcript of Hearing on 18 October 2022 PN 167.

[17] Ibid PN418.

[18] Ibid PN412.

[19] Ibid PN414.

[20] Transcript of Hearing on 18 October 2022 PN673, PN731, PN908.

[21] Transcript of Hearing on 19 October 2022 PN1390.

[22] Transcript of Hearing on 18 October 2022 PN676-PN677.

[23] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) [69].

[24] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373; *Raj Bista v Group Pty Ltd t/a Glad Commercial Cleaning* [2016] FWC 3009 citing *Edwards v Giudice* (1999) 94 FCR 561.

[25] Ibid.

[26] *Raj Bista v Group Pty Ltd t/a Glad Commercial Cleaning* [2016] FWC 3009.

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

[28] Ibid.

[29] *Smith v Bank of Queensland Ltd* [2021] FWC 4 [122].

[30] *Smith v Bank of Queensland Ltd* [2021] FWC 4 [125]-[126].

[31] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[32] *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410, 413.

[33] Statement of Felicity Templeman Attachment K.

[34] *Bailey v Dynamic Glass Pty Ltd* [2021] FWC 2027 (Colman DP) at [21]; *Coughlan v Mackay CC Pty Ltd T/A Trend Interiors Carpet Court* [2014] FWC 5957 (Asbury DP) at [4].