

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

Simon Freestone

(T13686 of 2010)

and

The Minister administering the State Service Act 2000

DEPUTY PRESIDENT TIM ABEY

HOBART, 3 September 2010

Industrial dispute - termination of employment - breach of State Service Code of Conduct - found sanction disproportionate to admitted behaviour - order issued - re-employment

REASONS FOR DECISION

[1] On 1 July 2010, Simon Freestone, (the applicant), applied to the President, pursuant to s.29(1A) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA) (the employer) arising out a dispute in relation to termination of employment.

[2] A hearing commenced in Ulverstone on 29 July 2010 and continued on 18 and 19 August. At the hearing Mr P Sullivan sought and was granted leave to appear on behalf of the applicant. Mr G Burgess of DPIPWE appeared for MASSA with Mr S Matuszek. Mr P Baker appeared for MASSA on 18 and 19 August with Mr Burgess and Mr Matuszek.

[3] Mr Freestone has been employed by the Parks and Wildlife Service [PWS] since 2003. In January 2009 he held the position of Field Officer stationed at Narawntapu National Park [Narawntapu].

[4] On 18 January 2010 Mr Freestone was involved in a vehicle accident on Bakers Beach. The vehicle, owned by the Department, was subsequently written off [\$26000]. The employer immediately commenced an investigation into alleged breaches of the State Service Code of Conduct [The Code].

[5] In correspondence to Mr Freestone dated 14 June 2010 the Secretary of the Department [Mr Evans] advised that the allegations had been substantially upheld and the Code had been breached in a number of material respects. The letter concluded:¹

"I do not consider other sanctions available to me under 'the Act' would adequately reflect the seriousness of your actions therefore I have discounted applying any of those sanctions.

As a consequence of this determination in accordance with Part 1(9)(c) of the Tasmanian State Service Award 2008 your employment has been terminated for serious misconduct and

¹ Exhibit A1

any wages owing to you will be paid up to the date of termination which is take effect from the formal receipt of this letter."

[6] Mr Freestone asserts that he was unfairly terminated; specifically that the penalty of termination was disproportionate to the admitted conduct.

Evidence

[7] During the hearing sworn evidence was taken from the following witnesses:

Simon Paul Freestone: the applicant.

Stanley Henry Matuszek; Regional Operations Manager, North, PWS.

Christopher Michael Emms; Parks and Reserves Manager for Great Western Tiers/Mersey area.

Brendon Dermot Kearns; Ranger, Narawntapu.

Anthony John Timmerman; Ranger i/c of Mersey Field Centre [at the time of the incident].

Sequence of Events

[8] On Tuesday 12 January Mr Freestone commenced a period of annual leave. His intention was to spend a period of time with his young family at the 'homestead'. The homestead is a facility within Narawntapu available to staff for recreational purposes.

[9] At 5 pm that day he was contacted by Mr Emms asking that he participate in fire fighting duties at the Denison Complex wildfire. Mr Freestone immediately embarked on the firefighting duties in Southern Tasmania whilst his family proceeded to the homestead.

[10] On Sunday 17 January Mr Freestone completed his firefighting duties, returned to Narawntapu at approx 8 pm and joined his family at the homestead. Monday 18 January was a compulsory rest day and Mr Freestone initially intended to return to his home in Railton. However he changed his mind and during the day he sought and was granted permission by Mr Timmerman to stay an extra day.

[11] Mr Freestone said he spent some time fishing on the beach and at approx 3 pm began preparing a barbeque for his family. During the barbeque Mr Freestone, on his evidence, consumed four or five full strength stubbies between 4pm and 7 pm.

[12] At approx 7pm Mr Freestone decided to take the family to the beach in the Departmental 4WD vehicle. He was aware that use of the vehicle for this purpose was not authorised. In his statement of 19 January, Mr Freestone said:²

"After the barbecue at about 7pm I decide to take my wife and kids for a drive on Bakers Beach. I'm not exactly sure why I decided to take a PWS vehicle without any authority, but I thought a PWS vehicle would not draw any attention if seen by a member of the public as opposed to taking my own vehicle."

² Exhibit A2

[13] Mr Freestone, in relation to the purpose of the trip, said:³

"I was just taking my children down after tea for a bit of a play down the beach before they went to bed."

[14] It is an agreed fact that one of the children was unrestrained as there were insufficient safety belt restraints in the vehicle.

[15] Mr Freestone proceeded for four km along an unsealed road within Narawntapu. He said he did not encounter any traffic and did not exceed the speed limit of 40kmh.

[16] The beach is signposted as being off limits to vehicles. On reaching the boom gate, he unlocked the gate and proceeded to drive along the beach for a distance of approx 7 km. Mr Freestone said he did not see any other person or individual on the beach.

[17] Mr Freestone said he proceeded to drive along the beach at 50/60kmh for approx 7 km. He described the incident that followed:⁴

"Now, when this rollover occurred can again you just describe to the Deputy President just how it happened – how suddenly it happened – how it actually unfolded?---Driving along Bakers Beach, towards the end of the beach, and we were just making a gradual left-hand turn, and the vehicle just, sort of, went like that – went over, and came back on its wheels, sort of – yes, it just went.

So it did this rollover and just stopped dead?---Yes. It just – it rolled over, landed back on its wheels and just stopped there.

Yes?---It didn't sort of carry on or anything, it just went over once and - - -

No, just once?---Yes.

Yes. Did you – I mean, hindsight is a great thing, and we know that the police officer attributed the cause of the accident to water shifting in the tank. Had you inspected that tank prior to driving the vehicle on that evening?---No, I didn't.

Did you make any observations in regard to water immediately after the accident?---I did. There was water on the ground and all over the back of the ute that had come out of the tank.

Right. You say "water on the ground," but you were driving on a beach. Was the beach otherwise dry? How – in other words, how can you maybe explain the water to having come from the tank, rather than just being a wet beach, if you know what I mean?---Well, the beach was quite dry. It was low tide; the beach was quite dry, but there was water all over the back of the ute and over the things that were on the back of the ute.

³ Transcript p 12

⁴ Transcript p 20

So it was on the ute and on - - -?---Yes, seeping on the sand as well.

- - - the sand. And you subsequently spoke to Mr Kearns about the tank?---The following day, yes.

What did he tell you about the tank?---The tank had – was half full, because he'd been – he'd filled it up and he'd been using the slip-on unit to put out a campfire – or some campfires, or something like that.

Okay. And you amended your statement by adding that little handwritten note to the end, after you'd spoken to Mr Kearns; is that correct?---That's correct.

You didn't – could you have struck a rut or something in the beach, or a hole, do you think?---That's quite possible, yes.

But you didn't see anything like that?---No.”

And later:⁵

“Yes. Did you feel that there was anything you could have done once you felt that vehicle, sort of, groan or dip, that there was anything you could have done?---No, it just went over too quickly. It just, sort of, dug in and went over.”

[18] Mr Freestone said he checked that the children were OK. His wife remained on the beach with the children while he drove the damaged vehicle back to the homestead. He returned in his own 4WD vehicle, collected the family and returned to the homestead.

[19] He immediately [8.06 pm] telephoned his supervisor, Mr Timmerman.

[20] The statement of Mr Timmerman, made the following day, reads:⁶

“On the evening of the 18 of January at 2010hrs I was at my home address and at 2006hrs I received a phone call from Simon Freestone, who informed me he had rolled a PWS vehicle on the beach, while traveling with his wife and four children.

I had a short conversation with Simon and asked if there was anyone injured and he replied that his eldest son Cimeon had received a knock to the head. Simon told me he was able to drive the damaged vehicle to the homestead within the park and that Cimeon may need medical treatment, I asked Simon if he had been drinking alcohol to which he replied he had, I then told Simon to remain where he was and I would come over to the park to offer assistance.

I then phoned Judy Westbrook, who is a VRO employed at the park and lives close by to go to the homestead to see Simon and check on his and his families welfare.

I then phoned '000' and requested an ambulance to attend.

I drove to the park and met Judy on Beach Road, Judy had Simon's wife Zeba and her son Cimeon in Judy's vehicle on route to the hospital, Judy phoned the ambulance and arranged to meet them on Bakers Beach Road.

⁵ Transcript p 22

⁶ Exhibit R2

I arrived at the homestead to find Simon in a dazed and confused state; I checked on the remaining three children and had a short conversation with Simon. I then inspected the PWS vehicle, which had suffered serious damage.

During the conversation Simon admitted to me he had been drinking for most of the afternoon and he was unsure as to how many 'beers' he had consumed. I then asked Simon what he was thinking to be driving a departmental vehicle without actually being on duty. Simon did not provide a direct answer and seemed to me to be upset and embarrassed. I then let Simon tend to his children. I remained outside.

Shortly afterwards Constable Andrew Maingay of Tasmanian police arrived at the homestead, I had a short conversation with Const. Maingay, and during this time three more ambulances and Judy arrived. The paramedics assessed Simon and the remaining children, and Const. Maingay had a conversation and breathalysed Simon. Both a paramedic and Const. Maingay informed me that the breath analysis reading was 0.115 and that Simon would be required to accompany Const. Maingay to Devonport police. Station."

[21] It transpired that after being checked at the hospital, the child did not require treatment.

[22] Mr Freestone was taken to the Devonport police station where a breath analysis of .068 was returned. At the time charges were not pressed in relation to the breath analysis reading although I understand that this has subsequently occurred.

[23] The family was reunited at the homestead shortly after midnight.

Subsequent Investigation

[24] A series of reports were completed the following day.⁷

[25] By letter dated 22 January 2010 the Acting Secretary advised Mr Freestone of an intention to conduct an investigation into allegations concerning possible breaches of the Code.

[26] The allegations can be summarised as follows:

- Unauthorised use of a Government vehicle for a non work related purpose.
- Transporting his family in Government vehicle without authorisation.
- Transporting children in a Government vehicle without approved child restraints.
- Transporting five passengers when safety belts are provided for only four.
- Driving a Government vehicle under the influence of alcohol.
- Entering a restricted area without authorisation and contrary to a vehicle control sign.
- Driving the vehicle at an unsafe speed.
- Causing bodily harm to a person as a result of driving in an unsafe manner.
- Causing extensive damage to a Government vehicle.

[27] It was further alleged that the above, either separately or in combination, breached the following sections of the Code.

⁷ Exhibit R1.

- 9[1] *An employee must behave honestly and with integrity in the course of State Service employment.*
- 9[2] *An employee must act with due care and diligence.*
- 9[3] *An employee must treat everyone with respect and without harassment, victimisation or discrimination.*
- 9[4] *An employee must comply with all applicable Australian Law.*
- 9[9] *An employee must use Government resources in a proper manner.*
- 9[11] *An employee must not make improper use of duties and status.*
- 9[13] *An employee must behave in a way that upholds the State Service Principles.*
- 9[14] *An employee must at all times behave in a way that does not adversely affect the integrity and good reputation of the State Service.*

[28] The Department appointed *Thomas Whayman and McCarthy* to conduct the investigation. Mr Freestone advised that he did not wish to be interviewed but chose to rely on his statement [as amended].

[29] The report was completed on 1 March 2010⁸ and Mr Freestone was subsequently given an opportunity to comment on the report. Mr Freestone responded in writing on 9 April 2010.

[30] By letter dated 14 June 2010 The Secretary advised of the outcome of investigation. The allegations were substantially upheld. The following allegations were dismissed:

- Driving at an unsafe speed.
- Motor vehicle stealing.
- Improper use of duties and status.

[31] The Secretary determined that Mr Freestone's employment was to be terminated forthwith for 'serious misconduct.' The Secretary stated:⁹

"I have determined this sanction taking into consideration all of the evidence, including your detailed response. I consider the sanction of termination of employment is appropriate due to the seriousness of the breaches and the consequences of your misconduct. Potentially greater consequences could have occurred and as you are an experienced employee of the Department you would have understood the risks that you took by taking the Departmental vehicle, particularly given your consumption of alcohol on that day. Your conduct has significantly damaged the relationship of trust and confidence between you, your General Manager and myself."

[32] The applicant has not contended that procedural fairness was denied.

⁸ Exhibit R2

⁹ Exhibit A1

Considerations

[33] The evidence and submissions gave rise to a number of considerations which I outline below.

Authorisation

[34] The Department has a comprehensive documented vehicle policy.¹⁰

[35] This policy deals with, *inter alia*, private use of Government vehicles, weekends and public holidays, and carriage of passengers.

[36] Mr Timmerman described the vehicle policy as follows¹¹:

"Are you familiar with the use of agency vehicles by employees out of hours?---Yes, I am.

Explain to the commission what you understand that is?---My understanding of the vehicle policy is that department vehicles may be used when – obviously if you're called back to work. They can be used after hours to facilitate, you know, the attending of a meeting the next day or if you've worked a period of overtime and, you know, you're late getting home. The vehicle policy also has the avenue there for department vehicles to be used in case of emergencies for obvious reasons. Because of the nature of our work we often work away from our field centre base and I know the department has avenues here that if you need to attend your home residence for an emergency you can use a departmental vehicle for that. The vehicle policy also states that they can be used on occasions for taking your kids to school if you've got a vehicle home that particular night to attend a meeting the next day there's the avenue there to do that. So – yes – that's basically in a nutshell what the vehicle policy states.

So it's flexible?---It's flexible to a degree, yes.

But does it provide for employees to use those vehicles after hours for joyrides, etcetera?---No, certainly not.

If the employee wished to use a vehicle after hours would they, by necessity, seek your permission to do so?---Not necessarily my permission but they would seek the permission of their supervisor. Yes, that's right. Or in the absence of their direct supervisor the next – you know, follow the chain of command. Yes, that's right."

[37] In relation to alcohol and drugs, the policy essentially relies on compliance with legislative requirements although it suggests that consumption of alcohol prior to driving be avoided.

[38] On 10 July 2008 Mr Matuszek sent a memorandum to Parks and Reserves Managers expressed as follows:¹²

¹⁰ Exhibit A5

¹¹ Transcript p 89

¹² Exhibit R4

"Home Garaging of Government Vehicles

Following on from my recent request for an assessment of local area vehicle use, can you now review your list and provide a recommendation to me of individuals that you believe satisfy the home garaging criteria. Specifically, this means staff that have a demonstrated need to garage a department vehicle overnight for periods of 5 consecutive nights or more.

Your recommendation needs to align and comply with section 8.1 of the vehicle policy. For isolated and infrequent cases of overnight garaging that comply with the criteria, you as the manager can give approval. This approval can be verbal or written or both for example verbal over the phone and a diary entry or follow up email. There is no specific requirement in this regard.

Where overnight garaging is over 5 consecutive nights written authority is needed from the Divisional head (ie. GM PWS). To enable this written authority to be secured please make your recommendation with supporting argument, as requested. Could you have the recommendations to me for review by COB 16 July 2008."

[39] Mr Matuszek explained the context of this memorandum:¹³

"MR BAKER: Is this memo a regular occurrence in relation to overnight vehicle garaging or is it a once-offer or - - -?---Every so often we have a – well, from my perspective, it's timely to remind staff, one, because we have new staff coming into the field centres and, secondly, that from time to time people have a tendency to let things slip by, but in this particular instance, it was timely as a consequence of events that had occurred in another park, to review the overnight garaging of vehicles and also to remind staff, through their parks and reserve managers, of the need to comply with the motor-vehicle policy and also to establish appropriate permits and authorities for those who have a genuine requirement to overnight garage or a need to do so, and it's basically to remind people that, yes, there are certain compliance requirements that the policy directs us to.

So it's your expectation that managers and staff are to comply with the vehicle policy as pronounced in 8.1 of the policy?---That's correct."

[40] Mr Matuszek confirmed that the 'events that had occurred in another park' was the incident concerning 'Mr H' which will be referred to later in this decision.

[41] Mr Freestone agreed that approx 18 months or two years ago, Mr Timmerman had shown him the vehicle policy. However he said that, in reality, nothing changed following the Mr H incident.¹⁴

[42] Mr Freestone's evidence in relation to the vehicle was:¹⁵

¹³ Transcript p 42

¹⁴ Transcript p 19

¹⁵ Transcript p 9

"Now, you agree that you did not have permission to use a department vehicle on 18 January 2010?---That's correct.

*You didn't seek permission?---No, I didn't.
If you – well, you had spoken to Mr Timmerman that very day about staying on at the homestead, is that correct?---If it wasn't that day it was the evening before.*

The evening before?---Yes.

And so you sought permission for that?---Yes.

And it was granted?---Yes.

Had you ever been refused permission to stay at the homestead?---No.

Why didn't you seek permission from Mr Timmerman to take your family in the vehicle down to the beach on 18 January 2010?---

I just didn't feel it was necessary to speak to him.

Okay. What's your belief about, if you had sought permission, what's your belief as to whether or not you would have been granted permission?---I think Mr Timmerman just said it was okay.

And that was your belief when you took your family down to the beach on that evening?---Yes."

[43] It was common ground that PWS staff regularly take vehicles onto the beach in the course of their normal duties.

[44] In relation to non work related access, Mr Freestone's evidence was:¹⁶

"Had you ever gone onto the beach before, if you like, through that gate for a non-work related purpose?---Yes.

What was the purpose?---We'd go up there fishing sometimes, or just to go for a drive sometimes.

Where would you go, specifically?---Just up to the end of the beach.

Okay. Is it Badger's Head?---Little Badger Head.

So in that vicinity?---Yes, at the end of the beach.

And that's about seven kilometres along from where the access is to the beach?---Yes.

And were you even in company of any other service employees when you went on to the beach for the purpose of fishing out of hours?---Yes.

And who were they?---Mr Timmerman, there was others as well.

¹⁶ Transcript p 10

All right. And when you say others, can you be more specific?---Yes, I recall going up there with Adam Smith, he was a field officer with the park at the time. I went up with Gary a couple of times - - -

Mr Sutton?---Mr Sutton a couple of times. Just trying to think who else.

...

With the keys that they had as a result of their employment?---Yes.

Did you ever beach net on the beach?---Yes.

You did?---Yes.

Who with?---Mr Timmerman.

Anyone else?---Rob Buck; Hunt, Mark Hunt; there was a couple of other guys. But sometimes we'd go surf fishing as well.

Right, so all service employees?---Yes, a lot of them.

Did you arrange these trips or were just invited along?---I was usually just invited along. It was usually when we having something going on out there, if we were having a small do or something, we'd quite often go for a fish.

Part of that?---Yes.

So you understood that, strictly speaking, you were not authorised to go onto the beach with a vehicle, is that correct?---Yes, yes.

Is that how you believed it to be, that – or what did you think? That the fact that someone's more senior to you was involved that they were giving the authority for that to happen, how did you - - -?---I didn't think it was a bit issue, I didn't think it was a real big thing to go down to the beach.

Did you think that, you know, it was a minor breach, if you like - - -?---Yes. I mean, it's one of those things like, it was sort of written in the paperwork that you shouldn't do those things or some of those things that we did."

[45] And later:¹⁷

"So at the time were you an authorised employee, an authorised person to enter the - - -?---No, probably not.

Probably not or not?---Well, at the time I didn't see it like that. It's been brought to my attention that I wasn't authorised but at the time I didn't really see myself as not being authorised because I worked there.

¹⁷ Transcript p 30

Okay. Now, is there a speed limit sign there?---No."

[46] Mr Timmerman's evidence on this point was:¹⁸

"Are you aware either in your capacity as the officer or ranger in charge at the facility of employees using work vehicles to go beach and any surf, fishing, etcetera on Bakers Beach?---In my time as ranger in charge, no, that's never occurred, not without authority. There is on occasions – park reserve managers within the northern region will organise meetings at various field centres, whether that be Liawenee, Mole Creek or Narawntapu. And as part of that sort of meeting process at the end of it there would be a team-building exercise organised. If it's at Mole Creek, for example, it would be a cave guide after hours sort of thing. It's just something traditional with the area to, you know, bond, that team thing. And at Narawntapu we have on at least one occasion because it's pertinent to the area gone for a beach net on Bakers Beach. But it's certainly not an offence to go fishing off Bakers Beach because - - -

Well, we'll come back to that. But the incident that you speak of, as far as the beach netting is concerned, that is an organised function within the parks management?---Yes, it's functions organised as part of the parks and reserve area meeting just to, you know, build - - -

Team bonding?---Team – yes, team bonding. Yes."

[47] Mr Timmerman could not recall whether Mr Freestone was a participant in this organised activity.

[48] There can be no doubt that that the use of the Department vehicle out of hours was unauthorised, and further, Mr Freestone was aware that it was unauthorised.

[49] Accessing the beach with the vehicle was also clearly unauthorised. I am satisfied that on at least one occasion both Mr Freestone and Mr Timmerman used a vehicle to access the beach for beach netting purposes, albeit as part of a team building exercise. Mr Freestone gave evidence in relation to other occasions when a vehicle was used for beach netting or fishing and was not cross examined in relation to this evidence. I am therefore prepared to accept that on more than one occasion a vehicle was used in the manner described by Mr Freestone, although probably not involving Mr Timmerman.

[50] I conclude that Mr Freestone was aware that using the vehicle on the beach in the manner he did was unauthorised. I am however prepared to accept that Mr Freestone was of the belief at the time, albeit incorrectly, that it was not a significant breach of Departmental policy.

Consumption of Alcohol

[51] There were some minor evidential inconsistencies as to the amount of alcohol Mr Freestone consumed.

[52] In Mr Freestone's initial statement of 19 January he said that he was '*unsure how many beers I had during tea.*'

¹⁸ Transcript p90

[53] In the report to the Tasmanian Risk Management Fund Mr Freestone recorded that he had '*3 beers at tea time.*'

[54] In the Thomas Whayman and McCarthy Report, Mr Timmerman was recorded as stating:¹⁹

"....yeah, I did ask Simon if he'd been drinking and he told me he had a couple of beers at tea time, earlier in the evening, yeah, that's all I can recall about that conversation."

[55] In his sworn evidence before this tribunal Mr Freestone said he had four or five stubbies.

[56] This relatively minor inconsistency is of no great moment and perhaps can be attributed to the stressful environment immediately following the incident. Importantly, at no stage did Mr Freestone attempt to hide the fact that he had consumed alcohol.

[57] The breath test analysis is of far greater significance. The initial hand held breathalyser reading was 0.115.

[58] Mr Sullivan contended that the breath test is only an indication that there may be alcohol present in the system and an analysis on a more sophisticated piece of machinery is required to be determinative. This was not contested.

[59] The subsequent Police Station breath analysis was 0.068.

[60] Mr Sullivan submitted that s23[2] is authority for the proposition that the .068 reading recorded subsequent to the driving is not evidence available to the Commission, that at the time of driving, he was exceeding .05.²⁰

[61] I consider this to be an argument for another place. It is for the courts decide guilt or otherwise in relation to blood alcohol readings. In this matter I consider the employer is entitled to rely on the .068 reading as evidence of alcohol present in the blood at the time of driving. To draw any conclusions in relation to the earlier 'hand held' reading would, in my view, be unsafe in the absence of toxicological evidence.

[62] Mr Freestone's further evidence was:²¹

"Did you feel adversely effected by alcohol when you got into the four wheel drive on that evening?---No, I didn't.

Would you have driven the vehicle if you'd felt effected by alcohol?---No, I wouldn't have.

Do you believe that your wife would have permitted you to drive the vehicle if she believed that you were affected by alcohol?---No, she wouldn't have.

And do you base that on her attitude to people drink driving? What's your basis for that belief?---It's just she wouldn't put the children in

¹⁹ Exhibit R2

²⁰ Transcript p109

²¹ Transcript p 14

the car if she thought I was adversely affected by alcohol, you know, this is our family."

Cause of Vehicle Rollover.

[63] In the letter of termination the Secretary states:²²

"As referred to in Allegation 1 you are an employee with approximately 6 years service and consequently should have been aware that the fire fighting tank may have had water in it. You also have had significant experience driving a vehicle with a slip on unit attached. No other adverse driving conditions have been indicated, therefore on the balance of probabilities it would appear that your unsafe manner of driving or your driving being adversely affected by alcohol rather than the half-full slip-on unit was the major factor in the cause of the accident."

[64] There are a number of elements in this conclusion which require further analysis.

[65] Mr Matuszek gave evidence pointing to the inherent stability of PWS vehicles in difficult terrain. He said that even with a full tank of water, it would be well under the specified GVM for that vehicle. In the letter of termination Mr Matuszek is quoted as saying:

"These vehicles are used on fire lines and fire trails in rugged terrain throughout the State with varying loads of water in the tank. I am unaware of any rollovers on the fire line or during burning or suppression activities or during normal operations."

[66] Under cross-examination Mr Matuszek did however agree that he was aware of an incident involving Mr 'M'.

[67] In this incident Mr M was driving a vehicle on a Narawntapu road, apparently within the 40km speed limit, and the vehicle rolled onto its side, causing some panel damage. Mr Matuszek said that this incident was not pursued further than the completion of an incident report form, as it was accepted as an accident.

[68] It was common ground that Mr Freestone was an experienced driver who had received appropriate training in this type of vehicle.

[69] There was some debate on the question of whether Mr Freestone should have expected the tank to have water in it. From the evidence of Mr Kearns, who drove the vehicle immediately before Mr Freestone, it is clear that the tank was half full of water. It is also clear that, but for an unexpected incident on Mr Kearns's shift, the vehicle would have been left with an empty tank. I am satisfied that, in other than periods of high fire danger, it was normal practice to leave the tank empty at the end of a shift. It follows that Mr Freestone reasonably had an expectation that the tank would have been empty. Having said that, as an experienced driver, Mr Freestone should have been alert to the possibility of water in the tank and driven the vehicle accordingly.

[70] In the letter of termination the Secretary dismissed the allegation that Mr Freestone was driving the vehicle at an unsafe speed. Notwithstanding, this aspect was canvassed at length during the hearing.

²² Exhibit A1

[71] The evidence of Mr Freestone was that he was driving the vehicle at 50/60kmh on the beach. There was some debate as to whether the Narawntapu general speed limit of 40kmh extended to the beach and this question is unresolved. I am satisfied however on the evidence of Mr Emms²³ and Mr Timmerman²⁴ that driving on the beach at 50/60kmh is not inherently dangerous.

[72] In closing submissions Mr Baker invited the Commission to conclude that the speed of the vehicle "*must have been in excess of 50 or 60 kilometres an hour.*" Whilst this cannot be ruled out as a possibility, it is no more than speculation. There is no compelling evidence that causes me to doubt the sworn evidence of Mr Freestone.

[73] I turn now to the consumption of alcohol question. Mr Freestone maintains that his driving was not adversely affected by alcohol at the time. Mr Sullivan submitted that there was absolutely no evidence which would enable the Commission to make a finding that alcohol was a contributing factor to the rollover.

[74] Mr Sullivan referred to the judgment of *Richards v Faulls Pty Ltd.*²⁵ This case involved a worker who drove in the course of his employment with a blood alcohol limit of 0.11-0.12. [the prescribed limit at the time was .08]. There was a single vehicle accident and the worker died shortly thereafter. The Workers' Compensation Board declined to award a benefit on the grounds that deceased's action in so driving amounted to serious and willful misconduct. The decision was overturned on appeal to the Full Court. At p133 Burt J said:

"In my opinion, the presence of alcohol in the blood does enable, and indeed on the facts here stated, it requires a finding that the deceased had ingested it in drink. Furthermore, it may be enough to sustain a finding that as a consequence the capacity of the deceased to control a motor vehicle had thereby been to some degree adversely affected. But this is to go no further than the Board in fact went, namely, to find that the 'general effect' of alcohol consumption on driving efficiency is 'deleterious'. It does not, standing on its own, enable one to make a more definitive finding relative to the effect which the unknown amount of alcohol consumed by the deceased had on him. And this is the critical finding which must be made because unless and until it is made no basis is laid for applying to the misconduct as found the criteria which enables one to say whether it is 'serious' or not. And this being so, there was, in my opinion, no evidence before the board to sustain the finding that the deceased's misconduct satisfied that description. The first question should be answered 'No'."

[75] In closing submissions Mr Baker said:²⁶

"...we don't make a causal link between the drinking on the one hand and the accident on the other. What we say though is that it needs to be borne in mind that one must, by necessity, affect the other."

[76] In correspondence from Tasmania Police dated 25 February 2010 Assistant Commissioner Tilyard said:²⁷

²³ Transcript p 70

²⁴ Transcript p 91

²⁵ SC of WA WAR [1971] Hale, Burt and Lavan JJ.

²⁶ Transcript p 35

"The attending officer submitted a traffic crash report detailing all persons involved. In the attending officer's opinion, as stated in the crash report, the cause was due to the vehicle being laden with a full water fire fighting tank causing it to be more unstable and it rolled over when a U-turn was completed in the sand. There is no evidence of reckless, furious or wanton driving therefore Section 36(1) of the Police Offences Act is not applicable."

[77] It seems that the Police did not actually inspect the tank but relied on interviews on the night of the incident. This would explain the 'full' v 'half full' discrepancy. This does not in my opinion affect the credibility of the attending officer's report. I suspect the conclusion would have been the same irrespective.

[78] On the available evidence a plausible explanation for the rollover is that the front wheel hit a rut or soft spot, which in combination with the movement of water in the tank [baffles notwithstanding], caused the vehicle to effectively flip. This appears to be the conclusion favoured by Tasmania Police. Whilst this is a plausible explanation, there is an absence of expert evidence to either support or reject such a conclusion. It can therefore only be put in the category of educated conjecture.

[79] There is even less evidence to support a causal relationship between excess speed and/or the consumption of alcohol and the rollover.

[80] In all the circumstances I conclude that only safe conclusion is to view the incident as an accident.

Consistency of Approach

[81] Earlier in this decision I referred to an incident identified as the 'Mr H' incident. This is a matter which has not been before the Commission and hence the need for circumspection as to the level of detail disclosed. Suffice to say that from the Investigation Report provided,²⁸ the following salient elements emerge.

- Mr H had consumed alcohol.
- Through circumstances which might be described as exceptional, he chose to drive a Departmental vehicle from the field station to his home. This occurred well outside normal working hours and without specific authorisation.
- Mr H was involved in a single vehicle accident which resulted in the vehicle being written off. It subsequently transpired that Mr H was injured, requiring a period of hospitalisation.
- The investigation concluded that, based on an verified method of calculation, the BAC at the time of the accident would have exceeded .05.
- The matter was not reported to Police until the following day. The subsequent crash report failed to mention the consumption of alcohol, invoking a finding of possible misrepresentation.

²⁷ Exhibit R2

²⁸ Exhibit R5

- An Accident Notification Form completed some 5 days later answered 'No' to the question of whether alcohol had been consumed. This led to a finding of attempted concealment.

[82] The Secretary at the time determined that the sanction would be a fine of \$1000. Mr H continues to be employed by PWS.

[83] Mr Freestone said he was told of the Mr H incident about two years ago.

[84] Mr Sullivan submitted *'that in many ways Mr H's conduct was more reprehensible, more dishonest, lacked far more integrity than the incident involving Mr Freestone.* He said that there was no fairness in the disparate outcomes of the two cases.

[85] Mr Baker acknowledged that there is a corollary between the two matters, but that each case must stand alone, and the issue for the Commission is whether the penalty imposed on Mr Freestone was appropriate in all the circumstances.

Work Performance Record

[86] Mr Freestone's evidence was that he had not previously been admonished, disciplined or warned by his employer during almost seven years of service. This was not contested. He tendered letters of appreciation from the Victorian and Tasmanian Premiers concerning his involvement in fighting the Victorian bushfires.²⁹ Mr Freestone went on to say:³⁰

"MR SULLIVAN: Mr Freestone, you've made application for reinstatement. Why?---This is a – it's a brilliant job. It's a great job to have. I never thought I'd have an opportunity to have a career. You know, I've got a pretty poor educational background. I went to lots of different schools, and just didn't do very well at school. And I had the opportunity to work at – with the department like this, and to feel that passion for your job. I just loved it, you know, and – you know, can you work – you know, quite often, "Can you work this weekend for me," or "Can you work now for me," or, "Can you go to a fire," so I said, "Yes, no worries," you know, I had a real passion for working for this department."

[87] The evidence of Mr Emms was:³¹

"Yes. And you've never had any issue out of your dealing – dealings with Mr Freestone as an employee of the department, prior to this incident, have you?---No.

No?---No, Simon has always been an excellent worker. You know, he's been about for a while. He knows the work. He knows – you know, he knows how to use vehicles, so it – you know, it was a bit of a shock that this incident occurred.

And you've seen him maybe grow into his role a bit, with the service?---Yes, he certainly has. When he was a temporary field

²⁹ Exhibits A2 and A3

³⁰ Transcript p19

³¹ Transcript p 70

*officer there, he was a bit young and, you know, as all of us have been
- - -*

Yes?--- - - - a little bit silly. But he certainly – certainly when got married, had kids, like all of us, he’s matured and he certainly, from my point of view, was a very good worker.

Yes. Enthusiastic?---Yes, yes. Motivated.

Put his hand up to go and fight fires anywhere, sort of thing. Never ever - - -?---Yes, yes. No, look, I had no problems with Simon’s character.

Yes, none at all?---He was – he was a solid worker and we were certainly happy to have him at Narawntapu.

Honest?---To my knowledge, yes.

Trustworthy?---Yes. He – as I said, he’s given me no grounds not to.

You’d be happy to be in the bush, fighting a fire with him alongside you?---Yes, he’s a well-experienced fire-fighter.”

[88] Mr Timmerman said he had a good working relationship with Mr Freestone.³²

Findings

[89] The essential facts of this case are largely not in dispute. There can be no doubt that Mr Freestone’s behavior was contrary to departmental policy in a number of material respects and it is not difficult to conclude that the Code has been breached in several aspects.

[90] I have no hesitation in concluding that Mr Freestone is guilty of misconduct. It is however entirely another step to take this to the next level of ‘serious misconduct’ of such a nature as to justify summary termination.

[91] Whilst the consequences of Mr Freestone’s actions turned out to be severe I conclude that his motivation for the course of action he embarked upon was quite innocent. Quite simply, after a period of interrupted leave fighting fires, he decided to take his young family down to beach for a play before bed. From the evidence I accept that it never entered his mind that his actions might place his employment in jeopardy. He said:³³

“Are you remorseful for what happened?---Extremely. I just – it comes down to a time – I was just taking the kids down for a drive down the beach and, you know, I should have thought better. Unfortunately, at the time I didn’t, and this is the outcome of it.

[92] He knew that taking the vehicle was unauthorised although in his mind [albeit wrongly] he did not see it as a serious offence. At one level this is understandable. There was evidence of the use of a vehicle for beach fishing and netting which Mr Freestone may have [incorrectly] interpreted as ‘wink and a nod’ that this sort of activity

³² Transcript p 86

³³ Transcript p 18

was condoned. Indeed in terms of the vehicle policy, Mr Matuszek said that *"from time to time people have a tendency to let things slip by."*

[93] The vehicle policy is clear and there can be no suggestion that Mr Freestone's actions resulted from any ambiguity or misunderstanding of the policy. He was clearly in breach. The pertinent question is, whether in the ordinary course of events, a breach of the vehicle policy would likely lead to summary dismissal. I think not. Indeed the opposite might well be the case. In the wake of the Mr H incident, there was an opportunity to draw a line in the sand, and if the Department was so minded, make it clear that a breach could lead to serious disciplinary consequences. Whilst it would seem that the policy was reinforced at the time, it was done so in a quite routine and unexceptional manner. Indeed the evidence of Mr Freestone was that nothing changed at a practical level.

[94] I have already found that the only safe conclusion in relation to the rollover incident was that it should be viewed as an accident, albeit a serious one.

[95] In the immediate aftermath of the accident, Mr Freestone acted in an exemplary manner and fully cooperated with all concerned. His evidence was:³⁴

"Is it your position – is it – do you believe that the – that you have shown how trustworthy you are, because you immediately reported what happened on this evening - - -?---Yes.

- - - and fully cooperated with the investigation?---Yes.

Even though you knew it was going to bring trouble to your door?---Yes.

And having said that, you also agree there's no way this could have been, if you like, swept under the carpet, is it? There was a severely damaged vehicle. There was always going to have to be an explanation, whether it was that night or the next day, wasn't there?---Yes.

But you chose to, if you like, report it immediately and face the full consequences of your actions?---I made a mistake, but I had to deal with the mistake I made. You know, there's no – well, it had to be sorted, you know. I wasn't – it was the only way to do it, was call Anthony straight away and tell him what had happened."

[96] Mr Baker submitted that serious misconduct may be a series of events or combination of incidents which, when added together may be considered as serious misconduct. There is some force in this argument and in different circumstances, might be compelling.

[97] There are a number of reasons why I decline the course urged by Mr Baker. They include:

- Mr Freestone's state of mind and motivation for the course of action embarked upon.
- His actions and cooperation immediately following the accident.

³⁴ Transcript p 19

- His unblemished work record and remorse expressed.

[98] There is one further overwhelming reason and I refer to the Mr H incident.

[99] I agree with Mr Sullivan that on the face of it, this incident was more serious than that of Mr Freestone. The employer had the opportunity to distinguish the two cases but failed to satisfactorily do so. Mr H was fined \$1000. In this context I find that summary termination of Mr Freestone was unfair.

[100] I conclude that the finding of the Secretary as to serious misconduct was not justified and the sanction of summary termination quite disproportionate to the admitted conduct of Mr Freestone.

[101] Clearly Mr Freestone is not without blame. For that reason I decline to order reinstatement. As an alternative I propose to order re-employment into Mr Freestone's former position from a prospective date. The gap between date of termination and the date of re-employment amounts to the financial equivalent of a serious fine.

[102] There was no suggestion or evidence that a satisfactory employment relationship could not be re-established. Indeed I believe that given this second chance, there is every prospect that Mr Freestone will be a model employee into the future. For that reason I propose to order re-employment into the position of Field Officer at Narawntapu.

[103] It would open to the Department to issue some form of written admonishment or warning on his personnel file, but that is a matter for the employer. The re-employment is to take effect from Monday 13 September 2010.

Order

[104] Pursuant to Section 31 of the Act I hereby order that the Minister administering the State Service Act 2000 (Department of Primary Industries, Parks, Water and Environment) re-employ Simon Freestone in the position of Field Officer at the same salary that was applicable immediately prior to his termination. The location of re-employment shall be Narawntapu National Park and shall take effect on Monday 13 September 2010 unless otherwise agreed.

Tim Abey
Deputy President

Appearances:

Mr G Burgess and Mr P Baker for MASSA
Mr P Sullivan representing Mr S Freestone

Date and place of hearing:

2010
July 29
August 18, 19
Ulverstone