

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s.29(1A) application for hearing relating to termination of employment

Stephen Yapp
(T13751 of 2011)

and

The Minister administering the State Service Act 2000 (Department of Justice)

COMMISSIONER JP MCALPINE

HOBART, 16 June 2011

Industrial dispute - termination of employment – alleged breach of the Tasmanian State Service Award – alleged breach of the State Service Code of Conduct – alleged breach of safety – clarity of operating procedures – valid reason for termination not proven - termination unfair – lesser penalty appropriate – re-instatement ordered

REASONS FOR DECISION

[1] On 18 January 2011, Stephen Yapp, (the applicant) applied to the President, pursuant to Section 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 (Department of Justice) (the respondent) arising out of his alleged unfair termination of employment.

[2] Correctional Supervisor (CS) Yapp had been employed in the Tasmania Prison Service (TPS) for 16 years. His conditions were governed by the Custodial Officers Award (the Award). Following a Commissioner's Direction #5 (CD5) investigation CS Yapp was notified by letter on 14 January 2011 that his employment was to be terminated with effect from 28 January 2011 on the grounds he had breached the State Service Code of Conduct (SSCC).

[3] The investigator addressed eight potential SSCC breaches of which three were deemed to be actual breaches by the Secretary of the Department of Justice (the Secretary), namely:

- That on the night of 19/20 July 2010 CS Yapp was found asleep on duty.
- That because of his falling asleep he created an unsafe situation for the other two correctional officers (COs) on duty at the time.
- That on 13 July 2010 Mr Yapp sought and was refused permission from Correctional Manager, State Reception Prisons (CM), Jo Maxfield, to have the following day off but despite the refusal arranged a shift swap and took that day off.

[4] In the letter of termination¹ the Secretary directs the reader to those SSCCs she has determined CS Yapp had breached:

¹ Exhibit A4

"I have also determined that these actions constitute a breach of the State Service Code of Conduct, specifically in relation to sections 9(1), 9(2), 9(10) and 9(13) of the Code of Conduct established by the State Service Act 2000:

- *9(1) An employee must behave with honesty and with integrity in the course of State Service employment*
- *9(2) An employee must act with care and diligence in the course of State Service employment*
- *9(10) An employee must not knowingly provide false or misleading information in connection with the employee's State Service employment*
- *9(13) An employee, when acting in the course of State Service employment, must behave in a way that upholds the State Service Principles. The relevant State Service Principle in this instance is:*

*7(1) the State Service provides a fair, flexible, **safe** and rewarding workplace. (the Secretary's emphasis)"*

[5] CS Yapp admitted to being asleep on duty on the date cited. He acknowledged he may have inadvertently breached SSCC, but pleaded extenuating circumstances.

[6] Mr Johnston, for the applicant, raised a threshold matter with respect to ministerial delegation and the requirement on the Secretary to consult with the Public Sector Management Office (PSMO) prior to terminating the employment of a State Service employee. The Commission chose to hear the matter in its entirety and address the threshold matter in the decision.

[7] He also sought to have the application amended to reflect a breach of the Tasmanian State Service Award in that CS Yapp, by dint of service, should have been afforded four weeks' notice and not two weeks as he was given. He also sought an amendment seeking payment of accumulated long service leave. Mr Baker conceded both points and undertook to have the "oversight" rectified.

[8] Mr Johnston argued that the CD5 investigation was flawed and that penalty imposed was manifestly unfair given the circumstances of the alleged breach.

[9] In the body of the decision I refer to statements made by various people, these statements are those which were made to the CD5 investigator Pamela Honan, unless otherwise stated.

BACKGROUND

[10] Mr Johnston argued that the proper process had not been followed by the Agency in determining CS Yapp had breached the SSCC. He cited a memorandum dated 19 May 2004 entitled Amended Premier's and Ministerial Delegations². With reference to the termination of employment of state service employees, it states:

"The requirement for consultation with the Director Industrial Relations and State Service Management is to ensure that any termination is consistent with relevant industrial laws and State Service employment requirements."

² Exhibit A12

At Schedule C of the same document the conditions by which power is delegated states:

"Exercisable only after consultation with the Director, Division of Industrial Relations and State Service Management."

[11] Mr Johnston argued that there is an explicit requirement for the Secretary to consult with the Public Sector Management Office before terminating an employee's employment. He argued that the directions issued by the Secretary to the PSMO on 11 January 2011 would not have given sufficient time for a proper evaluation of the matter before she issued the notice of termination on 14 January.

[12] Mr Baker argued that he had had a conversation about the matter with Mr Charlton, Assistant Director, Workplace Relations, and a subsequent discussion with the Director of PSMO about the matter. The conclusion was drawn to proceed with issuing the letter of termination to CS Yapp. Mr Baker argued that the consultation to which he was a party met the requirement of the Delegation of Ministerial Powers.

[13] Prior to the CD5 investigation being instigated on 17 August, a preliminary investigation had been entered into. The TPS management undertook an extensive review of CS Yapp's volunteer activities with the TAS. This included interrogating records of his rosters and identifying at which stations he worked as well as confirming various aspects of his involvement.

[14] Mr Baker justified this investigation as necessary to establish if indeed a CD5 investigation was appropriate. He argued that TPS and TAS were the *"one employer"*³ and that the information gleaned from TAS was available to the TPS.

[15] Mr Johnston argued that this investigation was illegal. He argued the personal information divulged by TAS to TPS was inappropriate and had *"poisoned"* the objectiveness of the CD5 investigation.

[16] He asserted that the quantity of unrelated allegations, later to be dropped, unreasonably tainted the decision of the Secretary in making her determination of sanctions to impose on CS Yapp.

[17] He further argued that the disclosure of CS Yapp's volunteer history with TAS was beyond the authority granted under DHHS privacy policy⁴.

[18] It was alleged that Mr Yapp's reputation with TAS was damaged by the investigation process.

[19] It was agreed by both parties that shift swapping was both common and condoned as well as being a recognised award condition.

[20] CS Yapp asserted he had contacted CS Allanby on 13 July seeking to have someone swap the following day's shift with him. CS Allanby said that there was no one available. He subsequently sought permission from his manager CM Maxfield to take 14 July off as a *"recreation day"* to enable him to volunteer a shift for TAS. The application was denied by CM Maxfield on the grounds that *"she was not there to fund the Tasmanian Ambulance Service"*. To facilitate the day he wanted CS Yapp arranged a shift swap directly with CO Oates for the following day.

³ P100, L30

⁴ Exhibit A14

[21] CS Yapp asserted he had sought clearance from CM Maxfield to swap shifts to which she agreed provided it did not incur any overtime. He said that CM Maxfield did not prohibit him from swapping a shift.

[22] CM Maxfield denied she discussed shift swaps with CS Yapp let alone approved him doing so.

[23] CS Yapp outlined his view of the process to swap shifts to the investigator:

"You would go to your supervisor and explain your need to change, a person is located who is available to swap, the staff member approaches this person, once agreed, the supervisor changes the roster."

[24] Under examination in chief he said the process for swapping shifts was to check the roster to see with whom you could swap and if both parties agreed and were on shift at the same time, fill out the "*change of duty/post form*" and pass it to the supervisor for approval. He reiterated that the particular section supervisor authorises shift swaps.

[25] CM Maxfield asserted that where a Correctional Supervisor seeks a shift swap they must go through the Correctional Manager, as their immediate supervisor.

[26] Mr Johnston cited an email from CS Allanby to CM Maxfield⁵ which outlines his interaction with CS Yapp regarding swapping shifts on 14 July. He argued that although this document was sent on 22 July it was not included in the documentation given to the investigator nor was it considered in the investigation, despite being germane to the evaluation of one of the alleged code breaches.

[27] On the morning of 20 July at approximately 12.30am CS Yapp and CO Sandra Cato took a smoke break together. In her statement CO Cato said:

"When I was having a smoke with him he said 'I am really tired and am going to get my head down, come and get me if one comes in or you want me for anything'."

[28] CO Cato's statement confirmed CS Yapp's assertion that he had asked to be wakened if he was required. CS Yapp then proceeded to the communications room where he bedded down.

[29] At approximately 1.40am on same morning CM Maxfield entered the Hobart Reception Prison (HRP). She was reacting to "*information received on a confidential basis*"⁶ that CS Yapp was known to sleep on nightshift. In preparation for the out of hours visit, she had sought and was given approval to enter the HRP by the Acting Director of Prisons, Mr Gregory Partridge.

[30] She entered the control room and found CO Dean Maddock and CO Cato at the control console. They were watching a DVD on the control room television. She asked the whereabouts of CS Yapp and was reluctantly directed to the communications room which opened on to the control room. Through the window she saw CS Yapp asleep on the floor with a bed roll under his head and a jacket over him.

⁵ Exhibit A16

⁶ Exhibit A2

[31] After two attempts, CM Maxfield was successful in waking him at approximately 2.20am. When challenged about sleeping on shift he responded with words to the effect:

*"... it was custom and practice ... if the other two staff members were OK with it."*⁷

[32] Similar wording is contained in CS Yapp's email to CM Maxfield of 20 July⁸ which he composed after consultation with his union official. Later in the same email CS Yapp asserted that he was unable to sleep in preparation for the shift. He also stated that:

"I have been an officer since Jan 1995 and since that time catching a few hours sleep on night shift if/when required has been custom and practice if a staff member was struggling to stay awake. Over this period of time I have only needed to do this 2-3 times."

[33] On the following day, 21 July he emailed CM Maxfield and sought to retract the above statement. He wrote, the statement was made *"without thought"*, it was *"an error"* due to *"the pressure of realising what a serious matter I had got myself into"*. He also said he made the statement under *"abnormal stress"*.

[34] Although CS Yapp had interaction with CM Maxfield on a number of occasions after the 19/20 July incident, it was only at the interview with the investigator on 29 October did he first raise the issue of taking medication on the night in question.

[35] Mr Johnston stated that he advised CS Yapp, after the initial communications, to wait until the *"legitimate"* CD5 investigation before making any further statements about his sleeping on duty.

[36] Mr Yapp alleged he had taken Schedule 8 medication to relieve severe back pain on the evening he fell asleep. He had an existing back injury, known to TPS management. He said that on that particular occasion the effect the medication had on him differed from his prior experience with it. The side effects were different. He said previous use of the medication had made him nauseous and queasy however on this occasion it made him drowsy. He did not normally take the medicine when going on shift and only used it as a relief of last resort.

[37] It was explained that there are nine levels of medication, Schedule 9 being the most potent. Morphine was given as an example of a Schedule 9 drug. The medication CS Yapp said he ingested on the night in question, Schedule 8, was obviously extremely strong.

[38] He said he believed CM Maxfield was aware he was taking medication. This position was not pursued.

[39] Mr Yapp acknowledged that he made a mistake by not leaving the shift prior to taking the medication. However he said that if an employee goes home sick from a shift he has swapped, it puts a burden on the person with whom they had made the swap and that they may not be keen to swap again.

[40] He also acknowledges that it would have been appropriate to notify the on-call manager of his plight at the time. Mr Johnston argued that in taking the medication CS Yapp's intention was innocent in that he saw it was a means to enable him to complete the shift.

⁷ Exhibit A2

⁸ Exhibit A2 (attachment 2)

[41] When asked why he did not explain to CM Maxfield, when she woke him, that he had an adverse effect from medication, he replied that he *"panicked"*⁹.

[42] He acknowledged that in his initial written response to CM Maxfield at 4.35am he did not mention his medication¹⁰. Further, the response he provided to CM Maxfield after consulting his union official still did not contain any reference to his taking medication¹¹. His written retraction of his statement of the 20th did not mention his taking medication.

[43] CS Yapp was accused of *"creating an unsafe situation for the operation of the HRP and those staff on duty that night"*. This accusation centres around the admission of a prisoner by CO Maddock on the night in question, without a second CO to assist.

[44] Mr Johnston noted that the Launceston Remand Centre (LRC) which has a similar function to the HRP only requires two correctional officers on duty at night. This dictates that prisoner processing is conducted by a single CO. However the prisoner processing function is supplemented by the arresting Tasmania Police Officers. It was argued that police officers routinely assist in prisoner processing at the HRP also.

[45] Exhibit A5 is a Memorandum of Understanding between the Department of Justice and the Department of Police and Emergency Management. It's purpose is stated as:

"... to provide a clear strategic framework for the provision of cooperative services to the shared clients of the DPEM and the DoJ."

[46] Further under s3.3 Supporting Legislation of the Working Protocols it states:

"In accordance with the Corrections Act 1997 section 5(6), all Police Officers are Correctional Officers."

And,

"In accordance with the Corrections Act 1997 section 26(3), if a Correctional Officer has custody of a person in lawful custody, other than a prisoner or detainee, in a prison, then the Correctional Officer is taken to be a Police Officer and the person in lawful custody is taken to be in the custody of a Police Officer."

[47] Under the Roles and Responsibilities:

"A Police Officer will remain present while a Correctional Officer completes a Prisoner Risk Assessment form for the watch-house detainee."

[48] On the particular night in question evidence showed that two Police Officers remained in attendance while the prisoner was processed by CO Maddock.

[49] When asked by the investigator if it was unusual for a single correctional officer to process a detainee CM Maxfield replied¹²:

"No, we do not do this for safety reasons."

⁹ P42, L40

¹⁰ Exhibit A2 (attachment 1)

¹¹ Exhibit A2 (attachment 2)

¹² Exhibit A2

[50] However in a follow up response to the initial interview CM Maxfield gave the reasoning behind the HRP having three officers on night duty. In an email dated 6 November 2010¹³ she stated:

"After speaking to some long term officers today, they have advised me that three officers on nightshift came about to enable them to open cells if needed after hours without having to rely on the police for assistance. However, they have also informed me that although it is not written anywhere (to their knowledge) if the police bring someone into the watch house after hours then two officers always assist to process the prisoner/detainee."

[51] The Commission understand the statement to mean the two "police" officers.

[52] CO Maddock in his interview said:

"Unless there are other circumstances to prevent this, it is usual that 2 Correctional Officers would process a detainee. In this instance based on my experience, TRG training and the compliance of the detainee, the situation was not deemed high risk so I processed him without another Correctional Officer present. The two police officers that brought him in were in close proximity."

[53] CO Cato, in her statement, said she did not waken CS Yapp to assist with processing the prisoner because she assessed the situation as not requiring his presence:

"Watching through the monitor, the inmate seemed compliant and Dean is TRG trained. I made the call not to get Yappy."

[54] CS Yapp did not consider that he had put CO Maddock at risk by being asleep.

[55] On 17 August a CD5 investigation was initiated into the allegations against CS Yapp. He was interviewed by the investigator on 29 October, 2 1/2 months after the investigation had commenced. The agency argued that CS Yapp had been overseas during the period as a reason for the delay. He in fact had been overseas for 10 days during the intervening period.

[56] The report was released on 23 November, CS Yapp responded to the investigator's report on 7 December 2010.

[57] The outcome of the investigation was handed down on 14 January 2011 initiating the termination of CS Yapp's employment.

[58] Much of the questioning conducted by the investigator was around CS Yapp's volunteer activities with TAS. The investigator formally interviewed two TAS staff as well as engaging in written correspondence. An extract from the TAS volunteer induction manual was also submitted in evidence¹⁴.

[59] Five of the eight allegations addressed in the CD5 investigation concerning CS Yapp's volunteer activities with the TAS were not pursued beyond the investigation. However in the letter of termination¹⁵ there is no mention that these investigations had come to nothing or that CS Yapp was exonerated from any potential transgressions associated with these five matters.

¹³ Exhibit A2

¹⁴ Exhibit A2

¹⁵ Exhibit A4

[60] Mr Johnston argued that the penalty imposed on CS Yapp was manifestly unfair and unjust. He asserted the process had been tainted by the “illegal” investigation conducted before CD5 was initiated. He said there was a blatant inconsistency in the outcome inflicted on CS Yapp compared to those penalties imposed on other officers committing the same offence of sleeping on duty.

[61] He cited the matter of officer J who was recorded sleeping by way of photographs, in much the same bedding situation as CS Yapp, but was not dismissed or demoted and currently still works in the TPS¹⁶.

[62] He cited another incident where a CO fell asleep while manning the master control room of the Risdon Prison Complex (RPC). The situation was such that to rouse the sleeping officer a master key had to be located and brought from the women’s prison to allow entry to the control room. He asserted there were no sanctions made against the particular CO. This was not challenged.

[63] Mr Baker responded¹⁷:

“...was an incident in the master control room where there was one officer ... And again, I make the distinction ... there is a difference between an officer drifting off in front of a selection of CCTV screens as opposed to somebody who physically removes themselves from the workplace and makes up a bed and goes to sleep.”

[64] Mr Baker evaluated CS Yapp’s action of removing himself from the workplace to sleep¹⁸:

“This is realms away from accidentally dozing off at your post.”

[65] He gave the agency’s view on the difference between an officer falling asleep at a control console and CS Yapp’s situation¹⁹:

“My position and that of the instructing agency is that we accept that an officer in front of a CCTV camera, by himself, in the middle of the night may inadvertently drift off for a few minutes.”

[66] He supported this in his opening address²⁰, where he said:

“The employee ... is a senior employee ... He is a supervisor with some 16 years service. In our view, this is simply not a case of simply dropping off in a chair for a couple of minutes. I think the common euphemism today is having a power nap.”

[67] While cross examining CS Yapp, Mr Baker made the following comment in posing a question²¹:

“Other than the officer inadvertently dozing off watching a CCTV screen – other than that - just accept that as a given ...”

¹⁶ P58, L30.

¹⁷ P127, L30

¹⁸ P93, L40

¹⁹ P103, L35

²⁰ P13, L 45

²¹ P43, L35

[68] An example was given which occurred on 11 January 2008 where an officer complained of a headache and was given permission by the operations manager to make a bed in the general manager's conference room. Both officers apparently were reprimanded. Mr Baker argued that in this situation the officer in question sought and was granted leave to go to sleep, very different from CS Yapp.

[69] In the authorities cited, Mr Baker said²²:

"There was considerable industrial precedent over numerous cases, predominantly in security related industries concerning the termination of employment, and it's a standard and appropriate sanction for sleeping on the job."

[70] Mr Johnston relied on an authority of this Commission, *T13686 of 2010, Simon Freestone v MASSA* before Abey DP, with respect to the inconsistency of the penalty imposed in that matter compared to a similar breach of SSCC. Mr Freestone had his employment terminated whereas, for a similar offence Mr H was fined and continued to be employed by the particular agency. Abey DP found that Mr Freestone was unfairly dismissed and ordered his re-employment.

[71] Mr Johnston cited the similarity between this matter and the instant matter where for similar offences other COs had not had their employment terminated²³.

[72] Mr Johnston argued that consideration should have been given to the fact that CS Yapp had 16 years unblemished record with TPS. CS Yapp's record was not challenged. He argued that that CS Yapp's contrition and his acceptance of his wrong doing would be a guide to his future conduct as an employee of TPS.

FINDINGS

[73] I turn to the threshold matter of the delegation of authority. The PSMO was given the Secretary's written position on 11 January 2011 to review. On 14 January she sent the letter of termination to CS Yapp. I have sympathy with Mr Johnston's position that the timeframe between the PSMO receiving the Secretary's recommendation and the execution of her determination is remarkably short.

[74] I certainly accept Mr Baker's assurance that an assessment was carried out, but have a concern as to the rigour achievable in such a short time.

[75] However the delegation of authority makes no mention of a timeframe for such interaction. It follows that the delegation was complied with, I so find.

[76] I turn to the management of CS Yapp. It is clear from the tenor of the initial investigation and the subsequent CD5 investigation as well as the respondent's introduction at the hearing that TPS management had an issue with CS Yapp's leisure time activities with TAS. More specifically the impact these activities were allegedly having on him satisfactorily performing his role as a CS. The implication from the questions asked of the interviewees, the interrogation of the TAS duty rosters and witness evidence appears that CS Yapp was overcommitting to TAS leaving himself "spent" (my wording) when he had to perform his role with TPS. An obvious consequence one would assume would be the difficulty in remaining alert and awake during night shifts.

²² P84, L25

²³ P60, L30

[77] CM Maxfield in her interview said:²⁴

"The other concern was rumours and innuendo I had heard from other officers about Mr Yapp being asleep on the night shift of the 11th July and he had allegedly been working numerous volunteer shifts with Tas Ambulance Service."

[78] The shift on 11/12 July was manned by COs Devine and Perry as well as CS Yapp. COs Devine and Perry were both interviewed and gave evidence that they could not account for the whereabouts of CS Yapp for a period of time during the shift on 11/12 July. Although neither saw CS Yapp asleep the inference is certainly there that he had gone somewhere to sleep. CM Maxfield obviously accepted the correlation that CS Yapp's absence from sight indicates he was asleep. To rely on this weak, imprecise evidence as an illustration of CS Yapp's behaviour is, in my view, misguided to say the least.

[79] CM Maxfield admitted to acting on "*rumours and innuendo*" when she took it upon herself to visit HRP on the night of 19/20 July. What was the purpose of the visit? The only reason appears to be to catch CS Yapp sleeping. She was lucky; she did indeed catch him asleep. Had CO Cato decided to rouse CS Yapp to assist CO Maddock, it may have been a wasted journey and nothing would have been proven.

[80] If the issue was, as it appears, that TPS management assessed that CS Yapp's leisure activities were impacting on his performance in the form of sleeping on nightshift, due process would dictate that he be made aware of the concern. At the very least, after identifying there really was an issue, he should have been given the opportunity to realign his activities to suit the requirements of the employer. From evidence, CS Yapp was never spoken to about his alleged sleeping habits on nightshift and obviously remained unaware of the "*rumours and innuendo*" circulating.

[81] In my view there was a failure in process to identify the issue, address the issue with CS Yapp, warn him of the consequences of continuing the same behaviour and put a supervisory process in place to ensure he maintained the appropriate behaviour. CS Yapp was not afforded procedural fairness.

[82] I turn to the preliminary investigation where CS Yapp's leisure activity was scrutinised in such detail. Although it was openly acknowledged that a preliminary investigation took place, the only concrete evidence educed was a batch of emails dated 5 August between Brett Charlton and Rena Venetsanakos of TAS²⁵. The content of the emails focuses on the supply of CS Yapp's TAS attendance records to TPS.

[83] I have major concerns over the disclosure of the personal details of a TAS volunteer to a third party. Had CS Yapp undertaken some other leisure time pursuit which potentially had the same effect on his capacity to perform his duties as alleged, what steps would TPS have taken to obtain private information? I do not accept Mr Baker's proposition that²⁶:

"... there's been a lot of talk today about the appropriateness of the inappropriateness of the Department of Justice contacting the Tasmanian Ambulance Service in relation to what Mr Yapp may or may not have been doing at that organisation. ...the Tasmanian Ambulance Service together with the Department of Justice are, in fact, all one employer."

²⁴ Exhibit A2

²⁵ Exhibit A2 (attachment B)

²⁶ P100, L30

[84] It should be noted that CS Yapp was not an employee of TAS, but a volunteer.

[85] Mr Johnston raised the matter of *Pervan v Frawley [2011] TASSC 27* where Acting State Service Commissioner (SSC) Frawley upheld the right of an agency to conduct a preliminary investigation to test the evidence before embarking on a CD5 investigation. The matter subsequently became the subject of a judicial review by the Supreme Court of Tasmania. His Honour Porter J handed down his decision on 3 June 2011. Among other aspects of the matter his Honour agreed in the main with Acting SSC Frawley's conclusions in that it was legitimate to conduct a preliminary investigation.

[86] In my view CS Yapp has every right to feel aggrieved that his private pursuits have been openly investigated without his consent. However, other than the potential to damage his reputation with TAS, it appears the trawling exercise did not manifest itself in the discovery of further SSCC breaches.

[87] I turn to the three grounds cited for terminating CS Yapp's employment, allegations (4), (5) and (6)²⁷.

[88] Allegation (5) states in part, *"... this may have potentially have (sic) created an unsafe situation for CO Maddock"*

[89] The determination states:²⁸

"I note that for the safe operation of HRP the roster is designed specifically to have three (3) correctional officers on duty with one permanently in the control room. It was clear that you were incapable of supporting your fellow correctional officers whilst asleep. In this context I note you had taken medication which you knew would make you drowsy If Correctional Officer Cato had wanted to wake you it would have required her to leave the control room which she is not allowed to do as an officer must be present in that area at all times."

[90] From CM Maxfield's evidence in the email of 27 August 2010 she gives the reason for three correctional officers on night shift as, to enable one to stay in the control room while the other two are available to *"open cells if needed"*. From evidence the Commission understands this to be where the behaviour of an already incarcerated prisoner becomes such that he or she has to be subdued or medical assistance is required or in the case of fire or similar emergency. The only activity which took place during the time CS Yapp was asleep, from evidence, occurred when a detainee was brought in by two Tasmania Police Officers and processed by CO Maddock, in their presence.

[91] Again from CM Maxfield's email *"... if the police bring someone into the watch house after hours then the two officers always assist to process the prisoner/detainee."* This is the same procedure followed in LRP. This procedure is also consistent with the Memorandum of Understanding²⁹, which does not form part of the investigation report³⁰. No reason has been given as to why this important document failed to form part of the report.

[92] CO Maddock's evidence to the investigation, which was not referred to in the determination, quite clearly states that because of his TRG training, the compliance of the detainee and the presence of two police officers, he assessed that the situation was

²⁷ Exhibit A4

²⁸ Exhibit A4

²⁹ Exhibit A5

³⁰ Exhibit A2

not *“high risk”*. CO Maddock had 12 years’ experience at the time. CO Cato an officer of 15 years’ experience also assessed the situation as being sufficiently benign not to require CS Yapp’s presence.

[93] There is no evidence from which the Secretary could have concluded that through CS Yapp’s actions he put CO Maddock, or anyone else, in an unsafe situation during that particular period of the morning in question.

[94] The determination refers to CS Yapp of having *“.. taken medicine which you knew made you drowsy...”* The unrefuted evidence of CS Yapp was that the medication he took on the night in question had an effect on him which he had not previously experienced. His evidence was that the medication had previously made him *“nauseous and queasy”*, not drowsy or sleepy. CS Yapp was not challenged directly on this evidence.

[95] There is no basis for the Secretary’s conclusion that CS Yapp wilfully took medication knowing it would make him drowsy.

[96] This determination also concluded CO Cato would have to *“... leave the control room”* to waken CS Yapp had she so wished or had the need arose. From CO Cato’s statement both she and CO Maddock were in the control room when the police brought in the prisoner for processing. She said:

“Dean told me to ‘send him down in the lift to process the inmate and to get Yappy and send the lift back up to get him’.”

[97] Had it been required, CO Maddock could have woken CS Yapp before he left the control room to process the prisoner or alternatively could have manned the control room while CO Cato did so.

[98] However, from the evidence of the COs on duty and CM Maxfield, the communications room where CS Yapp was asleep is adjacent to and opens on to the control room. In my view it would not have been necessary for CO Cato to leave the control room to waken CS Yapp, but only necessary to open the door. Had she been on her own, her attention may have been taken from the monitors momentarily.

[99] Further, one must ask how significant this distraction would have been in the context of CM Maxfield’s observation that the two COs were watching a DVD on television when she entered the control room on the night in question: a practice which is obviously condoned and not seen as a distraction from the control room officer’s duty.

[100] The basis upon which the Secretary made her determination of allegation (5) was flawed, I so find.

[101] Allegation (6) states in part:

“... on or about 13 July 2010 you sought approval from Ms Maxfield to have the day off... Ms Maxfield refused this request and it is alleged you subsequently arranged a shift swap with Mr Grant Oates ... At that time you did not make Ms Maxfield aware of this arrangement despite her request that you attend for duty.”

[102] Her determination states:

“... I find on the balance of probability that you changed your shift after being instructed by the Manager HRP not to do so. In drawing this conclusion I placed weight on the statement of the Manager HRP, the summary of events provided in

the investigation and that you failed to submit the appropriate paperwork that is required for this type of shift change."

[103] In CM Maxfield's evidence to the investigator she was asked the following question:

"Can you confirm that on 13 July 2010, Mr Yapp asked to have the 14th July off work to enable him to perform duties with Tasmania Ambulance Service?"

She responded:

"Yes, I refused him this request; he wanted to work at the Bridgewater Ambulance Service as they were short staffed. I commented to the effect that I was not here to fund the Tasmanian Ambulance Service."

[104] CM Maxfield asserted that she had not received a written request nor had a conversation with CS Yapp regarding his swapping shifts.

[105] During her evidence before the Commission the matter of CS Yapp allegedly disregarding this direction was not addressed.

[106] The investigation's Findings³¹ at 4.6 states:

"She (CM Maxfield) re-stated that she refused Mr Yapp's request for a recreation day, there was not a discussion referring to overtime or costs and no suggestion made by her to Mr Yapp that he could arrange a swap."

[107] The Commission's understanding of the difference between a recreation day and a shift swap is as follows:-

The granting of a recreation day to an employee would entail granting him or her a day's leave. Being at short notice, that is, unplanned, a substitute employee would be required to work on the particular shift. One assumes there is not a pool of COs able to take over at short notice therefore the shift would be carried out on overtime. This would add to the running cost of the facility.

On the other hand, within reason, a shift swap should only entail changing the names of the people working on the particular shift. As we have seen in evidence *the "bartering"* of shifts should be an exchange, like for like attracting no extra cost. Now in the instant matter staff had to be moved around to accommodate the required skills mix on the shift; a cost was inferred, but not quantified.

[108] CM Maxfield denied any discussion over costs yet she admits to saying words to the effect *"I was not here to fund the Tasmanian Ambulance Service"*. It is understandable that in managing a budget one would not accept extra costs over which one had control. However there was no other reasoning offered by CM Maxfield for refusing CS Yapp a recreation day.

[109] The Secretary's determination states:

"... you sought approval from Ms Maxfield to have the day off ... Ms Maxfield refused this request ..."

³¹ Exhibit A2

[110] From evidence CS Yapp was refused a "recreation day" off. The fact is he did not take a recreation day.

[111] Further she states:

"... you subsequently arranged a shift swap ... despite her request that you attend for duty."

[112] There was no evidence adduced either during the hearing of the matter, during the investigation or in correspondence that CM Maxfield requested CS Yapp to attend for duty.

[113] Further she states

"... I find ... that you changed your shift after being instructed by the Manager HRP not to do so. "

[114] There was no evidence that this instruction was ever given by CM Maxfield.

[115] The only issue which has been verified by evidence is that CS Yapp was refused a recreation day. There is simply insufficient evidence to establish that any other direction was given to CS Yapp regarding either attending work on 14 July or conversely not taking the day off.

[116] There is insufficient evidence adduced to establish CM Maxfield gave the instructions alluded to. It follows the Secretary had insufficient grounds to find CS Yapp disregarded any direct instructions, I so find.

[117] I turn to the issue, in the same determination, of CS Yapp's failure to provide CM Maxfield with the requisite paperwork to apply for a shift swap.

[118] There was no departmental policy, procedure or protocol adduced governing the operation or management of the "shift swap" process. Both parties stressed that the award provided for shift swaps, that the activity was an integral part of the operations function and widely used.

[119] The only reference to an employee altering shifts in the Award is found at clause 18(b)(iv) which states:

"where an employee's place on a roster is changed at the request of the employee, no penalty will be payable."

[120] The statement of itself is not particularly helpful.

[121] From evidence it appears the process for arranging a shift swap lies ostensibly with the two participating employees. Again it appears from evidence that the key influence in the shift swap process is the particular shift supervisor who decides on the skill mix required to operate the shift.

[122] CS Yapp is accused of, and admits to, not providing CM Maxfield with an "Application for Change of Shift" form for her approval prior to swapping shifts. His explanation was that the swap was done at short notice by telephone and at the time he was not sure if CS Allanby had submitted the paperwork. It appears that it is not uncommon for the shift supervisor in question to coordinate the paperwork for a shift swap, before changing the roster.

[123] In his evidence to the investigator CS Yapp said that he had not informed CM Maxfield of the swap because *"... this is not a required practice..."* The position he stated was not directly challenged at the hearing, although CM Maxfield gave evidence in her statement contradicting it.

[124] Perusing the change of shift requests³² there is certainly an inconsistency in the presentation of the shift change paperwork. In the main at LRP approval for a swop is signed by the supervisor; but in some cases only the signature of the applicant appears, with no one approving the request. On the other hand at the HRP approval seems to be from the operations chief (not defined), and rarely signed by the operations manager (not defined). Again some had not been approved at all.

[125] Although CS Yapp conceded that the normal practice was to arrange shift swaps through *"your supervisor"*, his evidence indicates that the supervisor referred to is the supervisor of the particular shift being swapped. Supporting this view, I believe, is that no evidence was presented to show that it was standard practice for CM Maxfield or CMs in general to approve shift swaps. There was no instance cited where CM Maxfield had previously given approval for CS Yapp to swap shifts. There appears to be a distinct lack of rigour in the shift swap process; however, but for the odd anomaly such as the instant matter, there may be no requirement for more formality.

[126] Although CM Maxfield was not happy that CS Yapp had arranged a shift swap without her approval, for want of contrary evidence, his lack of consultation with her appears to fit with the custom and practice of arranging shift swaps. If I am wrong in this view I still do not believe it is a code of conduct issue, but more a communications and management matter, particularly giving regard to the empirical nature of the shift swap process.

[127] Allegation (4) in part states:

"It is alleged that at approximately 1:40am on 20 July 2010 Ms Maxfield found you asleep ..."

[128] The determination states:

"... this was admitted in your own statements ..."

[129] There can be no argument that CS Yapp was sleeping while on duty. Other than the issue of the medication all other aspects surrounding the sleeping incident were within his control.

[130] S30(5) of the Act outlines the criteria applying to the termination of employment and requires the following:

"Where an employer terminates an employee's employment, the onus of proving the existence of a valid reason for the termination rests with the employer."

[131] CS Yapp's employment was terminated on three grounds. Although Mr Baker asserted³³:

³² Exhibits A6 and A7

³³ P82, L25

"The two other matters are not as important, but irrespective of the other two issues, the sanction of termination would have been applied had in fact there just simply been the single incident of sleeping on duty."

[132] However prior to this statement being made, when challenged by Mr Johnston as to the reasoning behind addressing those allegations not pursued and presumably not considered in the Secretary's determination, Mr Baker responded³⁴:

"Well, it did form part of it. I mean, the whole thing formed part of it."

[133] Relying on allegations (5) and (6) as stated above, the employer has failed to show that it had a valid reason for terminating the employment of CS Yapp as required by s30(5) of the Act, I so find.

[134] Considering ground (4) in isolation, sleeping on duty. One must consider the relative seriousness of CS Yapp's action. Mr Baker cited a number of authorities where the outcome of sleeping on duty was termination of employment. Mr Johnston on the other hand cited a number of instances of officers sleeping on duty within TPS and whose employment had not been terminated. In fact there was no evidence educed that any officer had ever been dismissed for sleeping on duty in the TPS.

[135] Mr Baker argued that it was understandable when an officer fell asleep on night shift while sitting in front of a bank of monitors. This he argued was much less serious than an officer removing himself from the workplace and *"bedding down"*.

[136] I compare the seriousness of the two scenarios. It was shown that CS Yapp's absence from the workplace did not endanger other officers. They both knew exactly where he was. His colleagues were not relying on him for support.

[137] The incident cited where an officer fell asleep in the main control centre of RPC was not considered, it appears, serious enough to warrant dismissal by the Department. In this instance the control room officer was the eyes and ears of all his colleagues who were in and around the prison complex. They were relying on him to be alert enough to initiate an emergency response should it have arisen. Indeed in allegation (5) the Secretary was quite specific that the control room officer was not permitted to leave the control room unattended, for obvious reasons. In my view CS Yapp is much less culpable than the officer cited in the above example.

[138] However, concerning aspect of this matter is CS Yapp's communications with CM Maxfield during and after the incident on 19/20 July. For want of specific evidence regarding her length of service as a correctional professional, I have assumed by dint of her position that CM Maxfield is an experienced officer. It follows that she would have had personal experience working in a shift environment. This, in my view makes CS Yapp's comments to her both verbally and written with respect to sleeping on duty being *"custom and practice"* as somewhat condescending. She would know what was *"custom and practice"* from her own experience. His later retraction of the statements only exacerbates the situation.

[139] His reasoning for initially making the comments then retracting them I find suspicious. A correctional officer of 16 years' experience, in my view, does not panic easily, particularly when he has had a few hours to mull over his comments and have his union representative vet them.

³⁴ P69, L10

[140] CS Yapp stated that CM Maxfield knew about his taking strong medication. He cited the instance where he had asked her to keep the medication in a safe place for him. Yet he failed to confide in her at the time of this potential mitigating factor. He also failed on two occasions in writing to inform her that he had taken medication. The reason given for this reticence being he was advised to wait for the formal CD5 investigation before divulging any further information. In my view there is no logic in withholding evidence with the potential to conclude the matter there and then in his favour.

[141] The letter from the Secretary³⁵ inviting CS Yapp to respond to the findings of the CD5 investigation is quite explicit:

"I now offer you the opportunity to provide me with a written response to the matters contained in this document t... so that I may determine what action should be taken in relation to this matter."

[142] Mr Baker made comment on the lack of information provided in CS Yapp's response of 7 December. What was offered to CS Yapp was quite clear, an opportunity to address the eight allegations in detail armed with the evidence as educed by the investigator. He chose a somewhat curt, and in my view evasive response. He said with reference to sleeping on duty:³⁶

"I submit also that the investigation report does not indicate any other breaches of the Code ..."

[143] For whatever reason he chose not to defend, clarify or deny any of the other allegations, yet he was aware that the Secretary's determination would rely, in part, on his response. Despite Mr Johnston's protestations that CS Yapp is contrite, regrets what he did and wants to remain employed by TPS, he did not help his cause at this critical juncture in the proceedings by failing to make the most of the opportunity open to him.

[144] CS Yapp has shown a lack of judgement in his conduct by sleeping on duty and the manner in which he communicated with CM Maxfield in the first instance and his trite approach to the CD5 process beyond that.

[145] CS Yapp's conduct cannot in anyway be condoned. However, I conclude that the determination of the Secretary that CS Yapp's actions constituted serious misconduct was not justified and the sanction of summary dismissal, disproportionate to his conduct. His dismissal was also inconsistent with sanctions against other officers whose conduct could have had much more serious consequences.

[146] Mr Baker argued the following with respect to CS Yapp's behaviour³⁷:

"In our view, his actions demonstrate a disregard for the safety and security of his peers in the Tasmanian Prison Service. His actions illustrate a significant lack of judgement, his actions in hiding important information from his colleagues and manager and his shifting stories about how he came to be asleep throw into doubt his reliability, honesty and trustworthiness, his latest reason for the action that any form of accountability demonstrates a lack of personal responsibility. These are all critical characteristics for a correctional supervisor and correctional officers. Remove any of these and you have a serious risk to the safety and security of correctional facilities."

³⁵ Exhibit A2

³⁶ Exhibit A3

³⁷ P98, L45

[147] Much of the basis of Mr Baker's argument that CS Yapp failed to demonstrate the critical characteristics required of a correctional officer³⁸ has been disproved. Given this there is no evidence that after 16 years of unblemished conduct the employment relationship has failed beyond recovery.

[148] As stated above, CS Yapp was not afforded procedural fairness TPS management had suspicions that CS Yapp was sleeping on night shift. Management also reacted to inference and innuendo in discovering him asleep. I have addressed earlier the management process that, in my view, should have been followed if there was a behavioural issue suspected or identified. CS Yapp was not given an opportunity to *"mend his way"*.

[149] At s30(6) the Act requires of the employee:

"Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving that the termination was unfair rests with the applicant."

[150] Relying on allegation (4) either singularly or in concert with allegations (5) and (6) the employer has failed to show that it had a valid reason for terminating the employment of CS Yapp.

[151] I conclude that CS Yapp was unfairly dismissed, I so find.

[152] CS Yapp is certainly not without blame. He has failed to maintain the standards one would expect from a Correctional Supervisor. There are a number of sanctions open to the Secretary to impose on CS Yapp for breaching the CCSS beyond dismissal. It is open to the Secretary to impose the sanctions she sees fit as well as issuing a formal warning on CS Yapp's employment record.

ORDER

Pursuant to Section 31 of the *Industrial Relations Act 1984* I hereby order the Minister administering the State Service Act 2000 (Department of Justice) to reinstate Stephen Yapp to his position of Correctional Supervisor with the Tasmanian Prison Service on or before 1 July 2011 and that all wages and entitlements be paid to him for the period from his termination until his reinstatement, discounting any wages or salary he may have earned during that time and that his service be deemed to be unbroken for the purpose of long service leave accrual.

J P McAlpine
COMMISSIONER

³⁸ P98, L45

Appearances:

Mr Mat Johnston for the Community and Public Sector Union (State Public Services Federation of Tasmania) Inc. for Mr Stephen Yapp

Mr P Baker for the Minister administering the State Service Act 2000 with Mr Brett Charlton, Ms Heather Chaplin, Ms Jo Maxfield and Mr John Withers

Date and Place of Hearing:

2011

January 25

February 15

Hobart