TASMANIAN INDUSTRIAL COMMISSION

CITATION: Eade v Minister administering the *State Service Act 2000* – Department of Justice [2023] TASIC 3

PARTIES: Michael Eade (Applicant)

Minister administering the *State Service Act 2000* (Respondent)

SUBJECT: *Industrial Relations Act 1984*, s 29(1A) application for hearing of an industrial dispute

FILE NO: T14964 of 2022

HEARING DATE(S): 19 & 20 December 2022

HEARING LOCATION: Tasmanian Civil and Administrative Tribunal, Launceston.

DATE REASONS ISSUED: 2 March 2023

MEMBER: Deputy President N M Ellis

CATCHWORDS: Industrial dispute – termination of employment – valid reason for termination - whether termination was fair - order issued

REPRESENTATION:

Applicant: N Gabbedy

Respondent: E Lim

MICHAEL EADE V MINISTER ADMINISTERING THE *STATE SERVICE ACT 2000* – DEPARTMENT OF JUSTICE

REASONS FOR DECISION 2 MARCH 2023

[1] Michael Eade, a Correctional Officer (CO) in the Launceston Reception Centre (LRC) had his employment terminated on the grounds that he used a detainee's clothes to mop up his urine which had seeped beneath the cell door. The detainee wore those urine stained clothes home the following day.[1]

[2] The applicant has been permanently employed since January 2005 and had a reasonable expectation of ongoing employment. The employer began an investigation pursuant to Employment Direction No. 5 on 15 October 2020, at which time he was suspended on pay under Employment Direction No. 4. He was found to have breached the State Service Code of Conduct. He admitted to the conduct during the investigation.

[3] The incident occurred on 29 August 2020. His employment was terminated on 24 August 2022, nearly two years after the incident.

[4] The applicant is seeking reinstatement to his former position and submitted it was a one-off lapse of judgement, resulting from mitigating factors including work related stressors.

[5] It was contended there was no valid reason for his termination, the termination was unfair and there is no reason why he should not be reinstated with conditions, back to his former role.

[6] The respondent submitted that the applicant's employment was terminated in accordance with s 44(3)(a) of the *State Service Act 2000* (Tas) (SS Act) on the grounds of breaching the Code of Conduct.[2] The decision was sound, defensible, well founded and therefore based on a valid reason. Procedural fairness was offered at all stages to the applicant.

[7] The respondent stated there was a loss of trust and confidence and the employment relationship could not be repaired. Reinstatement is impracticable.

BACKGROUND

[8] The ED5 process commenced on 15 October 2020, when the Secretary found reasonable grounds to believe that a breach of the Code may have occurred.

[9] On 10 June 2022, the Secretary determined that four of the five allegations were substantiated. The Applicant was offered an opportunity to respond to the investigation report and proposed sanction and offered the opportunity to meet with Secretary, which occurred on 8 March 2022.

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[1] On 9 September 2022, Michael Eade (the applicant), lodged an application pursuant to s 29(1A) of the *Industrial Relations Act 1984* (Tas) (IR 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).

[2] See *State Service Act 2000* (Tas) (SS Act) s 10.

[10] On 24 August 2022 the Secretary imposed the sanction of termination of the Applicant's employment from the date of determination.

[11] The following allegations were found to be substantiated:

(a) On or around 29 August 2020, whilst in the presence of correctional officers, the Applicant said words to the effect of 'fuck that' when he was asked to obtain a towel to clean up urine that had entered the hallway under the cell door housing of a prisoner. It is further alleged that the applicant proposed using the prisoner's clothes to clean up the urine;

(b) that the applicant placed clothing from the prisoner over urine that had come from his cell door into the hallway. It was also alleged that the applicant used that clothing to wipe up the urine. It was further alleged that the applicant left the clothes against the door where the urine had been until the following morning;

(c) On or around 30 August 2020 the applicant returned the clothing that he had used to cover the urine to the clothing bag where the prisoner's other clothes were placed; and

(d) during the shift, spanning 29 and 30 August 2020, the applicant lied to Ms Dickey when she enquired about whether he had used the prisoner's clothes to clean up the urine.

[12] The parties agree that the process was compliant with the requirements set out in ED5 and provided the applicant procedural fairness.

The Law

[13] The parties are not in dispute about the law which applies to the case. Section 30 of the IR Act relates to the criteria which I must apply in relation to disputes regarding termination of employment. Relevantly for this dispute it provides as follows:

> "(2) In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and employee concerned and that all of the circumstances of the case are fully taken into account.
>
> (3) The employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for the termination connected with –
>
> (a) the capacity, performance or conduct of the employee; or
>
> (b) the operational requirements of the employer's business.
>
> ...
>
> (5) 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.

(6) 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.

(7) The employment of an employee must not be terminated for reasons related to the employee's conduct, capacity or performance unless he or she is informed of those reasons and given an opportunity to respond to them, unless in all the circumstances the employer cannot reasonably be expected to provide such an opportunity.

(8) An employee responding to an employer under subsection (7) is to be offered the opportunity to be assisted by another person of the employee's choice.

(9) The principal remedy in a dispute in which the Commission finds that an employee's employment has been unfairly terminated is an order for reinstatement of the employee to the job he or she held immediately before the termination of employment or, if the Commission is of the opinion that it is appropriate in all the circumstances of the case, an order for re-employment of the employee to that job.

(10) The Commission may order compensation, instead of reinstatement or re-employment, to be paid to an employee who the Commission finds to have been unfairly dismissed only if, in the Commission's opinion, reinstatement or re-employment is impracticable.

(11) In determining the amount of compensation under subsection (10) , the Commission must have regard to all the circumstances of the case, including the following:

(a) the length of the employee's service with the employer;

(b) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated;

(c) any other matter the Commission considers relevant.

(12) Where the Commission finds that an employee's employment has been unfairly terminated and has determined that reinstatement or re-employment is impracticable, any amount of compensation must not exceed an amount equivalent to 6 months' ordinary pay for that employee.

(13) The Commission is to take into account any efforts of the employee to mitigate the loss suffered as a result of the termination of his or her employment."

[14] The respondent submitted the applicant's employment was terminated in accordance with s 44(3)(a) of the SS Act. Section 44 of the SS Act relevantly provides:

"Termination of employment of officers and employees

(1) The Minister may at any time, by notice in writing, terminate the employment of a permanent employee.

(2) The notice is to specify the ground or grounds that are relied on for the termination.

(3) The following are the only grounds for termination:

(a) that the permanent employee is found under section 10 to have breached the Code of Conduct;

(b) that the Head of Agency has requested the Minister under section 47(11) to terminate the employment of the permanent employee;"

[15] Section 10 of the SS Act relevantly provides the possible sanctions where a breach of the Code has been found. It states:

"Breaches of Code of Conduct

(1) The Minister may impose one or more of the following sanctions on an employee who is found, under procedures established under subsection (3), to have breached the Code of Conduct:

(a) counselling;
…
(g) termination of employment in accordance with section 44 or 45.
…
(3) The Employer is to establish procedures for the investigation and determination of whether an employee has breached the Code of Conduct.

Was there a valid reason for termination of the applicant's employment?

The applicant's case

[16] The applicant submitted that the issue is whether the conduct, which resulted in a breach of the Code of Conduct, constituted a valid reason for termination.

[17] The applicant has admitted to the conduct of using the detainee's clothes to mop up his urine, leaving the clothes in the urine and accepts the finding of a breach of the Code of Conduct. He does not accept that he proposed to use the detainee's clothes in a premeditated manner and admits he used the word "Fuck".

[18] It was submitted the reasons for termination must be sound, defensible and well founded. It was contended this conduct is not a valid reason for termination of employment.

[19] The applicant contends the working environment at the LRC is violent and officers are subjected to abuse and threats from detainees. It was alleged there is a lack of support and turbulent management over the last few years with a lack of guidance from management. Under-resourcing, over-worked and other difficulties have contributed to a difficult work environment as circumstances for consideration.

The work environment

[20] The applicant described the work environment as follows:[3]

[3] Exhibit A01.

"How would you describe the environment in the Launceston Reception Centre?.....It can be a lot of things. It's a very tight-knit team, but then it can be very [indistinct word], but you're – for 12 hours that you're there, it's a non-stop pressure cooker, really, I suppose, from what you can deal with on the regular day, what comes in that door and out that door.

Are all shifts 12-hour shifts?.....Generally. Generally it's a 12-hour shift.

And what sort of behaviour is subjected to by detainees?.....Well, I suppose, non-stop – probably abuse and angry words coming from them, they're not happy to be there so the inmates tend to take that dislike towards you. You're the reason that they're there and – with the lock ups, police lock ups that come through, you're definitely the reason that they feel that they're in there for a short amount of time before they go.

Are they violent?.....Yes, they can be, from – they resist from the moment they come in the door sometimes we're dealing with that. They don't want to be there and so they resist.

Have you ever been assaulted?.....Yes, a couple of times. At certain times, yes.

Have any of your colleagues been assaulted that you're aware of?.....Yes.

How do you deal with that?.....Well, you're virtually told that that's part of the job, it's what can happen, and you're expected to push through that.

Have you been personally abused?.....Oh, yes.

What sort of things are said to you?.....Oh, sorry to use the terms, but, like, that's in the gaol, you're pretty well referred to as a 'dog cunt', that's probably the regular. What they want to do to you, what they're gonna do to your family if they find you, general things like that, or about your pets. Anything to [indistinct words].

And how do you deal with that?.....The initial part is, I suppose, is the team environment that we have. So you work off each other. It gives you a little bit of strength to try and – a little bit of armour to try and cope, but it's like a duck, you try not to take it personally and notice it, and let it run off your back, and then when you go home at the end of your shift, you try and de-stress.

Can it wear you down, do you think?.....Pretty well."

[21] Correctional Officer First Class Philip Adkins' evidence was:[4]

"So, over the last few years, our workload has increased significantly, to the point where we – with our current staff, we've just been unable to cope with the workload and it's caused a lot of stress in the workplace and we've had a lot of people – like, we've had some of our staff go off on stress leave due to that. It is gradually getting better. So, through some union action and some negotiations with management, we have managed to secure some more

[4] Exhibit A02.

> staffing and provide some better rosters moving into the future, so in January we start a new roster with – as an example, we have two staff on our – on the floor working in the prison. We've now increased that to six. So we're sharing the workload with a lot more staff coming into January."

[22] He also stated he had suffered some mental health issues as a result of work and that it had taken its toll and worn him down. He sought support to help him through the issues.

In relation to snapping

[23] In the context of this violent workplace, the applicant submitted the cause of the one-off incident was said to be due to the trigger from the personal abuse from the detainee. In his interview with the investigator, Ms Anne McCullough, The applicant stated the incident was a one off and triggered by the detainee.[5]

> "Anne McCullough: Yep. Okay, so there's no dispute that you've made the decision to wipe up urine with his clothes. Do you regret that now?
>
> Michel Eade: Well it's the first time anyone's actually ever got to me. I can handle abuse and all that sort of shit. You shouldn't be doing the job if you take it all to heart and that sort of thing.
>
> Anne McCullough: Mm
>
> Michael Eade: And that's why I'm sort of bit annoyed with myself that I've got emotional before I'm logical
>
> Anne McCullough: Right, yes.
>
> Michael Eade: But I've never been in that situation before."

[24] The applicant provided the following evidence about the detainee's behaviour. He stated:[6]

> "Now, you say he was physically resisting, was he saying anything?.....He was yelling non-stop.
>
> I accept that what he said is probably going to be offensive, but to the best of your recollection, what was he saying?.....It was the 'dog cunt', style and – but mostly he was really harbouring on fucking my mother.
>
> So he was saying that to you?.....Yeah.
>
> And that was repeatedly, was it?.....Yeah.
>
> How did you feel about that?.....That was hard. That was a bit difficult in that time. Like I said, normally try not to – sort of runs off your back, but I'd just lost my mother-

[5] Exhibit R07 156.
[6] Transcript of Proceedings, *Eade v Minister administering the State Service Act 2000* (Tasmanian Industrial Commission, T14964 of 2022, Ellis DP, 19 and 20 December 2022) 11.

> in-law not long ago, and I found that a bit hard. It just seemed to hit home a little bit, but you focus on doing it – you don't take it personally, but he seemed to be focusing on me when we were in the cell, from a police officer, and then was focusing on me and give it all to me."

[25] In the same interview, The applicant said:[7]

> "I just couldn't believe that if it was urine, or that urine, water, whatever – when I saw it there- I just actually fucking saw my mother-in-law bathing in her own piss."

[26] The evidence from Mr Richardson in response to a question on the detainee involved in this incident substantiated the detainee's conduct. Mr Richardson confirmed:[8]

> "You'd accept from me, wouldn't you, that during the course of that evening, this same detainee said to The applicant, "Fuck off, you dog cunt. I'm gonna fuck your mother," and a range of other, you know, suitably [indistinct word] epithets?.....Yes. I don't remember the exact words, but he was giving us a mouthful, yes."

[27] The applicant relied on the medical statement,[9] dated 23 June 2021 from The applicant's treating General Practitioner, Dr Diane Hintum, of the Summerdale Medical Practice. She noted the "lifechanging and stressful events" of a recent marriage and his wife's mother death in August 2020. The incident occurred on 29 August 2020.

[28] Dr Hintum stated:

> "In the last couple of years The applicant has had some work-related stresses he's been seeing me for.
> …
>
> I would surmise that Michael may have had a lapse of judgement on the occasion when the incident occurred. It is currently being investigated which was affected by the stresses mentioned above."

Premeditation

[29] The applicant asserted the above evidence goes against the conduct being premeditated, rather it was an impulsive and a poor act. It was submitted the premeditation of the action relied on the allegation that The applicant said to Ms Veart; "Fuck that, I'll use his clothes" which was countered by the evidence of The applicant and Mr Richardson, who said he said "Fuck that".

[30] Ms Veart's evidence stated The applicant said: [10]

> "Fuck that I'll use his clothes," or words to that effect. I can't remember his exact- but that was basically, what he said, …"

[31] The applicant submitted Ms Veart may have had problems with her recollection of events in her evidence. It was alleged there was no premeditation by the applicant.

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[7] Ibid 151.
[8] Ibid 129.
[9] Exhibit R12.
[10] Transcript of Proceedings (n 6) 103.

[32] An allegation relating to the applicant lying was found to be substantiated by the Secretary. It was alleged the applicant lied to Ms Veart when she enquired about whether he had just used the detainee's clothes to clean up the urine.

[33] The submissions of the applicant were that his conduct would have been openly viewed by the control room officer on CCTV, so when he was asked if he had done just that, he replied "No". It was obvious he had mopped up the urine and admitted the response could have been handled better but it was not an attempt to conceal or lie about what he had just done.

[34] The applicant said he uses paper towels or rags to dispose of urine. He said using a mop and bucket, as suggested by the CO Richardson, was not a good idea as it all would have to be thrown out, unlike disposable paper towels. This suggestion prompted him to say "Fuck that". His evidence was that he went to the kitchen area at the end of the passage to get paper towels but found none. Subsequently, the detainee abused him and he says he snapped.

[35] Evidence from Ian Thomas, Director of Prisons, stated that no direction exists on the correct method for removing urine from outside cells. He concurred that using a paper towel is one solution.[11]

[36] Ms Veart's and Mr Richardson's evidence was that they did nothing to fix the situation of soiled clothes because Ms Veart was in the control room. Instead, she left it with the supervisor to deal with the next shift.[12]

[37] The applicant reported to CO Breeze about the clothing being urine stained and left beside the bag. When questioned by the interviewer he stated he wanted to give the oncoming staff the heads up as to why it stank of urine to enable them to protect themselves and to report a slip hazard, as part of a handover.

[38] Mr Breeze's evidence[13] confirmed he received a handover from The applicant and he stated there had been number of changes in management, all bringing a different approach.

The respondent's position

[39] The respondent submitted the valid reason for termination of employment is the Secretary's finding that the applicant has breached the Code of Conduct due to his conduct on the night of 30 August 2022. A finding that an employee has breached the Code of Conduct is one of the grounds set out in s 44(3)(a) of the SS Act for termination of employment.

[40] The respondent relied on the CCTV footage[14] which demonstrates the conduct. It shows the applicant walking up the passage to the end and into the kitchen, where he puts gloves on. He then walks up the front passage and opens the plastic bag, pulling the shirt and jumper out. However, dropping the shirt, he takes the jumper with him into the protection passage. He drops the detainee's jumper outside the cell and wipes up the urine using his foot, leaving the jumper pushed up against the door of the cell at 21:58. He goes out to collect the shirt and also uses it to wipe up urine, leaving it with the jumper against the door.

[11] Ibid 144.
[12] Ibid 117.
[13] Exhibit A03.
[14] Exhibit R30.

At 04:01, The applicant is filmed checking the cells with a torch and kicking the clothes up the corridor and back to the plastic bag.

[41] At 06:27, three COs open the cell and provide the plastic bag with the clothes to the detainee, the loose jumper and shirt separated from the bag. The other two officers witnessed the return of clothes. A policeman is talking to the CO's in the front protection passage. The detainee dresses himself in the clothes.

[42] The conduct is not in dispute. However, it was submitted the dispute surrounds whether The applicant's conduct was a temporary lapse in judgement or deliberate intentional conduct of many actions over a sustained period of time.

[43] It was conceded it is a challenging workplace with violent and verbally abusive behaviour from the detainees. It is a fact the detainees are in the care and custody of the State. Urinating under the doors of cells is common. It is agreed that using the detainee's clothes to clean up urine is unacceptable.

[44] The respondent submitted that using the detainee's clothes to clean the urine and denying this conduct constitutes a dishonest act and kicking the clothes down the corridor is a valid reason for termination of employment.

[45] Ms Veart gave evidence that she told him not to use the detainee's clothing.[15]

[46] Her evidence was that she believed there was a lot of history between the applicant and herself. She tried to speak to him about the incident, but after that was unsuccessful, she spoke to the supervisor, Rob Howard, confidentially. He suggested that officers get frustrated and to speak directly to the applicant. She ended up reporting to Les Dunkley, the Acting Superintendent of Launceston Reception Prison.

[47] Mr Richardson, a correctional officer since 2018, and on secondment for the last 48 weeks to Risdon, provided evidence.[16]

[48] His email to Ms Dunkley stated:[17]

> "CO Eade entered the control room. I asked him to get a towel from the laundry for me as I didn't have a laundry key on my bunch. CO Eade stated, "Fuck that." CO Dickey spoke with officer Eade. She challenged CO Eade on this position. CO Eade left the control room."

[49] In the interview transcript, CO Richardson confirmed the detainee was verbally and physically aggressive and alcohol affected.[18] He stated he and CO Veart saw officer Eade on the six big monitors using clothing to mop up the urine. He said The applicant responded "no" when Ms Veart challenged him asking if he did use his clothes. Ms Veart stated she knew he had used his clothes to mop up the urine and asked the question to try and talk about the incident.

[50] The detainee was signed out at 6.23am with the police. The team involved in the incident finished work at 6am. The incident was reported to the supervisor at the end of that shift, prior to the detainee's discharge.

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[15] Exhibit R31.
[16] Exhibit R32.
[17] Ibid Attachment 1.
[18] Ibid Attachment 2.

[51] Mr Richardson relied on Ms Veart to report the incident to the supervisor the next day and in cross examination he proposed actions he could have taken, such as calling a supervisor or going out to remove the clothes, but he was afraid of being "ridden" and bullied.[19]

[52] The respondent submitted the impact caused through the denial by the applicant placed his colleagues in a difficult position and they had to report his behaviour. This evidence illustrates the applicant proposed to use the clothing to mop up the urine and Ms Veart told him not to do that. There were a number of actions - not a single action over a duration of time - and his conduct was intentional and deliberate.

[53] Evidence from Ian Thomas outlined the requirements of COs to act in accordance with guidelines and Director's Standing Orders, focusing on Interim DSO 2.18:[20] "Hygiene and Grooming" and Interim DSO 1.25:[21] "Communicable Diseases". His evidence was:[22]

> "Why isn't there a specific instruction for this particular incident? This particular type of behaviour, given that we're told it's quite common?.....There are guidelines for these types of behaviours set out for staff to use. This type of behaviours reasonably common, but it's not as simple as saying if X is urinating under the door today and Y is doing it tomorrow, you can use exactly the same approach, you can't, you have to base it on the behaviour of the prisoner. Exactly what they're doing, how they're doing it, our knowledge of the prisoner, the – the cell or the watch house cell and the area that they're in. Hence why all our advice to staff and directions for staff are guidelines, for the staff to use, coupled with their own experience and training, to work out the best approach to take. And if they're unsure they can escalate it to a phone call."

[54] His evidence was that the personal qualities of correctional staff include personal integrity, decency, resilience and the ability to remain calm and focused in a crisis. This is reflected in the Statement of Duties[23] (SOD) which states the objective of the CO, contributes to the safe humane and secure containment of inmates and their rehabilitation.[24]

[55] He said the applicant's conduct was inconsistent with the key desirable qualities of COs and despite the three COs on duty being the same rank, he was the most senior and would have been deferred to for direction.

[56] Different accounts have been provided by the applicant according to the Respondent, including his interview, where he said he would not use a towel, rather a paper towel or a rag. The applicant admitted it was the wrong decision but he admitted he warned the detainee he was going to "drop his clothes in it" if he kept "pissing".[25]

[57] He admitted he lost it at that moment. He said at interview:[26]

> "Do you regret that now?.....Well, it's the first time that anyone's actually ever got to me. I can handle abuse and all that sort of shit. You shouldn't be

[19] Transcript of Proceedings (n 6) 169.
[20] Exhibit R27.
[21] Exhibit R26.
[22] Transcript of Proceedings (n 6) 144.
[23] Exhibit R25.
[24] Transcript of Proceedings (n 6) 137.
[25] Exhibit R07 6.
[26] Ibid 15.

> doing this job if you take it all to heart and that sort of thing, and that's why I'm sort of a bit annoyed with myself that I've got emotional before I'm logical, but I've never been in that situation before."

[58] In examination in chief, he said:[27]

> "Why did you do it on this particular night?.....That was a spur-of-the-moment thing. I'd picked – when I couldn't find anything in the kitchen and I walked along and grabbed his clothes out, he was yelling out from the cell, I could still hear the yelling, and I thought, "Well, I'll use that as a tool." My plan was to use it as a tool and I held – to try and say, "Man, you just need to relax and sit down there," and he'd just gone off with another hurl of abuse, and I – so that's why I just put the stuff on there and cleaned it up and then contained that spill from the cell, and that was it."

[59] The respondent stated that the applicant did not apologise and did not refer to the impact on the detainee or colleagues, demonstrating a lack of insight. Further, his response through his lawyers to the ED5 process, dated 1 July 2021, was the first time an apology appears.

[60] At the meeting with the Secretary on 8 March 2022, where it was made clear that termination of employment was being considered, the notes indicate the applicant did not grasp the seriousness of the conduct and his responses failed to recognise the responsibility to support others due to his seniority.[28]

[61] It was acknowledged in his witness statement that he accepts what he did was wrong and he would not do it again.[29] The Respondent contends this admission is too late and his responses fail to demonstrate the seriousness of the action and the inappropriateness of denying his conduct to his colleagues.

[62] The conduct was found to have breached ss 9(1), 9(2), 9(3), 9(6) and 9(13) of the Code of Conduct. The substantiated findings by the Secretary were that the applicant spoke inappropriately in front of COs Richardson and Veart and that he proposed using the detainee's clothes to mop up his urine.

[63] Further, the following conduct was not disputed by the Applicant. The applicant placed the detainee's clothes over the urine outside his cell and used the clothes to wipe up his urine and then returned them next to his bag.

[64] Finally, it was found that the applicant lied to Ms Veart when she enquired whether you had used his clothes to clean up his urine.

[65] It was submitted the above conduct resulted in breaches of the Code of Conduct and the loss of trust and confidence in the applicant as an employee, which formed a valid reason for termination of employment. It was submitted the decision was sound, defensible in compliance with s 30(3) of the IR Act.

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[27] Transcript of Proceedings (n 6) 14.
[28] Exhibit R18.
[29] Exhibit A01 [21]-[22].

Consideration

[66] To determine if there was a valid reason for his termination of employment, the onus of proof rests with the respondent.[30] Valid reasoning pertains to whether there was a sound, defensible, well founded reason for the dismissal, in the context of the employee's capacity or conduct. [31]

[67] Section 30(3) of the IR Act provides clear criteria with respect to termination of employment and states:

> "The employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for the termination connected with -
>
> the capacity, performance or conduct of the employee; or
>
> the operational requirements of the employer's business."

[68] The parties agree the applicant had a reasonable expectation of continuing employment as a permanent employee of the State Service. There is agreement the requirements set out in ED5 have been met and procedural fairness has been afforded to the applicant. There is also an acceptance from the applicant that he has breached the Code of Conduct for his conduct in using the detainee's clothes to wipe up the urine.

[69] The reasons for the termination of employment to be found must be valid, not just in the subject matter, but in soundness, defensibility and based on a proper foundation.

[70] An examination of the key reasons and evidence provided by the respondent for the valid reasons are as follows:

a) Breaches of the Code of Conduct;

b) the loss of trust and confidence in the Applicant as an employee;

c) due to the conduct, he was not fit to work in the Department of Justice and more broadly the state service;

d) the applicant showed little indication of remorse for his inappropriate behaviour in the workplace; and

e) the significant impact on colleagues present on that shift.

[71] I am not bound by the reasons given by the employer. Rather, I must determine afresh whether there was a valid reason for dismissal based on all the evidence before me.

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[30] Section 30(5) of the IR Act states the onus is on the employer to prove a valid reason for the termination. This context should be applied to the relationship between an employer and employee where both parties have rights, responsibilities and duties conferred and imposed on them.

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

[72] Relying on the principles outlined in *Walton v Mermaid Dry Cleaners Pty Ltd*,[32] my role is not to stand in the shoes of the employer who made this decision, rather the role of the Commission is "…to assess whether the employer has a valid reason connected with the employee's capacity or conduct."[33]

[73] In response to the respondent's preliminary submissions relating to the nature of the hearing for termination of employment made at hearing, I concur with President Barclay's determination in T14912 of 2022 *Aitken v Minister administering the State Service Act 2000-Department of Education*, where he said at paragraph [39]:

> "In my view the Commission was (and is) able to determine the nature of the hearing required by section 29 to be carried out when exercising its jurisdiction to hear and determine the industrial matter, namely, termination of employment. This includes the holding of a de novo hearing."

[74] I have taken into account all the circumstances of the case[34] and have considered the evidence, the authorities and materials provided by the parties, and the context of the conduct and applied a common sense approach to my determination.

[75] The facts are largely uncontested and the CCTV footage clearly demonstrates the conduct which led to the finding of a breach of the Code of Conduct. The other allegations relating to his premeditation of the incident and inappropriate swearing and lying to colleagues after the event were not conceded by the applicant.

[76] In addressing the allegation about lying, I am satisfied, considering the tone of the response to the obvious question, the response was not a malicious lie to conceal his actions. It is clear he knew his conduct was captured on the monitors and observed by CO Veart. Rather, to me, it appeared to be a flippant or dismissive remark from the applicant who had just snapped as a result of the personal abuse from the detainee. Ms Veart stated that the applicant knew what she was talking about but he said "Nope" in response and kept walking. Ms Veart admitted it was a question with the intent to open up the conversation. I accept the applicant's admission that he could have handled it better. I do not accept that the comment was a lie intended to mislead or gain personal advantage. All employees present knew what he had done. I am satisfied this isolated response di not unduly upset his colleagues.

[77] I accept the evidence of The applicant and Mr Richardson, that The applicant used the term "Fuck that" and note this is unacceptable workplace communication. I did not hear any evidence to say if this was a pattern of communication by the applicant or a one-off event. His evidence is that he thought it inappropriate to use the suggestion from CO Richardson to use a mop and bucket for OHS reasons, but intended to seek out paper towels from the kitchen and he thought CO Richardson was coming with him to assist. While not condoning the use of swear words, I am not surprised swear words may be used occasionally by the COs in the context of a stressful work environment, where there is a heightened level of verbal abuse by the detainees.

[78] Turning now to whether his action was premeditated rather than a momentary lapse of judgement, it was stated he went to the kitchen area to get some paper towels to mop up the urine. The CCTV footage shows him coming out of the kitchen with gloves on and no

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

[33] Ibid 685.

paper towels. From the kitchen, he walked straight to the detainee's tied bag and got the jumper and shirt out. I am unable to ascertain if the detainee was still abusing him to trigger the "snap" as the cell door is in the front protection passage, covered by a different CCTV camera. I note his evidence is not clear on the sequence of these actions. This action happened within one hour of the detainee's admission.

[79] Based on the evidence, I am satisfied there appears to have been a build-up of abuse, with a focus on his mother, by the detainee and some time lag in his decision making process. Regardless, he picked up the clothes prior to warning the detainee with the intention to mop up the urine, which is completely unacceptable conduct by a Correctional Officer at any time. Later in the night, he returned the urine soaked clothes next to the bag. The exercise of professional judgment of the applicant was seriously misplaced and the conduct happened over a six hour period.

[80] I do accept there was a degree of loss of control by the applicant as stated in his evidence, which affected his decision making on that shift. The verbal abusive attacks directed to his mother following the recent loss of his mother in law would be sufficient to cause upset for even the most hardened person. This is supported by the medical statement from his General Practitioner, stating that The applicant may have had a lapse of judgement affected by work related stressors and life changing recent events.

[81] However, this conduct by a CO towards a detainee contravenes the minimum standard of behaviour set out in the Statement of Duties, which direct him to consider people equally, influence positive behaviour, be respectful, act professionally, place public interest over personal interest and take responsibility for situations in a challenging work environment.

[82] The lack of a clear written direction on how to clean up urine does not excuse this action. The evidence from colleagues indicate they all use different cleaning methods, from paper towels, cloth towels or a mop and bucket. This conduct breached the Interim Director's Standing Order 2.18 Hygiene and Grooming requirement to dispose of waste in accordance with OHS requirements. Using a detainee's clothes to mop up urine is not in accordance with OHS standards.

[83] Mr Thomas' evidence was the directions for staff are guidelines and discretional. I am satisfied there is no specific direction for the removal of urine outside a cell, rather broad OHS requirements and standards to be adhered to, using professional judgement. The use of personal protective clothing and equipment was evident on the video used by the applicant during the admission of the detainee. I find the applicant breached the DSO requiring compliance with OHS requirements.

[84] There is no dispute the LRC is a volatile work environment and the highest standards of professionalism are required at all times.

[85] The conduct of using the detainee's clothes to mop up his urine is unacceptable behaviour of a CO. It does not comply with the qualities set out in the CO SOD and breaches the OHS requirements set out in the Interim DSO 2.18. The conduct has been found to breach the provisions of s 9 of the SS Act and the State Service Code of Conduct, findings which I concur with. Further, I am satisfied the reasoning for termination of employment based on the applicant's conduct on the 29 August 2020 is sound, defensible and well founded.

[86] I am satisfied that conduct during the incident constitutes a valid reason for termination of employment pursuant to s 30(3)(a) of the IR Act.

Was the termination of employment fair?

[87] Having found, on the balance of probabilities, that the applicant's conduct constituted a valid reason for the termination of his employment by the respondent, I will now turn to determining if the termination of employment was unfair.

[88] This onus of proof lies with the applicant, as stated in s 30(6) of the IR Act:

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

The applicant's position

[89] The applicant submits the termination of employment was unfair for the following reasons:

a. The abusive work environment;

b. the lack of counselling and support for COs;

c. the long period of service, nearly 16 years without prior incident;

d. the genuine response and trust from other colleagues, and his capacity as CO during a workforce shortage;

e. the severity of the sanction compared to other sanctions arising from incidents at LRC;

f. the psychological toll on the applicant; and

g. The applicant's cooperation with the investigation, his remorse and desire to make amends.

[90] It was stated there is no dispute the work environment is challenging.

[91] Mr Oliver Breeze gave evidence on the context of the management of the LRC workplace which is as follows:[35]

> "I've worked under seven superintendents in the four years I've been there. A lot of people acting up, some people that I've only met briefly, some people acting as chief superintendent from Risdon that you might see for a period of one or two hours on a Wednesday during training day, and then not see them again for a lengthy period of time. So I guess, a lot of changes when it comes to management, and while the DSOs govern our operation procedures, a frequent change in staff does lead to inconsistencies.
>
> Is Launceston Reception Prison managed from Hobart or Launceston?.....Currently it's being managed from Hobart. Chief Superintendent Dunk is residing there, I

[35] Exhibit A03 52-53.

> believe, and coming up every Friday, I understand. So there's an acting superintendent substantive that's in the – well, you know, acting substantive, that is currently there most days, but the chief superintendent is working out of Risdon for the majority of the time.
>
> Does that cause any issues at your level in terms of what's expected and how you should [indistinct words]?.....Yeah, often you'd like to get an answer to something or just have the OIC, the officer-in-charge, there to ask certain questions, or to perhaps resolve matters in a more prompt manner, but with so many acting people over that period of time, you don't always, I guess, have a good understanding of their thoughts or processes, or command process. So you're working under someone that you're seeing infrequently."

[92] He describes the workplace as more challenging that working in the Army due to the better support network in the Army. He said:[36]

> "But the dynamics of the detainees and prisoners we get in there, is quite often violent, quite often it's the first time they've come into custody. It's as diverse as any prison. I've toured prisons overseas, and because you're getting them straight in from the police, you don't know what they're in for. You're getting a very brief oversight from Tas Pol when they bring them in, and it can be highly aggressive nature, combative, right up to suicidal [indistinct word]. So, you've got people that are wanting to fight, as soon as the charge room doors open, to people that are wanting to slash up as soon as they're in our care. It's volatile, and it's a challenging workplace.
>
> What does that do to you as a correctional officer overtime?.....I guess I was fortunate, I came into the job later in life and had a – a fair amount of life experience from military service to working in remote Aboriginal communities. But there's so many things you see in prison that the general public have no idea of what we observe, from bronzing, where they cover the cells – the cell, and themselves, in their own faeces, to my first serious slash-up where someone used a razor blade on themselves, that – I don't think it matters where you've been or what you've seen in operational duties that is confronting. Self-harm is something that you – you observe and you think, "Gee, that's a tough day at the job." And then often you go and talk to one of your colleagues going, you never guess what happened last night. But of course when you've got officers who've been in the job 10, 15, 20 years, they say, "Oh, yeah, nah, he does that all the time." But it is confronting."

[93] Mr Matthew McGillvary, LRC clinical nurse, provided this evidence on the workplace:

> "And are they violent towards correctional officers?.....Yes. Yes –
>
> And are they – verbally abusive?.....Yes, I've – I've seen a number of correctional officers – I've – I've been on shift with have been assaulted. There was one guy that was assaulted by a – a man that come back from court and so I finished my shift and went and sat with him at the hospital 'cause he was left alone. So it's – it's not uncommon, there's – there's a supervisor there – Mr Armour, he's been assaulted numerous times to the point where I think he got a whole personal injury pay out and had to have surgery in his face. So it's – it's extremely common."

[36] Transcript of Proceedings (n 6) 56.

[94] Mr Kenny Dunk, a retired Correctional Officer recalled the environment as toxic. He said in examination-in-chief:[37]

> "In your statement in paragraph 4, you describe the environment within the Launceston Reception Area as 'toxic'. What do you mean by that?.....That's probably a bit hard to contextualise in a short period of time, but – the environment itself, I say in my statement that it's aggressive, violent, confronting, it doesn't really do justice to how – how [indistinct words] it is dealing with that day in, day out. But on top of the, the violence, [indistinct words], aggression, and – and difficult work circumstances, you've also got a lot of difficulties between staff members there as well. And there – there's a lot of staff members that, in my experience, didn't do the job properly, who are either incompetent or afraid to do their job. And as a result, people like myself, Michael, and others that I work with bore the brunt of – of dealing with all of that violence from the inmates. So there was a bit of bad blood between staff at times, and a – a lot of disgruntled people because they were carrying other peoples work load basically. And, on top of that, there were issues with supervisors and superintendents. And, rarely or never supported staff under those circumstances. You were doing the job on your own."

[95] Ms Veart, Correctional Officer currently undergoing retraining, recalled the type of detainee in cross examination:[38]

> "You refer to the behaviour of this young person back in 2020 as no better or worse than some?.....Correct.
>
> Is that the sort of behaviour that you're used to seeing from detainees on a daily basis?.....Yes.
>
> And you refer to him as carrying on like a pork chop?.....Correct.
>
> What was he doing?.....I think he was hitting walls. He was screaming. He was – bail when sobers are usually quite vocal.
>
> But what was he doing? I want to know what he was doing?.....I cannot remember off the top of my head what he was doing. I think he was hitting, he was being quite vocal. Hitting the wall, that is."

[96] Mr Richardson, who has since been seconded to the staff development and training unit at Risdon Prison complex, gave further evidence:[39]

> "And that doesn't stand out that much because that's the sort of stuff you deal with every day, isn't it?.....Yes, it's, to coin a phrase, "It's like water off a duck's back."
>
> So unfortunately in your line of work, on a daily basis you'll deal with people who are physically violent. Is that right?.....Yes, it is.
>
> And verbally abusive?.....Yes."

[37] Transcript of Proceedings (n 6) 86.
[38] Ibid 108.
[39] Ibid 128.

[97] Mr Thomas gave evidence that the LRC had a more difficult environment in August 2020 due to the split roster because of COVID. [40] He acknowledged overtime, short-staffing issues and the agreement to increase staff on the roster. He acknowledged working in the environment can be potentially physically and verbally threatening and acknowledged the stress of being a CO.

[98] Witness evidence suggests that there was insufficient staff counselling and the constant change of managers resulted in a perceived lack of support.

[99] The applicant submitted the lack of organised counselling and support for CO's should be considered as part of the circumstances. Evidence was led that CO's do not receive active management support and there is a lack of effective mental health support.

[100] It was stated the 'MATES' program[41] lacked confidentiality and was not widely used. Evidence was provided that other officers provide informal support for each other but not through the MATE service.

[101] Additionally the Employee Assistance Program[42] is offered but the evidence indicated it is not used. The CO witnesses for the respondent did not provide evidence in relation to workplace support or the MATE program.

[102] The applicant has worked at LRC for nearly 16 years. During this period, the applicant admitted to only one incident in his working career. The applicant's evidence was that in around 2008, about 70 or so officers, including himself were involved in forwarding an inappropriate email with links as part of an email train, within the prison. [43] He admitted those emails contained pornography. He met with management and realised it was the wrong thing to do and it never happened again. That was 12 years ago and early in his career. There have been no other disciplinary or performance issues raised.

[103] Many witnesses raised examples of other alleged serious incidents where the CO involved did not receive a sanction. Direct evidence was provided by Clinical Nurse Mr McGillivray involving an attack on him by a detainee, when a CO opened a cell door contravening the policy of the requirement for two CO's to open a cell door. It was alleged that this incident had far worse outcomes, was a breach of guidelines and there appeared to be no investigation into the conduct of officers on that shift.

[104] Mr Thomas, Director of Prisons, gave evidence[44] there would have been an internal review and escalation to review if it needed to go for a more formal investigation which could include an ED5 Code of Conduct investigation. He stated that the people involved in the incident would be interviewed to ascertain the appropriate course of action.

[105] It was alleged that this incident had far worse outcomes, was a breach of guidelines and there appeared to be no investigation into the conduct of officers on that shift.

[106] The applicant relied on *Stephen Yapp and MASSA(DOJ)*,[45] where it was found the applicant's dismissal was inconsistent with sanctions against other officers whose conduct could have had more serious consequences, and it was submitted this case directly relates

[40] Ibid 151.
[41] Ibid 37, 55; exhibit A03.
[42] Transcript of Proceedings (n 6) 32, 55, 73.
[43] Ibid 9.
[44] Ibid 149.
[45] T13751 of 2011.

to the evidence of the incident involving Mr McGillivray. Mr Yapp, a Correctional Supervisor had his employment terminated following a finding of a breach of the Code of Conduct for sleeping on shift. Commissioner McAlpine found the termination was unfair. He observed that the case of another CO who fell asleep monitoring the control room and bank of monitors was more serious misconduct, yet his employment was not dismissed.[46] He stated CS Yapp was much less culpable than the above example.

[107] The applicant further relied on *United Voice, Tasmanian Branch and MASSA*,[47] where a Correctional Supervisor was involved in a strip search of a female detainee. Following the finding of a breach of the Code of Conduct, his employment was terminated. President Abey found there was a valid reason for the termination of employment but it was unfair and disproportionate to the seriousness of the offence due to the mitigating and environmental factors. The applicant submitted the circumstances are similar to this case and that the sanction is disproportionate to the seriousness of the action, when considering the mitigating factors.

[108] It was submitted The applicant has shown remorse, he accepts the conduct was not acceptable and he would never repeat this conduct. His evidence was that he cooperated with all aspects of the investigation and process, made full admissions in relation to his conduct and that he fully accepts what he did was wrong.[48]

[109] Other mitigating circumstances raised by the applicant include confirmation he had raised the incident with the oncoming shift. The applicant's evidence[49] was that he gave the oncoming shift the heads-up that the area was wet and at interview, he said he left the clothes which had urine on them beside the bag.

[110] Mr Breeze's evidence supported a handover from The applicant and he stated:[50]

> ".....Obviously, I was aware of the slip hazard. I can't recall any action I undertook, but certainly, part of your duties when you come on would be to do a lap around the facility as the oncoming shift, and it'd be speculation to say what I did during that time, but certainly the first lap would have been noting that there was urine there, or a fluid there, because it's very common for that to happen."

[111] The applicant contests that a number of officers could have replaced the detainees clothes prior to his discharge; the two COs on shift who had witnessed the incident; the oncoming CO who had received a handover and actually discharged the detainee and provided the urine stained jumper and shirt back to the detainee or the Supervisor, Mr Howard who Ms Veart had reported the incident to at 0600 hours, prior to the detainees discharge. It was submitted all of these employees had a responsibility to the detainee and yet no-one rectified the situation for the detainee.

[112] Mr Richardson's evidence was that he could have rung the on-call supervisor, he could have gone out and removed the clothing but he didn't feel comfortable. [51]

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[46] Ibid [134]-[137].
[47] T14114 of 2013.
[48] Exhibit A01; Transcript of Proceedings (n 6) 16.
[49] Exhibit R07 12, 14; Transcript of Proceedings (n 6) 16.
[50] Transcript of Proceedings (n 6) 51.
[51] Ibid 132.

[113] It was submitted the applicant has already suffered severe psychological damage and the incident occurred over two-and-a-half years ago. He was suspended on pay for around two years prior to his termination of employment.

[114] The applicant stated this isolated incident was the misconduct which formed the basis of termination, despite it being the only significant disciplinary conduct during his employment.

[115] The applicant stated he is keen to return to his role as Correctional Officer as he enjoyed the role and working with the team in the unique environment at LRC.

[116] Mr Richardson acknowledged that The applicant had no authority over him but he didn't feel comfortable to intervene as Ms Veart was handling the situation. He did not say he was bullied by the applicant. He said:[52]

> "Why didn't you do something about the clothing at that stage?.....Because I didn't want to be ridden. I – became quite anxious and, it was easier just to leave it and deal with it the next day. Mr Eade is a senior officer, and the culture there, at that time, has improved but it wasn't very forgiving. So, I didn't want to be ridden and be the subject of intimidation."

[117] Mr Breeze gave evidence:[53]

> "Now you've – you've mentioned bullying just then, it was suggested to The applicant under cross-examination that he had been bullying Estelle Veart. Are you aware of – of any of that?.....I'm aware of the accusation. But I've – I've never seen Michael bully her. I've never been present where she's actually been bullied by anybody. But I know that she's very fragile, and I've never had an issue with Estelle. And I've never seen Michael do anything of a nature where I've cause to question his actions. But I've seen other people bully, and it has troubled me."

[118] Evidence from Mr Breeze[54], Mr Dunk[55] (retired), Mr Adkins[56], Mr McGillivray[57], supported working with the applicant in the future and attested to his capacity as a CO and stated their respect and support for him as a colleague and co-worker. Four witnesses also attested they had not seen the applicant bullying other staff members.

[119] Mr McGillvary, who works on regular basis with The applicant, stated that he had never seen The applicant bully Ms Veart and he was surprised by the allegation by Ms Veart. [58] He stated it was not the sort of behaviour that the applicant is liable to do.

[120] In closing, counsel for the applicant summarised the value placed on the applicant by his colleagues and their wish to continue to work with him. He submitted the respondent's witness oral evidence did not adduce anything about the prospect of working with the applicant in the future, nor was there anything mentioned in their witness statements. [59]

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[52] Ibid 131.
[53] Ibid 51.
[54] Exhibit A03.
[55] Exhibit A06.
[56] Exhibit A02.
[57] Exhibit A04.
[58] Transcript of Proceedings (n 6) 76.
[59] Ibid 166.

[121] The applicant stated that the termination of employment was unfair and he seeks reinstatement.

The respondent's position

[122] The respondent submitted the termination of employment was not unfair. For completeness, I have copied their written submissions below (citations omitted):

> "33. Unfair is not a technical term. It's plain and ordinary meaning is not fair, biased or partial; not just or equitable.
>
> 34. The onus is on the applicant to demonstrate that the decision was unfair.
>
> 35. For the termination to be unfair it must offend against the standard of reasonable industrial behaviour.
>
> 36. In the assessment of many factors, relevant to the circumstances of the applicant and the State, need to be considered and evaluated. Some of those factors are:
>
> (a) The particular nature of the applicant's employment as a Correctional Officer with the Department of Justice;
>
> (b) Personal qualities and skills required by Correctional Officers;
>
> (c) The nature of the breaches substantiated against the applicant and his conduct more generally;
>
> (d) The standard of personal judgment and integrity demonstrated by the applicant;
>
> (e) The level of compliance with directions, processes and procedures demonstrated by the applicant;
>
> (f) Interpersonal factors such as the applicant's relationships with his colleagues, his superiors and prisoners/inmates at the Launceston Reception Prison; and
>
> (g) The standard of leadership and trustworthiness demonstrated by the applicant as a senior employee.
>
> 37. Overriding the consideration of the application is the Commission's obligation to ensure fair consideration is accorded to both the State and to the applicant and that all of the circumstances of the case are fully taken into account – subsection 30(2).
>
> **Remedy**
>
> 38. The applicant seeks that the Commission imposes reinstatement. Reinstatement is opposed. As has been made manifest by the Secretary's communications, the virtue of the applicant's conduct the employer no longer has trust and confidence in him. Reinstatement is therefore impracticable."

[123] The Respondent submitted there have been numerous opportunities for the applicant to demonstrate insight into his conduct, accountability for his actions and how he would behave differently in the future. It is believed that he cannot change his behaviour to the

required degree and he has failed to demonstrate he can and will act ethically and professionally and with integrity taking accountability for his actions.

[124] Based on the applicant's responses, the respondent stated it was not surprising the Secretary formed the view that he did not grasp the seriousness of his conduct or that he had capacity to change. The respondent maintains the view that the applicant has demonstrated he is not equipped to be trusted to exercise the significant control over detainees required for the role.

[125] It was acknowledged the work environment can wear a person down but it was submitted this does not enable a finding that the environment is the reason why the applicant used the detainee's clothes.

[126] Counsel for the respondent further summarised the issues[60]:

> "The applicant refers to Mr Eade's long period of service without prior incident, and the genuine respect and trust that The applicant's colleagues place in him and his ability as a correctional officer. In my submission, this needs to be considered in the context of the evidence today from Ms Veart, where she referred or referenced long-standing bullying by The applicant, as well as Mr Richardson's evidence that he did not feel comfortable to take action and that he was afraid of being – I think the phrase he used was 'ridden'.
>
> It is submitted that the evidence as to his character and the opinion as to whether he's likely to behave in this way should be given – sorry, behave in this way in future should be given little weight."

[127] In response to the comparison with other allegations of misconduct involving other COs, the respondent stated there was not enough evidence to carry out a comparative exercise of the cases raised by the applicant's witnesses.

[128] Opposing reinstatement, it was submitted the Secretary has lost trust and confidence in the applicant as he cannot be trusted to exercise the powers of a CO, with significant control over vulnerable community members. It was stated the further statements were not before the Secretary and add nothing to the issue of unfairness, but it was accepted they are relevant to reinstatement.

[129] The Respondent submitted that reinstatement is impracticable on the basis that there is a loss of trust and confidence with the applicant as an employee.

Consideration and findings

[130] While noting the different statutory requirements to those in the IR Act, in determining whether a dismissal for misconduct may be "harsh, unjust or unreasonable", the Fair Work Commission Full Bench held in *B,C,and D v Australia Postal Corporation T/A Australia Post*, that the Commission were required to consider:[61]

> "The personal or private circumstances of the employee that bear upon the substantive fairness of the dismissal. [This includes, matters such as length of

[60] Transcript of Proceedings (n 6) 177.
[61] *B, C and D v Australia Postal Corporation T/A Australia Post* [2013] FWCFB 6191, [42].

> service, the absence of any disciplinary history and the harshness of dismissal for the employee and his or her dependents."

[131] Considering the context and personal circumstances of the applicant, I have considered the following factors as relevant to the determination of whether this sanction was unfair.

[132] The applicant had worked for LRC for 15 years with an unblemished work record, noting an exception of an earlier incident in 2008 regarding being part of a group forwarding an email which contained pornography. This conduct has not been repeated. He had not undergone any performance management nor received any disciplinary action or warnings over the last 12 years. I am satisfied he has demonstrated the key desirable qualities required of a CO during his employment, with no recent performance management noted. He did not demonstrate these qualities on this isolated occasion.

[133] The applicant has co-operated and provided statements to the investigator and management and consistently admitted the conduct. This conduct pertained to a one-off incident relating to the same detainee on the same night and was uncharacteristic based on witness evidence. He accepts there should be adverse consequences for him.

[134] I am of the view that LRC is a challenging work environment with limited employee support. The unchallenged evidence indicates high rates of workers compensation cases from LRC employees. At the time of the incident during the Covid pandemic, it was conceded there were workforce shortages and workload issues with overtime requirements.

[135] I am satisfied the staff support from the constant changing of management, the lack of trust in the external EAP providers and the MATE program resulted in an unsatisfactory support strategy at a time for employees working in a high risk workplace environment with known workload issues. The applicant would have benefited from more effective support which may have reduced the risk of his "snapping" resulting in the unprofessional conduct.

[136] The applicant was subjected to personal abuse from the detainee relating to his mother shortly after the death of his mother in law. His medical evidence reported on the stressful events leading to this incident, including recent marriage and the death of his mother in law the same month as the incident, and other work related stressors. The GP refers to a lapse of judgment on the occasion the incident occurred affected by the stressors.

[137] The applicant's classification was a CO, with the same ranking as the two colleagues on shift working as a team, reporting to the Correctional Supervisor, which is a promotable position. The evidence is they were equal colleagues with no one in charge over the others. I do not give weight to the submissions that weighted his sanction relating to his seniority and required leadership.

[138] In my view, with the benefit of the oral evidence at hearing, the applicant has shown remorse, accepts the conduct was wrong and provided an undertaking there will be no reoccurrence. I disagree with the Secretary that there will be of any likelihood of reoffending. I do not concur with the respondent that his admissions were too late. I have considered all materials before me and have not been limited to those which were available to the Secretary.

[139] The status of the Interim DSO's are based on legislation pursuant to the *Corrections Act 1997* and contain state-wide policy and procedural requirements. Specific instructions and guidelines regarding the management of prisons or units are contained in Operating

Manuals. Mr Thomas stated the IDSOs were discretional and treated as guidelines requiring professional judgement and experience. I note they are not prescriptive and are broadly stated principles. While this does not exclude employees complying with IDSO, it goes some length to explaining the context in which the applicant applied poor professional judgment in his conduct.

[140] Despite the applicant's unacceptable behaviour, in my view, there were many opportunities for other COs and supervisors to ensure the detainee had clean clothes to go home with. His two colleagues who witnessed the event could not articulate why they did not provide clean prison the clothes in the bag during the shift. The Supervisor, Mr Howard, was made aware of the incident prior to the detainee's discharge and the oncoming CO received a handover from the applicant. However, the dirty clothes were offered by the oncoming new shift to the detainee on discharge. Mr Thomas concurred with the view that other CO's could have rectified the situation to provide a humane environment, albeit which was caused by the misconduct of the applicant.

[141] In response to allegations The applicant was a bully, CO Richardson explained the workplace culture:[62]

> "So insofar as what The applicant had done, you were comfortable that Ms Veart had dealt with it?.....She was dealing with it, yes. I have found our work environment to be toxic at times, and I wasn't prepared to ride a colleague. Ms Veart was, out of respect to her and the position she was in that night, she was the C12 officer. She told me she was going to continue on with it. So, I went okay, you run with it. I've been here, if I'm required to make a statement or what have you, I will."

[142] I find the workplace was a difficult environment with limited employee support. There is insufficient evidence to make a finding relating to bullying, however it was stated the workplace environment was toxic.

[143] In *Stephen Yapp and MASSA(DOJ)*,[63] Commissioner McAlpine could directly compare the two similar cases with the benefit of evidence. As stated by Mr Thomas, all incidents should be investigated, notwithstanding the evidence of Mr McGillivray, who has not been contacted for an interview following an incident. In relation to the comparable cases, I find there is insufficient evidence of the circumstances to enable a proper comparison to be made.

[144] The consequences of his dismissal are significant, both financially and on a personal basis.

[145] Whilst the applicant's behaviour was inappropriate and unacceptable and was a serious error of judgement under pressure, I find the lack of any past performance issues indicate it was not a pattern of behaviour, rather a one off mistake due to the personal stress as outlined by his GP as a mitigating factor at the time. Given the demonstrated remorse in evidence, the recognition of the mistake and his statements he would never do that again, I am convinced that the likelihood of reoccurrence would be negligible.

[146] While I have found a valid reason for the employer to terminate the employment of the applicant, considering all evidence and materials in accordance with s 30(2) of the IR Act, I find the termination of employment was unfair and disproportionate in relation to the context

[62] Transcript of Proceedings (n 6) 132.
[63] T13751 of 2011.

and circumstances of the conduct.[64] I have taken into consideration the above relevant factors in the context of the conduct. The reasons include the lack of any previous performance management, any warnings revealing a pattern of poor behaviour during a lengthy career at LRC, confidence he will not repeat this conduct and the significant personal and economic impact on the applicant.

Remedy

[147] Section 30(9) of the Act provides that the principal remedy is reinstatement to the job he held immediately before the termination or if the Commission deems it appropriate, an order for re-employment of the employee for that job. Subsections (10), (11) and (12) provide the Commission with power to order compensation if in the Commission's opinion reinstatement or reemployment is impracticable and includes the matters to consider in respect to the issue of compensation.

[148] I rely on *Nicholson v Heaven and Earth Gallery Pty Limited*,[65] where Wilcox CJ said that all the circumstances of the case relating to both employee and employer need to be considered and evaluated to assess the practicality of reinstatement and if that poses unacceptable problems to productivity or harmony with the business, it may be impracticable to order reinstatement.

[149] In *Perkins v Grace Worldwide (Aust) Pty Ltd*,[66] the Full Bench commented that a loss of trust and confidence is a relevant consideration and each case must be decided on its own merits. They also said that for a viable and productive employment relationship there must be sufficient trust:[67]

> "In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive."

[150] The Full Bench of the Fair Work Commission considered the relevant principles in *Nguyen and Le v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* (citations omitted): [68]

> "[27] The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:
>
> - Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
>
> - Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will

[64] See IR Act s 30(6).
[65] (1994) 1 IRCA 199.
[66] (1997) IRCA 15.
[67] Ibid 191.
[68] [2014] FWCFB 7198.

destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.

- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate."

[151] It is the discretion of the Commission to determine whether it is impractical for the applicant to return to the workplace, after consideration of all the circumstances relating to both the employer and employee. If it is my opinion that it is impractical to be returned to the LRC, I will order compensation.

[152] The respondent relies on the Secretary's loss of trust and confidence in the applicant to work as a CO or in the State Service as the basis it is impractical for him to return to the workplace.

[153] There was limited evidence led by the respondent on the impracticality of his return to the workplace by his colleagues or supervisor. There was no evidence from Mr Howard or his two colleagues present on that shift whether they could work with the applicant in the future. I note Ms Veart is now being retrained and working off site and Mr Richardson is on secondment in Hobart. Neither employee is working at the LRC.

[154] Mr Thomas' evidence was that the conduct was not in line with the qualities of a CO, he showed no respect, no care and no integrity. He stated it was not his decision to what determination was made by the Secretary. While he supported the termination of employment, he admitted under cross-examination he had not seen all the documentation, nor the medical report.

[155] The evidence before me relevant to the loss of trust and confidence is contained predominantly in the termination letter from the Secretary.[69] The Secretary stated she did not consider the employment relationship could be repaired. During this process the Secretary provided numerous opportunities for the applicant to respond and, in my view, offered all elements of procedural fairness. His final letter to the Secretary, dated 15 July 2022, outlined his medical evidence, his remorse, his credibility and potential for change which included strategies to deal with a similar incident on reflection. The Secretary wrote in the Summary:

> "I acknowledge that you end the correspondence of 15 July 2022 with an assurance that you value your correctional role; have learnt from this situation and give an

[69] Exhibit R21.

undertaking that you will never engage is such conduct again. You also state that you can offer no rational explanation for why you behaved in this way however have sought professional help to ensure it will never happen again."

[156] She did not change her position after careful consideration of the additional submissions.

[157] Conversely, four of the applicant's current colleagues provided oral and written evidence in support of working with the applicant in the future.

a. Mr Kenny Dunk, retired CO, worked with the applicant for 8 years and stated he was a good, reliable colleague who he could always count on; he had his back.[70]

b. CO Oliver Breeze, stated he has worked with the applicant every week since 2018 and supported he is a great person to work with and has a good rapport with prisoners, with the ability to walk the yard by himself, due to the respect between inmates and himself. He said he was a good CO and would have no problem working with him in the future.[71]

c. CO Philip Adkins, who has worked with the applicant for 14 years and stated he was a capable CO and would be happy to work alongside him if her returned to work.[72]

d. RN Matthew McGillivray, has worked with The applicant since 2005 and stated he deals with inmates very well and "that behaviour is not like Michael" He said he wanted to work with him again as he "is confident, capable, proactive, insightful and responsible."[73]

[158] Having regard to all the evidence and materials, I find that it is not impracticable for the applicant to return to the LRC. His immediate colleagues have offered full support and have indicated their desire to work with him in the future. He is unlikely to have contact with the two colleagues who were on shift in the future work environment as they have been seconded or retrained elsewhere.

[159] I do not believe he will cause any issues to the harmony and productivity of the workplace. I am confident he will perform his duties in accordance with his SOD, which is supported by the lack of any performance issues throughout his career. He has worked at LRC for almost 16 years before his termination of employment with no criticism of his work performance (albeit one incident relating to inappropriate group emails early in his career). He has indicated he has received professional help to assist in his workplace stress.

[160] I do not support the Secretary's finding there is irreparable damage to the employment relationship. I also find there is negligible chance of the applicant repeating his conduct. He has already demonstrated this ability through a lack of repetition of forwarding inappropriate emails. I am satisfied his remorse and attestation to not repeat the conduct are genuine.

[161] However, I am convinced there should be conditions for his unacceptable conduct on the night and I do not condone his behaviour in any way. He made a serious error of

[70] Exhibit A06.
[71] Exhibit A03.
[72] Exhibit A02.
[73] Exhibit A04.

judgement, under pressure, which was in breach of the Code of Conduct, Standing Orders and his requirements under his SOD.

[162] Noting the clear legislative intention for reinstatement as the principal remedy for the finding of unfair termination of employment, s 30(9) of the IR Act sets out re-employment to that job may be ordered if the Commission is of the opinion that it is appropriate in all the circumstances.

[163] In *United Voice, Tasmanian Branch and MASSA (DOJ)*,[74] the Full Bench found reemployment rather than reinstatement to be a reasonable remedy under comparable circumstances. I am satisfied in this context, re-employment is appropriate.

[164] Accordingly, I propose to order to re-employment to the position immediately prior to the termination of his employment, with the same conditions under which he was previously working, from a prospective date. There will be no payment of salary between the date of termination and recommencement date. The period between the date of termination and the date of re-employment will not break continuity of employment for any leave purposes.

Order

[165] Pursuant to s 31 of the *Industrial Relations Act 1984* (Tas), I hereby order that:

a. The applicant be re-employed, not later than the week commencing 13 March 2023, to the position and conditions he held on the termination of his employment; and

b. the period between the date of termination and the date of re-employment will not break continuity of employment for any leave accrual purposes.

Neroli Ellis
Deputy President

[74] T14184 of 2014.