# DECISION

*Fair Work Act 2009*
s.394 - Application for unfair dismissal remedy

**Mr Gary McDermott**
**v**
**BHP Coal Pty Ltd**
(U2015/16219)

COMMISSIONER SPENCER BRISBANE, 26 SEPTEMBER 2016

*Application for relief from unfair dismissal.*

**Introduction**

**[1]** This Decision relates to an application made by Mr Gary McDermott (the Applicant) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act) for an unfair dismissal remedy alleging that the termination of his employment from BHP Coal Pty Ltd (the Respondent) was harsh, unjust and/or unreasonable.

**[2]** The Applicant was employed by the Respondent to work as an Operator at their Saraji mine, in June 2003. The Applicant was employed by the Respondent for a period of approximately 13 years. The Applicant's employment was terminated by the Respondent in relation to inappropriate workplace conduct allegedly engaged in by the Applicant on 15 October 2015. The allegations of conduct were considered by the Respondent to be in breach of the BHP Billiton Charter Values of Respect, Integrity and Accountability and contrary to the Respondent's expected standards of behaviour of its employees.

**[3]** The matter was not resolved at Conciliation and was allocated to the Commission as currently constituted. An interlocutory issue arose when the Applicant sought to advance evidence disputing the Step 2 Warning received by the Applicant in July 2015. The Respondent objected to this, as the Applicant had not, prior to the termination of his employment, disputed this Step 2 Warning. An Interim Decision on this threshold issue and the Respondent's application for legal representation, was provided on 5 May 2016[i].

**[4]** The substantive matter was heard at the Mackay Courthouse on Tuesday 31 May, Wednesday 1 June and Thursday 2 June 2016 and with final submissions on Tuesday 2 August 2016 in Brisbane.

**[5]** The Interim Decision also granted permission for the Respondent to be legally represented. As a result of this Decision, the Directions were amended to allow the Respondent to adduce further evidence with respect to the Applicant's case including the Step 2 Warning. The Applicant was represented by Mr Rowan Anderson, Legal Officer of the Construction, Forestry, Mining and Energy Union – Mining and Energy Division Queensland

District Branch (CFMEU). The Respondent was represented with permission by Mr Michael Coonan, Partner and Ms Christie Jenkins, solicitor, of Herbert Smith Freehills solicitors.

**[6]** Orders to attend were sought by the Respondent. The persons ordered to attend were former employees of the Respondent. Orders were issued for the attendance of Mr David Weickhardt, Former General Manager and Site Senior Executive, Mr Ron Stockley, former Supervisor and Mr Nigel Mansfield, BHP Employee. All provided evidence at the hearing in Mackay.

**[7]** It is noted that whilst not all of the evidence and submissions are referred to in this matter, all of such have been considered in making the Decision.

**Background**

**[8]** The Applicant was employed by the Respondent in June 2003 as an Operator at the Saraji mine ("Mine"). The Applicant's employment was terminated on 6 November 2015 due to two incidents. The incidents occurred on 29 June 2015 ("first incident"), involving an alleged breach of safety procedures, whilst operating a Light Vehicle, and on 15 October 2015 ("second incident"), involving a verbal altercation between fellow employees at the worksite.

**First Incident**

**[9]** The first incident involved the Applicant entering the Active Mining Area ("AMA"), where the Applicant was asked to take a Light Vehicle and move a sign. There is disparity between the parties regarding this incident. More detailed evidence on this incident is covered later in the Decision. The Applicant stated that he took the Light Vehicle and moved the sign as instructed. Upon turning the vehicle around, there was a Rear Dump Truck backing into the Excavator to be loaded within the AMA. The Applicant stated he radioed the Excavator Operator ("EO") and informed him that he needed to enter the AMA area. The EO responded "all clear." The Applicant proceeded to enter the AMA area; however, the EO then responded that the Rear Dump Truck was not shut down.

**[10]** Following this incident, a meeting was scheduled with Mr Ron Stockley (Supervisor) where it is alleged that he referred to the "Just Culture Decision Tree" and "BMA Guideline to Fair Play Policy". The Applicant was issued a Step 2 Warning as a result of this incident. Other employees also received disciplinary action. The Applicant stated the process was rushed as Mr Stockley was proceeding on leave. The Applicant stated that he did not receive a written copy of the warning letter until he received further documentation in these dismissal proceedings and then he stated he recognised his involvement in the incident was misstated. The Applicant was subject to this Step 2 Warning at the time of the second incident, and it was raised in the show cause letters in respect of the consideration of the second incident and the dismissal.

**Second Incident**

**[11]** The Applicant stated this second incident involved a minor verbal exchange outside a crib hut at the Mine. The Respondent concluded, on the basis of different recollections of the exchange, that this incident was significantly serious. The details of the second incident are set out in the show cause letter extracted below. The Applicant alleged he was sworn at by another employee. During the verbal dispute, it was alleged by the Respondent that the

Applicant said words to the effect of "*you suck dick*" to another employee, Mr Mansfield. Further, it was alleged that the Applicant said *"it doesn't matter, the scabby bugger will come and jump on it anyway."* No formal written complaint was made by any of the employees present during the exchange. However, the Respondent documented that employees raised the incident with management.

**[12]** Following this incident, a meeting was scheduled on 16 October 2015 with Mr. Abrams (Superintendent Prestrip) and Mr Michael Findlay (a CFMEU delegate). The Applicant provided a written statement ("GM03")[ii]. After the meeting and an ensuing process, the Applicant's employment was terminated.

**Termination Meeting**

**[13]** The Applicant stated he attended a further meeting on 25 October 2016 with Mr Bull (Superintendent at the Mine) and Mr Brad Crompton (the Applicant's Union representative), at which he was issued with a "show cause" letter[iii].

**[14]** The show cause letter asked the Applicant to provide a response, by no later than 5.00pm on Wednesday 28 October 2015, as to why the Applicant's employment should not be terminated for serious misconduct, and stated as follows:

> *"…*
>
> *Dear Gary*
>
> *Your Employment – Show Cause*
>
> *I refer to our meeting on 15 October 2015 with you when you were requested to respond to allegations of inappropriate workplace conduct engaged in by you on 15 October 2015. I note that Brad Crompton attended the meeting on 15 October 2015 as your employee representative.*
>
> *I also refer to our meeting on 16 October 2015 regarding this matter, during which you were requested to provide a further statement in relation to the allegations of inappropriate workplace conduct engaged in by you on 15 October 2015, and the subsequent investigation. I note that Michael Findlay attended the meeting on 16 October as your employee representative. The Company's correspondence to you dated 15 October 2015 advised that you are suspended from your usual employment duties on full pay whilst the company conducts its investigation into this matter. This investigation is now complete.*
>
> *Findings*
>
> *In reaching the following findings, the investigator has considered all relevant information, including your written and verbal responses and the information provided by other parties. The investigation has substantiated that on 15 October 2015 you engaged in a verbal altercation with two fellow coal mine workers, a contract employee and a BMA employee. During the verbal altercation, you directed the following comment to the contract employee 'scabs' (or words to this effect), and the following comment to a BMA employee 'you suck dick' (or words to that effect).*

*In your written statement dated 18 October 2015, you acknowledge the comment 'you suck cock' to the BMA employee, and also acknowledged making the comment '…the scabby/grubby…' to the contract employee. In your written statement dated 16 October 2015, you have also acknowledged I was deeply remorseful when I said it was off the cuff not directed at anyone just general stupid comment.*

*Breaches*

*Your actions are considered to be in breach of the BHP Billiton Charter Values and the BHP Billiton Code of Business Conduct. Specifically, your actions are in breach of the BHP Billiton Charter Values of Respect, Integrity and Accountability, and are contrary to the Company's expected standards of behaviours of its employees.*

*As you are aware, BMA are required to comply with all BHP Billiton and BMA policies and procedures at all times during their employment.*

*Outcomes – show cause*

*Gary, these findings are very serious. BMA is considering disciplinary action against you, which might include the termination of your employment. Before deciding the appropriate outcome, I would like to provide you with an opportunity to consider the findings of the investigation and your employment history with BMA.*

*I note that you were issued with a Step 2 – Written Warning on 15 July 2015. The circumstances of the Written Warning are that on 29 June 2015 you breached the Active Mining Procedure (SRM SOP 30.01 Section 13b) by intentionally allowing a light vehicle to enter an active mining area before all equipment was de-energised. You are currently still subject to this Step 2 – Written Warning.*

*You are required to provide a written response and to show cause as to why your employment should not be terminated. Please provide your written response to me via email at vaugh.abrams@bhpbilliton.com by no later than 5.00pm on Wednesday 28 October 2015. If you do not provide any written response by this time, I will have no alternative but to make a decision in relation to your employment based on the information presently available.*

*In deciding the appropriate outcome I will consider a number of factors including all of your written and verbal responses, all of the information obtained as part of the investigation, your employment history with BMA and any other relevant factors.*

*Direction not to attend work*

*You are directed not to attend work from today until further notice. You will continue to be suspended from your usual employment duties on full pay pending the conclusion of this process, and you must be available at the Company's request.*

*Employee Assistance Program*

*Gary, I understand that this may be a difficult time for you. I wish again extend to you the offer of any assistance you may require regarding this matter and also remind you that the Company's Employee Assistance Program is available to you by calling 1800 058 076.*

*I look forward to receiving your written response by 5.00pm on Wednesday 28 October 2015.*

*Yours Sincerely,*

*Vaughn Abrams*
*Superintendent Prestrip*
*BMA Saraji Mine."*

(emphasis added)

**[15]** The Applicant provided a written response to the show cause letter dated 26 October 2015. The response to the show cause letter stated as follows:

*"…*

*Dear Vaughn,*

*In the show cause correspondence dated 25th October 2015, and under your signature, I am advised that I am required to provide a response to yourself by no later than 5pm Wednesday 28th October 2015 (as amended to the 29th October 2015 following a request from Brad Crompton, Saraji Lodge President) to the allegations contained within.*

*On the 15th October 2015 I left the dump dozer to use the toiler at the R11 crib hut. When I came out of the toilet there were a number of people in the vicinity and I started talking to Nudge and Damian.*

*I asked Damian how long to get RPL'd on the shovel and he said that he had not had much of a go in it yet which the conversation was of a general nature and of nothing in particular.*

*Nudge then asked if I had been "busting for a shit" and more general discussion followed. During the course of this discussion Nudge said words to the effect of "we are here to pick up your dig rate you useless c@#t."*

*While it is not usual for Nudge to address fellow employees in such a manner on this occasion I was taken back by the comment as it was not in the general context of the conversation and as a senior Shovel Operator on SHE 37 I was offended by the comment. Without thinking I retorted with a comment to him to the effect that all he does is suck dick."*

*While I am not completely sure of next statement I made to the best of my recollection I said words to the effect of "next the scabby/grubby (not sure which) from down the*

*other end will be here on the shovel." This comment was not directed at anyone participating in the conversation or any particular person.*

*Damian then made a comment to the effect that "if someone called him a scab both of us would be gone." He also said that his hands were tied in respect to what machine he was allocated, usually SHE 37, and that he would prefer to be down at SHE 50.*

*I acknowledge Damian's comment and agreed with his position having known him for over 15 years and having a good relationship with him both on a personal and work level.*

*Nudge then made some further comment about "useless c@#ts" and I returned to my machine.*

*Conclusion:*

*I now recognise that regardless of the circumstances my comments were inappropriate and am deeply remorseful of my actions and any angst that they may have caused to any of those involved in the conversation or in the general vicinity.*

*As a BMA employee with over 12 years of service, including performing the roles of Step Up Supervisor and Trainer/Assessor I have never been involved in an incident such as this before or been disciplined as a result of such similar behaviour.*

*I have an excellent attendance record and a good work ethic always completing every task to the best of my ability in a safe manner.*

*In my roles as a trainer/assessor and Step Up Supervisor I have always treated everyone with the utmost of respect and have sought to foster the same attitude in all those employees I have trained.*

*I am not financially independent and am totally reliant on my income from my job to meet all of my financial commitments, including the additional and specific needs of one of my children who suffers from severe Autism.*

*If BMA were to terminate my employment at the conclusion of this process I would be placed in a position of severe financial hardship where I would not be able to meet my financial commitments, including the additional and specific needs of one of my children who suffers from severe Autism.*

*If BMA were to terminate my employment at the conclusion of this process I would be placed in a position of severe financial hardship where I would not be able to meet my financial commitments or provde for the needs of my family.*

*I respectfully request that when considering this matter and my response that if BMA are of a mind to take some form of disciplinary action against me that it considers all of the options available with the exception of termination.*

*I understand that the company are disappointed with my actions and I am prepared to undertake the necessary training and/or retraining considered necessary by the company at the conclusion of this process.*

*I thank you for taking the time to consider my response and look forward to being permitted to return to work and continuing my role as a productive member of the Mining Department Team.*

*Regards,*
*Gary McDermott."*

**[16]** On 6 November 2015, the Applicant attended a meeting in Mackay where Mr Abrams was present (Mr Crompton was connected by telephone as the Applicant's representative). It was at this time the Applicant was handed a termination letter with immediate effect. The termination letter, dated 6 November 2015, stated as follows:

*"...*

*Dear Gary,*

*Your employment*

*I refer to our meeting on 25 October 2015 during which you were requested to show cause in relation to the allegations of inappropriate workplace conduct engaged in by you on 15 October 2015, the specifics of which are outlined in the show cause correspondence dated 25 October 2015 ('show cause correspondence'). I note that your employee representative, Brad Crompton, also attended the show cause meeting held on 25 October 2015.*

*The company has taken into account the written response submitted by you dated 26 October 2015 and received by us 29 October 2015 ('show cause response'), as well as having regard to all relevant matters arising during the course of the investigation. In your show cause response, you state "I now recognise that regardless of the circumstances my comments were inappropriate and am deeply remorseful of my actions and any angst that they may have caused to any of those involved in the conversation or in the general vicinity.*

*Breaches*

*Based on the findings of the investigation, your actions are considered to be in breach of the BHP Billiton Charter Values and the BHP Billiton Code of Business Conduct. Specifically, your actions are in breach of the BHP Billiton Charter Values of Respect, Integrity and Accountability, and are contrary to the Company's expected standards of behaviour of its employees. As you are aware BMA employees are required to comply with all BHP Billiton and BMA policies and procedures at all times during their employment.*

*Employment History*

*At the time of the incident on 15 October 2015, you were subject to a Step 2- Written Warning, which was issued to you on 15 July 2015. The circumstances of the Written Warning are that on 29 June 2015 you breached the Active Mining Procedure (SRM SOP 30.01 Section 13b) by intentionally allowing a light vehicle to enter an active mining area before all equipment was de-energised. You are currently still subject to this Step 2- Written Warning.*

*Decision about your Employment*

*In the circumstances, having considered all of the information available to me, including your employment history with BMA, the investigation and your show cause response, I have decided to terminate your employment with effect from today (6 November 2016).*

*In accordance with the BMA Enterprise Agreement 2012, BMA will make a payment to you equivalent to 4 weeks' pay in lieu of termination of your employment. This payment will be made to you at the same time payment of your accrued entitlements will be paid to you.*

*Payment of Accrued Entitlements*

*Upon termination of your employment, you will be paid all outstanding wages and all accrued and untaken annual leave accruals. Details of your termination payments will be provided to you separately.*

*Post-Employment Obligations*

*After your employment ends, you must not disclose to anyone any confidential information about BMA. You also remain bound by all other obligations in your contract of employment and associated documentation which are expressed to continue after the termination of your employment.*

*Return of BMA property*

*Please ensure that all BMA property in your possession is returned to Vaughn Abrams (Superintendent Prestrip) by 4 November 2015. Your termination payment will not be paid to you until all BMA property is returned.*

*We thank you for your service to BMA and wish you all the best for the future.*

*David Weickhardt*
*General Manager/SSE*
*BMA Saraji Mine."*

**[17]** The Applicant submitted that the termination letter incorrectly categorised the conduct relating to the Step 2 Warning. Further, the Applicant stated that the termination of his employment was harsh, unjust and unfair.

**[18]** The Applicant argued that the Respondent failed to consider appropriate alternatives to dismissal, such as asking the employees to apologise to each other, providing further training

to the employees, or asking the employees to participate in a mediation session. The Applicant alleged that the Respondent failed to take into consideration the Applicant's length of service and history of employment. Further, the Applicant alleged the Respondent failed to adhere to its own policies and procedures, in reaching the decision to terminate the Applicant's employment.

**Legislation**

**[19]** The application was made pursuant to s.394 of the Act, which provides as follows:

> ***394 Application for unfair dismissal remedy***
>
> *(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.*
>
> *Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.*
>
> *Note 2: For application fees, see section 395.*
>
> *Note 3: Part 6 1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.*
>
> *(2) The application must be made:*
>
> *(a) within 21 days after the dismissal took effect; or*
>
> *(b) within such further period as the FWC allows under subsection (3)...*

**[20]** Prior to considering the merits of the matter the Commission must decide those matters prescribed by s.396 of the Act as follows:

> ***396 Initial matters to be considered before merits***
>
> *The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:*
>
> *(a) whether the application was made within the period required in subsection 394(2);*
>
> *(b) whether the person was protected from unfair dismissal;*
>
> *(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;*
>
> *(d) whether the dismissal was a case of genuine redundancy.*

**[21]** There is no dispute that the application was filed within the time period prescribed. The Commission's file indicates that the application was filed on 25 November 2015. The originating application stated that the dismissal took effect on 6 November 2015. As the date

of termination is not disputed between the parties, the application was made within the period required in s.394(2) of the Act.

**[22]** A person is protected from unfair dismissal, at a time, if that person satisfies those matters prescribed by s.382 of the Act, as follows:

> ***382 When a person is protected from unfair dismissal***
>
> *A person is protected from unfair dismissal at a time if, at that time:*
>
> > *(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and*
> >
> > *(b) one or more of the following apply:*
> >
> > > *(i) a modern award covers the person;*
> > >
> > > *(ii) an enterprise agreement applies to the person in relation to the employment;*
> > >
> > > *(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.*

**[23]** There is no dispute between the parties that the Applicant had completed the minimum employment period and was not jurisdictionally barred as a high income employee. No other jurisdictional objections were made by the Respondent. The Applicant was a person protected by the unfair dismissal provisions at the time of the dismissal.

**[24]** The Applicant alleged that he has been unfairly dismissed within the meaning of s.385 of the Act which states as follows:

> ***385 What is an unfair dismissal***
>
> *A person has been unfairly dismissed if the FWC is satisfied that:*
>
> > *(a) the person has been dismissed; and*
> >
> > *(b) the dismissal was harsh, unjust or unreasonable; and*
> >
> > *(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and*
> >
> > *(d) the dismissal was not a case of genuine redundancy.*

**[25]** There is no dispute that the Applicant is a person who has been dismissed. Those matters in ss.385(c) and (d) do not arise.

**[26]** The Applicant has alleged that the dismissal was harsh, unjust and/or unreasonable.[iv] In considering whether the Commission is satisfied that a dismissal was harsh, unjust or

unreasonable, the Commission must take into account those matters specified by s.387 of the Act, as follows:

> ***387 Criteria for considering harshness etc.***
>
> *In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:*
>
> *(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and*
>
> *(b) whether the person was notified of that reason; and*
>
> *(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*
>
> *(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and*
>
> *(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and*
>
> *(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
>
> *(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
>
> *(h) any other matters that the FWC considers relevant.*

**[27]** Regulation 1.07 of the *Fair Work Regulations 2009* provides the definition of serious misconduct, as follows:

> ***1.07 Meaning of serious misconduct***
>
> *(1) For the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning.*
>
> *(2) For subregulation (1), conduct that is serious misconduct includes both of the following:*
>
> *(a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;*
>
> *(b) conduct that causes serious and imminent risk to:*
>
> *(i) the health or safety of a person; or*

*(ii) the reputation, viability or profitability of the employer's business.*

*(3) For subregulation (1), conduct that is serious misconduct includes each of the following:*

*(a) the employee, in the course of the employee's employment, engaging in:*

*(i) theft; or*

*(ii) fraud; or*

*(iii) assault;*

*(b) the employee being intoxicated at work;*

*(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.*

*(4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.*

*(5) For paragraph (3)(b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform.*

**Summary of Applicant's Submissions and Evidence**

***(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and***

**[28]** In regards to s.387(a), the Applicant noted that the reasons given for the Applicant's termination of employment were that he breached the BHP Billiton Charter Values and the BHP Billiton Code of Business Conduct.

**[29]** The Applicant submitted that when determining whether or not a valid reason exists, the Commission must be of the view that the reason put forward by the Respondent is:

*"sound, defensible, or well founded. A reason that is capricious fanciful, spiteful or prejudiced could never be a valid reason."* [v]

**[30]** The Applicant submitted that when the reason for a dismissal is due to an allegation of misconduct made by the Respondent, the Commission must be satisfied that the alleged conduct took place. In *King v Freshmore (Vic) Pty Ltd*[vi] a Full Bench of the Australian Industrial Relations Commission stated:

*"When a reason for a termination is based on the conduct of the employee, the Commission must, if it is an issue in the proceedings challenging the termination, determine whether the conduct occurred. The obligation to make such a determination flows from s.170CG(3)(a). The Commission must determine whether the alleged conduct took place, and what it involved. "*

**[31]** Further, the Applicant submitted that a belief, even a reasonably held belief, as to the conduct by the employee for which the termination was based, is not sufficient for the purposes of s.387(a) of the Act and does not amount to a termination for a valid reason[vii].

**[32]** It was submitted on behalf of the Applicant, that the reason for termination was not *"sound, defensible, or well founded".*

**[33]** The Applicant explained the conduct that allegedly occurred in his response to the show cause letter included above.

**[34]** The Applicant, in his statement dated 18 March 2016, recalled the incident of the verbal exchange on 15 October 2015 as follows:

*"...30. On 15 October 2015 I was working day shift. This was the third day shift of my roster.*

*31. At approximately 8.30am I drove in a Light Vehicle to the Prestrip Crib Hut to use the toilet.*

*32. After I had used the toilet I was walking back to the Light Vehicle. At that time I saw Mr Mansfield and Mr Damien Barrett, WorkPac Operator. Mr Mansfield was sitting in an area outside the front of the Crib Hut and Mr Barrett was standing up not far from Mr Mansfield. I recall there were one or two other employees also in the outside area of the crib hut sitting down, although they were a little further away.*

*33. I had known Mr Mansfield for approximately 13 years as he had been at the Mine for longer than I had. I believed I had a reasonably good relationship with Mr Mansfield and we used to car pool for a period of a couple of years when he used to live in Marian, where I still live. In my view we had a good working relationship but would sometimes give each other a bit of stick. This was nothing serious and went both ways. Mr Mansfield had never raised an issue with it previously and it was common for such banter to occur at the Mine.*

*34. Mr Barrett had worked at the Mine for approximately 18 months. I understood that Mr Mansfield had helped him to get the job at the Mine and that the two had been good mates for many years.*

*35. Mr Mansfield was an Operator and had been working with Mr Barrett for a number of days. I understood this was because Mr Mansfield was "passing out" Mr Barrett on Shovel 37. "Passing out" is a term used in relation to the testing of an Operator to check they are competent to operate a particular piece of equipment and to check their skills and knowledge. The formal process is called RPL (Recognised Prior Learning). This would usually only take a few hours and is directed at ensuring*

*the Operator actually has the skills, it is not done to provide the actual training on the equipment.*

*36. I was a trainer and assessor on the Shovel. I understood that Mr Barrett would usually work on a Dozer or a Hydraulic Shovel. I was also of the understanding that Mr Mansfield would not usually work on the Shovel.*

*37. When I left the toilet Mr Mansfield made a comment towards me to the effect of "the wrong thing just came out of the shithouse". As I have stated elsewhere such banter was not uncommon. This initiated the conversation.*

*38. I said words to Mr Mansfield to the effect of "how long does it take to get RPLD on the Shovel". This was a reference to the inexplicably long time Mr Mansfield and Mr Barrett had been on the Shovel getting Mr Barrett 'passed out'.*

*39. Mr Barrett then said something to the effect of "I have not had much of a go yet". By this time both Mr Mansfield and Mr Barrett were standing. Mr Mansfield then said words to the effect of "were you busting for a shit". There were some further responses made but I do not recall all of what was said. There was nothing of particular note and I would describe it as usual banter.*

*40. Mr Mansfield then said to me "we're down here to pick up your dig rate you useless cunts". I found this surprising because as far as I was aware I had the one of the highest dig rates at the Mine. I then said words to the following effect to Mr Mansfield "you suck dick".*

*41. I also said words to the effect of "it doesn't matter, the scabby buggers will come and jump on it anyway". This comment was made in response to Mr Mansfield's comment to the effect that I was not a good Operator. The comment was not directed at Mr Barrett or any other individual. I did not call Mr Barrett a scab as I now understand BHP has alleged.*

*42. Mr Barrett then said words to the following effect "if anyone called me a scab me and them would both be down the road" and "you know me, you know me". I understood Mr Barrett to be saying that if anyone called him a scab there would be a fight and both people would be sacked.*

*43. I did not call Mr Barrett or anyone else a scab. The fact that I did not do so is clear from Mr Barrett's response to the effect of "if anyone called me a scab…".*

*44. The incident ended there and I returned to my Light Vehicle and went back to work..."*

**[35]** The Applicant, in his reply statement dated 24 May 2016, stated that he "*did not call Mr Barrett a scab* and "*did not say the word 'scab' but rather 'scabby' and it was not directed at Mr Barrett*." Further, the Applicant stated that he "*did not intentionally use the 'word' scabby in an 'industrial connotation' as suggested by Mr Weickhardt. The use of the term 'scabby' was a slip of the tongue*."

**[36]** The Applicant also stated in his reply statement that "*when Mr Barrett suggested that there would be an issue if anyone called him a scab I said words to the effect of "I don't blame you". I made it clear to Mr Barrett that I didn't call him a scab*."

**[37]** The Applicant gave evidence at the hearing as to what he said on 15 October 2015 as follows:

> *"PN 554 Which is your best memory?---Well, I said "scabby". I can't remember if "grubby" was in there, too. I can't quite remember.*
> *PN 555 Again, what is your best evidence? Is it scabby, is it grubby, it is scabby buggers, is it scab?---Scabby buggers, to the best of my recollection."*

**[38]** The Applicant alleged that the Respondent's basis, for deciding that the Applicant's actions were in breach of the above policies, was fundamentally flawed. It was argued on behalf of the Applicant that the Respondent dismissed the Applicant on the basis of vague and unhelpful 'Charter Values'. Further, the Applicant alleged the Respondent had no basis for determining that the Applicant acted in breach of what were the specific stated values of "integrity" and "accountability".

**[39]** The Applicant noted that the Respondent did not produce statements made by the two other participants, Mr Mansfield and Mr Barrett. The Applicant submitted that the Respondent failed to obtain such statements and there was no follow up with Mr Mansfield or Mr Barrett.[viii] The following was conceded at the hearing from Mr Abrams:

> *"PN 1766 Did he ever provide a written statement?---No.*
> *PN 1767 Was he ever asked to?---No, except initially.*
> *PN 1768 But after the interview?---No.*
> *PN 1769 So there was no follow-up request for a written statement?---No."*

**[40]** The Applicant also emphasised that neither Mr Barrett nor Mr Mansfield made a formal complaint regarding the incident.

**[41]** The Applicant submitted that the Applicant's evidence should be preferred over that of Mr Mansfield. It was submitted that Mr Mansfield first gave clear and unequivocal responses attesting that the notes of his interview with Mr Abrams were correct and that he did not hear the context in which the word "scab" was said.[ix] Mr Manfield's evidence was conceded at the hearing as follows:

> *"PN 2340 You say you didn't hear the context, but are you certain he used the word scab?---Yes."*

**[42]** However, the Applicant's representative submitted that in cross-examination, Mr Mansfield sought to "recraft" his evidence and asserted that he did hear the context.[x] The following evidence was relied on to demonstrate this:

> *"PN 2396 You say in that statement the word "scab" was used, but you did not hear the context?---Sorry?*
> *PN 2397 Mr Abrams says that you said that the word "scab" was used, but you didn't hear the context?---I heard the context, yes.*
> *PN 2398 You did hear the context? So that's incorrect?---No, I heard the context."*

**[43]** In his statement, the Applicant provided evidence of the fact that the exchange on 15 October 2015 was mutual, and that the other primary employee involved had sworn at him and made disparaging comments first and that the alleged conduct was taken out of context, and, further, that the comments the Applicant had made were not directed at any individual.

**[44]** In addition to the above, the Applicant alleged the conduct was of a type exhibited or used by other employees and supervisors at the Mine on a regular basis. The Applicant submitted that the Respondent appears to have indefensibly and erroneously focused on a mistaken view that the Applicant had deliberately used the term "scab" and that again, erroneously found that this conduct should result in termination.

**[45]** It was submitted by the Applicant that the Respondent's reliance on the Step 2 Warning, when making the decision to terminate the Applicant's employment, was inappropriate and wrong. The Applicant submitted that the Respondent clearly and inexplicably characterised the Step 2 Warning as relating to intentional conduct when it was not. In addition, the Applicant submitted that the Step 2 Warning was otherwise mischaracterised in the decision making process.

**[46]** Irrespective of the Step 2 Warning, the Applicant submitted, the conduct for which the warning was issued in the first incident related to a minor alleged procedural failing, when operating a vehicle at the Mine. It was argued that that type of conduct was so far removed from the allegations relating to 15 October 2015, so as to be irrelevant. The Applicant submitted that it cannot be sensibly suggested that having been issued with the Step 2 Warning that the Applicant would understand, that if he was involved in a verbal exchange in the nature of what occurred, that his employment would be terminated.

**[47]** The Applicant submitted that the Respondent knew that such conduct as alleged should not result in termination. The Applicant submitted the Respondent has policies and procedures to deal with conduct where it is reported to be offensive or inappropriate. The Applicant submitted that the Respondent simply chose to disregard the circumstances of the incident, the reality of the alleged conduct, and it policies and procedures, all because a word similar to "scab" was said to have been used.

**[48]** In terminating the employment of the Applicant, it was submitted by the Applicant, that the Respondent had also inappropriately and erroneously suggested that an admission by the Applicant that he was "remorseful" and that the comments made were "off the cuff"; amounted to a justification of the termination. The Applicant submitted they were quite the opposite.

**[49]** The Applicant's representative submitted that reliance on such matters for the termination of his employment was fanciful and capricious and could not form part a valid reason to justify the termination.

**[50]** The Applicant submitted that the Respondent's further basis for the termination of his employment was an alleged breach of the Company's Charter Values of "accountability, integrity and respect". The Applicant submitted that it was unclear on what basis the Respondent came to those conclusions and the Applicant submitted that a breach of those specified elements was an unavailable conclusion on the facts.

**[51]** The Applicant's representative submitted that the actions of the Applicant cannot be considered to be serious misconduct in the circumstances. Therefore, when the evidence is viewed as a whole, the Applicant argued, that there was no valid reason for the termination.

***(b) whether the person was notified of that reason; and***

**[52]** In regards to s.387(b), the Applicant submitted that an employer must notify an employee of the valid reason and the grounds upon which they may be terminated, before making a decision to terminate their employment. This notification must be done in a time and manner that gives the Applicant an opportunity to respond to the allegation.

**[53]** The Applicant submitted that the clear reasons why his employment was being terminated were not provided to the Applicant, prior to the termination. Specifically, it was submitted that the Respondent failed to articulate or describe the elements of the alleged conduct which were said to result in the alleged breaches. For example, the Applicant submitted the Respondent failed to notify the Applicant of the precise reasons why they considered his conduct amounted to a breach of the Respondent's Charter Values and standards of conduct and for example a lack of "integrity".

***(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and***

**[54]** In regards to s.387(c), the Applicant submitted that, in order to be given an opportunity to genuinely respond, an employer cannot just "go through the motions", in making a decision to terminate the employment of an employee.

**[55]** In this instance, the Applicant submitted he was allowed an opportunity to respond to the allegations, but only to the extent that they were generally outlined in the show cause correspondence from the Employer.

**[56]** The Applicant submitted that the Respondent had made a predetermined and/or erroneous decision to dismiss the Applicant, because of a preconceived view, held by a certain manager or managers, as to the use of the term "scab".

***(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and***

**[57]** The Applicant has not alleged that the Respondent failed to allow the Applicant to have a support person present for the relevant discussions.

***(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and***

**[58]** The Applicant submitted that the termination of the Applicant's employment involved consideration of a previous alleged unsatisfactory performance incident, specifically the 'Step 2 Warning' that related to an event on 29 June 2015.

**[59]** The Applicant submitted that this warning was issued due to an alleged minor incident, involving an allegation of failing to follow an operational procedure. The Applicant submitted that that warning was irrelevant to the assessment of the alleged conduct on 15

October 2015 and was inappropriately and unfairly taken into account. The Applicant further submitted that the warning itself was unwarranted and or excessive in the circumstances.

**[60]** The Applicant submitted that the Respondent had not previously warned the Applicant in relation to the type of conduct which was alleged to have taken place on 15 October 2015.

**[61]** The Applicant also submitted that the previous warning should not have been taken into account in the termination as it erroneously documented the situation and this error was only discovered after the warning document was provided after his dismissal.

***(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and***

***(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and***

**[62]** The Applicant submitted that the Respondent is a large multinational company with access to dedicated human resource and industrial relations specialists. Despite this, the Applicant submitted, the Respondent failed to take into account the reality of the nature of the alleged conduct in the context of the exchange between the employees.

**[63]** The Applicant submitted the Respondent also inappropriately conducted an investigation and sought to influence the statement of at least one witness/participant.

**[64]** The Applicant also submitted the Respondent maintained policies and procedures that were not utilised and/or incorrectly utilised in the investigation and disciplinary process. Accordingly, the Applicant submitted, clearly set out mechanisms; including the use of mediation, were not implemented despite the content of the Code of Conduct. The following evidence by Mr Abrams was provided at the hearing, demonstrating alternatives to dismissal were not considered:

> *"PN 2192 Now, in paragraph 80 you refer to page 7 of the Code. The second paragraph starting, "In many cases advice supporting guidance will enable you to resolve the issue yourself." Did you encourage Mr Mansfield or Mr Barrett at all to try and resolve the issue themselves?---No.*
> *PN 2193 No. Not even where Mr Mansfield had requested mediation or a general conversation?---That's correct.*
> *PN 2194 And if you carry on with that paragraph that I was referring to at 80 - of the code of conduct - "If it is not possible or if it requires referral, mediation or investigation you will be advised of the next steps." It contemplates potentially mediation, doesn't it?---That's correct.*
> *PN 2195 But no real consideration of that was made?---Consideration was given but not followed through with.*
> *PN 2196 Well, you didn't ask the other employees whether that might be a solution to the issue?---No."*

**[65]** The Applicant submitted the Respondent mischaracterised the Step 2 Warning and continued to do so despite being told such. Further, with the resources available to the

Respondent, the Applicant submitted such mischaracterisation is inexplicable, particularly given the consequences of such for the Applicant.

**[66]** The Applicant also stated that the Respondent failed to take into account the Applicant's lengthy service and to provide alternatives to dismissal. Further, the Applicant stated, the Respondent failed to take into account his personnel file or his particular facts and circumstances, which was conceded at the hearing as follows:

> *"PN 3178 Did you look through his personnel file to determine which parts were relevant and which parts weren't?---I didn't review his personnel file.*
> *PN 3179 At all?---No. Well, the full personnel file.*
> *PN 3180 Yes?--- I reviewed the - I knew his personnel file from the previous two years*
> *PN 3181 But you didn't review that at all, in respect of the termination?---Well, I looked at his length of employment and I looked at his disciplinary record over the previous - I think I knew how long he had been employed at Saraji. I knew that primarily he'd had a pretty clear record prior to that and I took that into account when making the decision.*
> *PN 3182 Yes?---I did not personally open up his employment file and look at it page by page."*

***(h) any other matters that the FWC considers relevant***

- **If a valid reason is found**

**[67]** The Applicant submitted that, if the Commission forms a view that the Applicant's actions did constitute a 'valid reason', in that his actions were a breach of the Respondent's policies as outlined, then the Applicant submitted that the decision to terminate his employment was still unfair, as the decision was harsh, unjust and unreasonable.[xi]

**[68]** The Applicant referred to and submitted that the Commission should give regard to the case of *Makin v Glaxosmith Kline Australia Pty Ltd*[xii] in that, in unfair dismissal matters, *"that there is a valid reason for terminating employment does not necessarily mean that the termination was not harsh, or unjust or unreasonable."*[xiii]

**[69]** The Applicant submitted that when making a determination, Commissioner Bissett referred to the Full Bench decision in *Woolworths v Brown*[xiv] and outlined a range of factors which the Commission must consider in order to determine if the dismissal was contrary to s.387 of the Act. These matters of relevance to the current circumstances include (but are not limited to) the following:

- *Ignorance of the policy which the applicant was found to have breached;*
- *The termination was disproportionate to the breach having regard to the employee's length of service and prior history;*
- *Inconsistent or discriminatory application of the policy;*
- *The need for employers to uphold legitimate OH&S policies and procedures;*[xv]

**[70]** Further reliance was placed on this case in emphasising the specific facts and circumstances of each dismissal which must be carefully considered:

> *"The authorities provide a range of views in a variety of circumstances on the approach that should be adopted with respect to a breach of policy. They are all relevant to these proceedings in providing some guidance as to the approach that should be adopted. But no two sets of circumstances are the same and the factors that weigh on the decision are unique in each case."*[xvi]

- **The Applicant's employment history and comparative differentiation of the treatment of the Applicant.**

**[71]** In this matter, the Applicant submitted, that there are a range of matters to which the Commission should give regard to, when deciding whether or not the Applicant was unfairly dismissed. These are as follows; the Applicant's length of service (13 years); the Applicant's lack of disciplinary record; the exemplary work history of the Applicant; and a disparity in treatment between the Applicant and others involved in the incident. In addition, regard should be had to disparity of treatment between the Applicant and other employees and staff involved in similar or worse behaviour and an inconsistent and discriminatory application of the Respondent's policies.

**[72]** The Applicant submitted that he had an unblemished record (aside from the unwarranted warning from the AMA incident) of employment over the approximately 13 years of his service with the Respondent. Further, the Applicant submitted that it is relevant that that service has occurred in a remote environment involving shift work. Further, the Applicant submitted that the Respondent has fundamentally failed to recognise or acknowledge the relevance of the Applicant's service and dedication to the Respondent.

**[73]** The Applicant submitted that he had not been previously engaged in or subject to any discipline for conduct such as that alleged to have occurred on 15 October 2015.

**[74]** As addressed above, the Applicant submitted that he was advised he would receive a Step 2 Written Warning but this warning related to a fundamentally different issue to that which led to the termination. Further the Applicant confirmed that there had not been a repeat of the issues, relevant to the issues that led to the Applicant being advised he would receive a Step 2 Written Warning.

**[75]** The Applicant submitted that, given that the verbal exchange did not relate to the Applicant's performance whilst undertaking his work, the Respondent should not have taken this Step 2 Warning into consideration when making the decision to terminate his employment.

**[76]** The Applicant submitted that the culture at the mine, was such that, the type of alleged behaviour was routine. Further, the Applicant submitted that, the Respondent's representatives and staff members would regularly use similar behaviour and this went uninvestigated.

- **Erroneous Application of Policies and Procedures**

**[77]** The Applicant submitted that the application of the policies and procedures of the Respondent were applied in a discriminatory manner. The Applicant submitted that the Respondent applied their policies in a manner designed to punish union members while leaving behaviour undertaken by others of a comparable nature, unaddressed.

- **The personal circumstances of the Applicant**

**[78]** The Applicant submitted that the Respondent also fundamentally failed to take into account the Applicant's personal circumstances, including the medical condition of his son, and further that mediation could have been implemented with the employees in the verbal exchange to resolve the matter.

- **The disciplinary outcome was not proportionate to the incident**

**[79]** The Applicant argued that the alleged misconduct in both incidents was of a minor nature and should not have brought the Applicant's long term employment to an end. Further, the Applicant submitted that regardless of whether a valid reason for termination existed, the termination of the Applicant's employment was so grossly out of proportion as to be absurd.

**[80]** Taking all of such into account, the Applicant submitted that the Commission should find that the termination of his employment by the Respondent was harsh, unjust and unreasonable.

- **Comments on the evidence**

**[81]** The following witnesses provided statements as evidence:

- Gary McDermott – Applicant
- Brad Crompton – Operator at the Saraji Mine, CFMEU Saraji Lodge President
- Mick Findlay – Employee at Saraji Mine

**[82]** In consideration of his overall employment, the Applicant summarised his employment history with the Respondent,[xvii] the Warning that was given by the Respondent on 29 June 2015,[xviii] the incident and meeting of 15 October 2015,[xix] the meeting of 16 October 2015,[xx] the meeting of 25 October 2015, the Show Cause correspondence and response,[xxi] the Termination Meeting dated 6 November 2015,[xxii] and the Events after the Termination.[xxiii] Mr McDermott emphasised the disparity between the parties in their consideration of the context and their views of the events and using the word scabby.

**[83]** Mr Crompton outlined what he alleged occurred during the meeting with Mr Mansfield. He stated that he believed Mr Abrams was trying to get an agreement from Mr Mansfield as to what occurred, rather than allowing Mr Mansfield to recount his version of events. Further, Mr Compton stated that when he was later speaking with Mr Mansfield following the meeting, and Mr. Mansfield expressed to M. Crompton, that he regretted that the matter had escalated to such a serious level.

**[84]** Mr Crompton, on behalf of the Applicant, provided information as to the context of the mine site and Mr Mansfield's character. He stated that it was not uncommon for the D Crew at the mine to use colourful language between each other. Further, Mr Crompton stated that Mr Mansfield was the Step-up Supervisor and was acting in supervisory role practically the whole time. It was this that gave some context to the incident and the exchange.

**[85]** Mr Compton further stated that he had worked with Mr McDermott since he first commenced employment. He stated that Mr McDermott was well known to be very good at

his job. In Mr Crompton's belief he was one of the most productive Shovel Operator's on site. Further, Mr Crompton stated he saw no reason why Mr McDermott should not be reinstated, that he was unaware of any impediments to such.

**[86]** Mr Findlay provided evidence that he did not work with Mr McDermott on a day to day basis, however, he was aware from various discussions, with him, other employees, and staff, that he was a good operator and he had the second best dig rate on the mine.[xxiv]

**[87]** Mr Findlay provided evidence that he does not believe Mr McDermott was asked to provide a written statement at that meeting. Further, during the meeting, Mr Findlay stated that Mr McDermott expressed remorse for being involved in the incident. Further, there was no mention of any complaint from the employees being made at the meeting. From Mr Findlay's understanding, no formal complaint had been made, in relation to the incident by either Mr Mansfield or Mr Barrett (a WorkPac contractor at the Mine).[xxv]

**[88]** Following the meeting, Mr Findlay recalls seeing Mr Mansfield stating words to the effect of "*"I didn't mean for it to go this far"*[xxvi].

**[89]** Mr Findlay also stated that he recalls sometime between 25 October 2016 and 6 November 2015, where he discussed with Mr Abrams the reference to the warning in the show cause letter was incorrect.[xxvii]

**[90]** Mr Findlay provided evidence that he did not believe the allegations contained in the show cause letter were correct, based on the recollection of meetings he attended with Mr McDermott and Mr Mansfield.[xxviii] Further at the meeting on 6 November 2015, he believed the termination letter incorrectly referred to the Applicant's conduct as intentional.

**Summary of the Respondent's submissions pursuant to section 387.**

**(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and**

**[91]** The Respondent submitted it terminated the Applicant's employment because the evidence showed that on the balance of probabilities the Applicant engaged in inappropriate workplace conduct on 15 October 2015.

**[92]** In relation to the Step 2 Warning, the Respondent submitted that the Applicant's case was that the Step 2 Warning was wrongly applied because: he should have never received a warning as he did not breached the SOP;[xxix] he should have never received a warning at that level as it was unintentional and the fault of others; [xxx] and his Step 2 Warning was wrongly described.[xxxi]

**[93]** The Respondent submitted that the SOP required positive communication with all equipment in the AMA. The Respondent relied upon the following to demonstrate this:

> *"**…**the following procedure must be followed: a. Approaching vehicles must park in a designated safe area (where available), outside of the activing mining area, and establish positive communications with the operating equipment, prior to entry.* [xxxii]*"*

**[94]** The following evidence was referred to by the Respondent to demonstrate that discipline arising from the first incident was warranted:

> *"[Stockley]*
> *PN3690 Given that's the case, why was Mr McDermott disciplined? Because the rear dump in that area is still - wasn't de-energised. That was the only problem in that scenario. The SOP states that all machinery - the hydraulic excavator; bucket grounded, hydraulics locked out. Okay. Compliant. The rear dump that Mr White directed into the loading bay and had part loaded wasn't switched off. Had park brake applied, it was fundamentally stable, that's fine, but was not switched off, as in engine-wise - running still, it is not de-energised, so that is the breach there.*
>
> *...*
>
> *PN3773 So I am labouring this point (indistinct). Was it his responsibility prior to giving the direction to get positive communication that the rear dump was switched off? Yes, everyone's responsibility.*
> *PN3774 So if he had got that positive communication, given the direction, and then you are saying Mr McDermott had a further responsibility to communicate with the rear dump operator again? Yes, common practice is if there is any machinery - like, if you are going to pass any machinery in any area at any time, positive communication must be made in case - just say that rear dump is still running and that rear dump didn't hear the two-way communication and that rear dump drives off while you are driving past in front of him, the truck don't make sure work of a car so it's common practice, to pass any machine, you must make positive communication. So driving in front of that truck, he should have made positive communication anyway just in case to be sure.*
>
> *...*
>
> *PN3779 The warning given to Mr White says: "A light vehicle made positive communications to enter the active mining area and you allowed the light vehicle entry before all equipment was de- energised." It was Mr White who allowed the vehicle to enter. He had received positive communications. That is what the company is saying he did wrong. That is not Mr McDermott's fault, is it? That there is correct for Mr White. That is correct in the way he had to conduct, but, like I said, because SOP clearly states all machinery must be de-energised, so the breach is still there. The breach doesn't go away because of anybody's direction. It's up to every individual to think and double check themselves, like.*
> *PN3780 The breach doesn't go away, but each individual's responsibility in respect of that breach is different, isn't it? Each individual's responsibility in regard to that breach is different, but the outcome is the same because they are all still obligated to follow the SOP. The obligation doesn't change. Everyone must comply to the SOP.*
>
> *...*
>
> *[Fitzgerald]*

*PN1602 When can a light vehicle enter the active mining area? When everything's been de-energised and it talks about - I'll just - I'll just read it out to you anyway. "Before any vehicle or pedestrian enters an active mining area, all mobile equipment operations in the active mining area must de- energise. This means lower implements to the ground and then drop excitation for electric shovels, de-powering hydraulic pumps for hydraulic excavators and shovels, de-energising motion and setting the park brake for LeTourneau loaders and shutting down engines for all other diesel powered equipment.*
*PN1603 That trucks are diesel powered equipment? A truck is a diesel powered equipment, yes.*
*PN1604 So the light vehicle can't enter until those things are done? That's correct.*
*PN1605 The onus is on the light vehicle, isn't it? The procedure in 13 is about when a vehicle or mobile equipment not involved directly in the direct operation or activity of mining must not approach. So that is when a light vehicle can or cannot enter an area? That's right.*

*...*

*[Abrams]*

*PN2082 You say, don't you, that all of the equipment in the area must be contacted individually. Is that your understanding of the procedure? That positive communication must be made with all equipment in the area."*

**[95]** The Respondent submitted, by relying on the evidence below, that the rear dump truck was covered by the SOP and the information brief:

*"[Fitzgerald]*
*PN1602 When can a light vehicle enter the active mining area? When everything's been de-energised and it talks about - I'll just - I'll just read it out to you anyway. "Before any vehicle or pedestrian enters an active mining area, all mobile equipment operations in the active mining area must de- energise. This means lower implements to the ground and then drop excitation for electric shovels, de-powering hydraulic pumps for hydraulic excavators and shovels, de-energising motion and setting the park brake for LeTourneau loaders and shutting down engines for all other diesel powered equipment.*
*PN1603 That trucks are diesel powered equipment? A truck is a diesel powered equipment, yes."*

**[96]** Furthermore, the Respondent submitted that the Applicant did not have positive communication with the rear dump truck operator:

*"PN3774 So if he had got that positive communication, given the direction, and then you are saying Mr McDermott had a further responsibility to communicate with the rear dump operator again? Yes, common practice is if there is any machinery - like, if you are going to pass any machinery in any area at any time, positive communication must be made in case - just say that rear dump is still running and that rear dump didn't hear the two-way communication and that rear dump drives off while you are driving past in front of him, the truck don't make*

*sure work of a car so it's common practice, to pass any machine, you must make positive communication. So driving in front of that truck, he should have made positive communication anyway just in case to be sure.*

*...*

*PN2082 You say, don't you, that all of the equipment in the area must be contacted individually. Is that your understanding of the procedure? That positive communication must be made with all equipment in the area."*

**[97]** In relation to the Information Brief ("Brief"), the Respondent submitted that, given the self-serving nature of the Applicant's evidence and Mr Crompton's attempts not to cause too much embarrassment for the Applicant, the Applicant conceded he was aware of the Brief and the Applicant admitted he was trained in it. The following extract was referred to in affirming the Respondent's submission:

*"PN242 Yes. And you say you've never seen that? I could have. I don't remember it.*
*PN243 See, it uses the ? We have to sign on a lot of these things we get thrown at us at pre-starts and all that, so if I – I mightn't have been there. I take annual leave all the time.*
*PN244 But you might have seen it? Might have.*
*PN245 All right? Might have.*
*PN246 Now, you said you received specific training in this, active mining areas. What was the specific training you did receive? Probably this. I don't know."*

**[98]** The Respondent submitted it was quite clear that the Applicant breached the SOP and the Respondent was entitled to act upon that breach. In relation to the Just Culture Decision Tree, the Respondent submitted, upon conclusion of the meeting with the Applicant and his union representative on 29 June 2015, a non-intentional breach had been found.[xxxiii] The Respondent submitted it relies upon the following evidence to demonstrate the Applicant is in agreement with the alleged breach:

*"Does the Employee agree with the alleged breach? Yes / No [Yes is circled]*[xxxiv]
*PN266 But you agree with me it was accurate. What's in paragraph - it's your evidence. That's what's in the Just Culture Decision Tree and it's accurate? Yes, I suppose, and it was unintentional. I did agree with it, you said that. I've got the form there, I've agreed to it."*

**[99]** Concerning the alleged flawed description of the breach, the Respondent submitted that it did not change the fact that the Applicant admitted it was a breach and secondly, it did not change the fact that the Applicant has never denied he was on a Step 2 Warning.

**[100]** The Respondent submitted, in relation to the credibility of the evidence concerning whether and when he objected to the way the Step 2 Warning was described, as follows: the alleged erroneous description was argued to be crucial but the Applicant did not raise it in the show cause; it was argued that Mr Crompton cannot give any reliable evidence of when he raised it with Mr Abrams; Mr. Abrams said it was not raised with him before or during the show cause period and he was not cross examined on that point; and it was submitted it was not plausible that if it had been raised with the Respondent before the termination, that the Respondent would not have addressed it in the termination letter.

**[101]** From this, the Respondent submitted the Applicant was treated equitably in that process.

**[102]** In relation to the credibility of the Applicant, the Respondent submitted there was a large number of inconsistencies in the Applicant's evidence as follows: on 15 October 2016 – the Applicant was unsure whether he said the "next scabby or grubby,"[xxxv] on 16 October 2016 – the Applicant stated the "scabby/grubby will come and jump on it anyways," [xxxvi] on 26 October 2016 – the Applicant stated "*I made to the best of my recollection I said words to the effect of "next the scabby/grubby (not sure which) from down the other end will be here on the shovel,"*[xxxvii] and on 18 March 2016 – the Applicant stated "I also said words to the effect of "it doesn't matter, the scabby buggers will come and jump on it anyway".[xxxviii]

**[103]** By reference to the different meanings of the words "the scabby" and "scab," the Respondent submitted the Applicant was given every opportunity but had not provided any evidence of what a "grubby" is, or what a "scabby" is, or how they are meaningfully different, or different at all.

**[104]** The Respondent submitted that the evidence of Mr Abrams was that Mr Mansfield used the word "scab"[xxxix] and Mr Barrett told him he used the word scab. Further, the Respondent relied on the following evidence from Mr Mansfield in relation to the context of the terms used by the Applicant:

> *"PN2406 So you did not hear the context? The context was about like I said before, about the person coming down doing the job and the operators were worried about losing their jobs and it was the fact of you may as well be a scab.*
>
> *...*
>
> *PN2409 So what do you say exactly was said? The context what I heard was the fact of, "You're down and you might as well be a scab", and I'm nothing but a dick sucker was in the office.*
>
> *...*
>
> *PN2449 Mr McDermott says what he in fact said, this is in relation to the scab or scabby part:*
> *PN2450 Because it doesn't matter the scabby buggers will come jump on it anyway.*
> *PN2451 ? No.*
> *PN2452 You didn't hear the context? On the context that I thought at the time, no. It hadn't been written down before is what they're going to ask.*
> *PN2453 But you'd heard the word "scab"? Yes, "May as well be a scab".*
> *PN2454 Not scabby? No."*

**[105]** Whilst the Applicant alleged his conduct was minor,[xl] the Respondent submitted it is irrelevant as his conduct caused offence. The following evidence of Mr Stockley highlighted the offence taken by Mr Mansfield and Mr Barrett:

*"PN 3495 You observed Mr Mansfield and Mr Barrett. How were they - who did they look to you? when I got to Vaughn Abrams' office there they were very distraught, wound up, angry, upset. I had never seen them like it, to be honest. They definitely weren't happy. They most certainly weren't happy at all; very wound up, aggravated.*

*Mr Barrett told me that he then walked away because he was upset that he had been called a scab.*[xli] *"*

**[106]** Further, in relation to the context of the verbal exchange, the Respondent submitted the importance of it by reference to *Walter Meacle v BHP Coal Pty Ltd*[xlii], in the following terms:

*"While it is accepted that the use of the word "scab" on its own may not, in certain circumstances, cause offence, the authorities are clear that consideration must be had to the circumstances, as a whole, as before the decision-maker. In this matter, the Federal Court has found that the use of the word is derogatory and uttered for the purpose of criticising and upsetting. The particular facts and circumstances as before the relevant decision-maker must be taken into account.*[xliii] *"*

**[107]** To demonstrate the context of the discussion, the Respondent submitted the Applicant initiated a discussion with Mr Mansfield and Mr Barrett in circumstances where he was angry and frustrated over the labour hire employees working on the Employer's machines. Further to this, the Respondent submitted the Applicant's only possible target of his comments (on the versions of both the Applicant and Mr Mansfield was Mr Barrett (a Workpac employee). The Respondent believed that the evidence of the Applicant was deliberately vague and evasive. The Respondent submitted the following extract of the Applicant's evidence under cross-examination demonstrated this:

*"PN671 How often do you call someone a scabby bugger? I don't call anyone a scabby bugger. I didn't call anyone a scabby bugger and I don't do it.*
*PN672 You called some people up the other end of the mine, they were scabby buggers? No, I didn't. didn't call anyone individually anything.*
*PN673 You must have? It was just a stupid comment.*
*PN674 You referred to some people up the other end of the mine as scabby buggers. We will come back to who they may be, but that was your evidence? I have told you my answer: no-one. It was just a general stupid comment.*
*PN675 But that general stupid comment you knew was wrong straight away? You have asked me this. Yes.*
*PN676 And you agreed? Yes, I agree it was a stupid comment.*
*PN677 You wouldn't be upset if another BMA employee come and jumped on a machine, would you? I don't care who jumps on the machines.*
*PN678 You were. You were upset? I have trained many people on the machines. I didn't care who umped on the machines.*
*PN679 Then that just makes even stranger your comment about some grubby buggers from up the other end of the mine getting on your machine? On my machine? I didn't own it.*
*PN680 On the shovel, the BMA shovel? Mate, so, what's the question?*

*PN681 That makes even stranger your comment that there were some grubby buggers up the other end of the mine who would come and jump on your machine? Is that a question to me?*
*PN682 Yes, that is a question to you? I don't quite understand the question you are asking me there. What have I - I don't care who jumps on the shovel, mate.*
*PN683 Yes, but if you don't care who jumps on the shovel, then what is the explanation for your statement? What part of the statement?"*

**[108]** The Respondent submitted it did what it was required to do, given it made an objective evaluation of the evidence before it of the Applicant's conduct. [xliv] Further, the Respondent submitted it acted reasonably by terminating the Applicant's employment and as such the decision was based upon a valid reason.

**(b) whether the person was notified of that reason; and**

**[109]** The Respondent submitted the evidence in the case does not support the submissions by the Applicant that the Employer never informed the Applicant of the findings of the investigation and that the Respondent failed to inform him of the conduct that was alleged to have breached the Code and Charter Values.

**[110]** On 15 October 2015, Mr Abrams invited the Applicant and his support person to attend an interview and the Respondent submitted the Applicant believed he was there because of the incident at the crib area on 15 October.[xlv] Subsequently, the Respondent stated on 16 October 2015, Mr. Abrams met with the Applicant and his support person Mr Findlay for a second meeting and he said he was clear on the purpose.[xlvi] Following this, the Applicant was issued with a show cause letter which set out the Respondent's findings against the Applicant.[xlvii] The Respondent submitted that it clearly set out the alleged breached against the Applicant.[xlviii] The last paragraph of the Respondent's reply reads as follows:

*"As you are aware, BMA employees are required to comply with all BHP Billiton and BMA policies and procedures at all times during their employment.[xlix]"*

**[111]** The Respondent submitted it is interesting and informative that the Applicant has never challenged that final paragraph.

**[112]** Once the Applicant responded to the show cause letter, the Respondent submitted that it terminated the Applicant's employment on 6 November 2015 and the Applicant was notified of the reason in his dismissal letter. Further, the Respondent submitted the specific allegations were provided for in the 'show cause' correspondence 25 October 2015 as follows:

*"I refer to our meeting on 25 October 2015 during which you were requested to show cause in relation to the allegations of inappropriate workplace conduct engaged in by you on 15 October 2015, the specifics of which are outlined in the show cause correspondence dated 25 October 2015 ('show cause correspondence').[l]"*

**[113]** The Respondent submitted the following in relation to the Applicant's admissions:

*"The Company has taken into account the written response submitted by you dated 26 October 2015 and received by us 29 October 2015 ('show cause response'), as well as*

*having regard to all relevant matters arising during the course of the investigation. In your show cause response, you state 'I now recognise that regardless of the circumstances my comments were inappropriate and am deeply remorseful of my actions and any angst that they may have caused to any of those involved in the conversation or in the general vicinity.*[li]*"*

**[114]** In regards to the reason for dismissal, the Respondent submitted the Applicant does not deny that he was told he was dismissed for breaching the Code.[lii]

**[115]** In summary, the Respondent submitted that the Code and Charter Values explain the standards that are not acceptable, and that the Applicant read them and was trained in them and he knew what it meant to call someone a scab or scabby. Secondly, the Respondent submitted, never has the Applicant once, at the two interviews, a stand down, or in the show cause process raised any doubts as to what was happening to him and why. Thirdly, the Respondent emphasised that the Applicant has admitted his conduct was inappropriate.[liii] This was conceded at the hearing as follows:

*"PN 519 I take you to paragraph 65 of your statement. Go back to your very first statement. In paragraph 71, as soon as you said these - well, we will come back to what words you said, whether it was scab, scabby, grubby, whatever it was. You knew straightaway they weren't appropriate, didn't you?---It's pretty common knowledge that you don't use it, yes.*
*PN 520 Pretty common knowledge. You didn't need training, did you, to know not to use that word?---Well, it's never mentioned at any training or anything like that. That's for sure.*
*PN 521 But you just said it's pretty common knowledge not to use - - -?---Well, I've been in the industry for a long time, mate.*
*PN 522 Yes, correct. So you don't need training to know you're not supposed to say it, do you?---Say what?*
*PN 523 Scab?---I didn't say scab.*
*PN 524 Scabby, grubby, scabby buggers. We'll come to what you said, because that's in a different version?---Yes.*
*PN 525 Your words were you don't need training to know not to use those words?---Well - - -"*

**[116]** The Respondent submitted it is clear from the evidence the Applicant was notified of the reason for his dismissal.

**(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and**

**[117]** The Respondent submitted the following occurred between the parties; on 15 October 2015, the Respondent advised the Applicant that he was being given the chance to respond to what Mr Mansfield and Mr Barrett claimed had occurred;[liv] in his own application, the Applicant admitted he was asked to provide a statement, Mr Abrams provided the Applicant with a suspension letter setting out his right to respond; and on 25 October the Applicant received a show cause letter which advised him of the findings of the investigation and what was alleged by the Respondent and provided him the opportunity to respond.

**[118]** The Respondent submitted the Applicant provided a response to the show cause and it believed there can be no clearer demonstration of the opportunity to provide a response. Further, the Respondent submitted it is only required to provide the opportunity to respond [lv] and it is up to the Applicant to take that opportunity.

**[119]** At no stage, the Respondent submitted, did the Applicant claim he did not understand what was being required of him or what he was required to answer. The Respondent states there was no evidence of the pre-determined outcome, the Applicant did not receive any material until after the show cause response.

**[120]** In relation to the evidence of Mr Weickhardt, the Respondent submitted he gave extensive evidence of the processes he went through in considering the investigation report and the 'show cause' response, along with the Applicant's employment history and personal circumstances, before making a considered decision to dismiss the Applicant.[lvi]

**[121]** Conclusively, the Respondent submitted, the Applicant was given an opportunity to respond to the allegations and did so during his interviews with Mr Abrams on 15 and 16 October 2015. Further, in the show cause respond he provided on or about 29 October 2015.

**(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and**

**[122]** The Respondent submitted the Applicant afforded and availed himself of the opportunity to have a support person present at relevant times. Relevantly, the Respondent stated that the Applicant accepted that the Respondent allowed him to have a support person at all relevant times.[lvii]

**(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and**

**[123]** The Respondent submitted this section is not relevant to these proceedings as the Applicant was dismissed for conduct reasons, not for unsatisfactory performance.

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

**[124]** The Respondent submitted that whilst it is a large enterprise with dedicated human resources specialists, it accepted the procedure was not perfect but that the dismissal was appropriate.

**[125]** The Respondent stated that to believe the Applicant's evidence one would have to: ignore the flip flops in his evidence on what he said; accept "scabby" or "grubby" or "scabby buggers", or "scab" did not mean anyone and that people from over the other end did not mean anyone.

**Incorrectly utilised procedures**

**[126]** The Respondent submitted there is no requirement that it must await a formal complaint before commencing an investigation. Furthermore, the Respondent believed rather than this being a case of busy body intervenor of officious bystander commencing an unwarranted investigation, this was a matter that both Mr Barrett and Mr Mansfield brought to the attention of Mr Abrams.[lviii]

**[127]** In relation to Mr Abrams' conduct, the Respondent submitted that he is a supervisor who is required to address behaviour in breach of the Code.[lix] Further, it is submitted that Mr Abrams investigated Mr Mansfield and Mr Barrett's concern objectively and transparently. The Respondent believed Mr Abrams did not make any decisions until he had all the material before him, nor were any predeterminations made that the Applicant had engaged in the conduct.

**Allegation of Mischaracterisation of the Step 2 Warning**

**[128]** The Respondent submitted the alleged mischaracterised warning letter is irrelevant because the Just Culture Decision Tree clearly sets out that the warning was issued for a breach of an Active Mining Area procedure and further, the characterisation of the Step 2 Warning in the warning letter dated 15 July 2015 and the 'show cause' letter was not mischaracterised because on 15 October 2015, the Applicant intentionally allowed a light vehicle to enter the AMA by driving the vehicle that he was in control of into the AMA.[lx]

**[129]** In relation to disputing the warning, the Respondent submitted the Applicant chose not to dispute the warning and took the issue on board regardless of its characterisation.[lxi]

**(h) any other matters that the FWC considers relevant**

**[130]** The Respondent submitted in *Parmalat*[lxii], the Full Bench noted (emphasis added):

> *"Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if* ***significant mitigating factors*** *are present that a conclusion of harshness is open*."

**[131]** The Applicant submitted that his dismissal was harsh because of the impact it has had upon him; his contrition and remorse; his length of service, clean record; and the inequitable treatment.[lxiii]

**[132]** In response to the Applicant's mitigating factors, the Respondent submitted Mr Weickhardt considered the following alleged mitigating factors before making the decision to terminate:

- The Applicant's personal circumstances as raised in the 'show cause' response including the impact that the termination would have on his family life and son[lxiv];
- Whether or not the Applicant showed contrition and remorse;
- The Applicant's length of employment with the Respondent[lxv];
- The Applicant's employment record which included a Step 2 written warning[lxvi]; and
- whether a termination would result in equitable treatment.

**[133]** After having reviewed the evidence, the Respondent submitted that the Applicant was not remorseful at the time of the incident.[lxvii] Further, the Respondent was of the opinion that long service, clean records and co-operation do not in themselves excuse serious misconduct.

**[134]** The Respondent submitted that there was no evidence that the Applicant's disciplinary outcome or treatment was inequitable.

**[135]** The Respondent referred to instances when the Applicant was a trainer/assessor; the Respondent submitted at various times during the course of his employment the Applicant was expected to adhere to a higher standard having regard to his awareness of safety procedures and the Code and Charter Values. The Respondent states a similar standard was observed in the Full Bench case of *Brambleby*[lxviii] at [89] as follows:

> *"It is not unreasonable to expect higher standards of supervisory employees particularly in this case having regard to Mr Brambleby's awareness of the policies in place and the risks that others may view the material that was being sent."*

**[136]** In relation to a consideration of mediation as an alternative to termination, despite the Applicant's assertion, the Respondent submitted it would be unwarranted due to the gravity of the conduct.

**[137]** The Respondent submitted in relation to the Step 2 warning, the alleged mischaracterisation does not matter because:

- The Step 2 warning was not inappropriate. It was issued because the Applicant breached an Active Mine Area procedure – a procedure in which he had knowledge of and was trained in; and
- The submission proceeds from one assumption that conduct that is unintentional could not be a breach of the safety procedures. That is clearly incorrect; and
- While Mr Weickhardt was aware that the Applicant was issued a Step 2, it was not a decisive factor in the decision to terminate.[lxix]

**[138]** In summary, the Respondent submitted that termination of employment was a proportionate and appropriate response to the gravity of the Applicant's conduct. Therefore, the Commission can be satisfied that the Applicant's dismissal was not harsh.

**Further Submissions by the Respondent**

**Applicant's credibility**

**[139]** The Respondent submitted when the Applicant discussed regularly monitoring job websites after the termination of his employment, the Applicant blatantly contradicted himself. The Respondent extracted the following evidence which, it submitted, tests the credibility of the Applicant's evidence:

> *"PN887 Yes, and you check other job search sites. So I'm just asking, what are the other job search sites that you check? I can't remember, mate. I'd have to have a look again, what I was on. I can't remember.*
> *PN888 You can't remember what job sites you checked? I think I just kept an eye on Workforce – Workpac and all that, too.*

*PN889 No, no, no, this is – you said you check other job search sites? I can't remember, mate.*
*PN890 On the internet? I can't remember.*
*PN891 When did you do it? Earlier in the year.*
*PN892 So, what, early 2016 you were checking - - -? I think, late last year, as well, after all this debacle.*
*PN893 How many times did you check? Several times.*
*PN894 What's "several"? Five or six.*
*PN895 Don't you - - -? Is that on the internet or with the - - -*
*PN896 It's your evidence, on the internet? Probably more than that then. I don't know how many."*

**[140]** The Respondent submitted that, in the above transcript references, the Applicant was vague on where he looked, how many times and when. The Respondent submitted that the Applicant offered to find the sites which he said he could do by checking the web history, not expecting to be pushed on that, as follows:

*"PN897 Well, what sites? I just told you, Seek, and I can't remember – I'll find out for you if you want but I can't remember exactly what they were.*
*PN898 Yes, well (indistinct). Yes, well, what – but how are you going to find out? How am I going to find out?*
*PN899 Yes, what you monitored? I'll probably look at the websites I was looking at.*
*PN900 That's what I'm asking you? I can't remember what they were, mate.*
*PN901 Well, how are you going to go back and see what you were looking at if you can't remember what they were? Well, they're probably on my history.*
*PN902 On your computer history? (No audible reply)"*

**[141]** The Respondent submitted that when requested to provide screenshots, the Applicant retracted the offer:

*"PN903 All right, well could you send a screenshot to Mr Anderson of that computer history? A screenshot?*
*PN904 Yes? Probably not. It's probably all been cleared, by now.*
*PN905 Well - - -? It's been that long ago, mate, with that – and I'm - - -*
*PN906 You just told me you were going back to check it and now you're saying it's cleared? What do you want me to say?*
*PN907 I want you to say you can't check it, can you? Well, because it's cleared, mate."*

**[142]** From this, the Respondent submitted there is clear evidence of the Applicant being deliberately dishonest by making self-serving comments in a situation where he thought he would not be expected to provide evidence to substantiate his allegation, not expecting the Respondent would take him up on his claims.

**[143]** The Respondent submitted the Applicant backtracked on the evidence that he had previously given under oath:

*"PN908 Well, you just told me it might be cleared, so it can't be there. See, you just keep throwing these things in, Mr McDermott? Throwing what things in*

*PN909 You keep pointing yourself in the prettiest light that you can but when you're asked for specifics you can't give them, can you? Oh, mate, is that a specific, asking for what websites I've been on?*
*PN910 You're the one who told me you could find them? Hey?*
*PN911 You're the one who told me you could find them? I've got no answer for you.*
*PN912 Yes, I know you don't."*

**Consideration**

**[144]** The Applicant's representative, in the final submissions, emphasised matters of significant mitigation to the alleged conduct, as follows:

*"5. On the basis of the statements provided and evidence given at hearing, the applicant alleges the following:*

*a) The Applicant was employed by the Respondent to work as an operator at their Saraji mine on approximately 26 June 2003.*[lxx]

*b) At approximately 8.30am on 15 October 2015 the Applicant drove light vehicle to a crib hut at the Saraji Mine to use the toilet.*[lxxi]

*c) The Applicant became involved in a conversation with two other workers outside the crib hut after having used the toilet. The two employees were Mr Damien Barrett (an employee of WorkPac) and Mr Nigel Mansfield (an employee of BHP Coal Pty Ltd).*[lxxii]

*d) Upon leaving the toilet Mr Mansfield said words to the effect of "the wrong thing just came out of the shithouse" to the applicant.*[lxxiii]

*e) There was an exchange of words between the applicant and Mr Mansfield that was in the nature of usual banter at the Mine.*[lxxiv] *Mr Mansfield agreed at hearing that most of the exchange was in the nature of "usual banter".*[lxxv]

*f) During the exchange Mr Mansfield said words to the effect of "we're down here to pick your dig rates up you useless cunts" to the Applicant.*[lxxvi]

*g) During the exchange, and in response to Mr Mansfield's comments the Applicant said words to the effect of "you suck dick" to Mr Mansfield.*[lxxvii]

*h) During the exchange the Applicant said words to the effect of "it doesn't matter, the <u>scabby buggers</u> will come jump on it anyway". The Applicant did not call Mr Barrett a scab and the comment was not directed at any person in particular.*[lxxviii] *Mr Mansfield's recollection is that the Applicant did not call Mr Barrett a scab.*[lxxix]

*i) Mr Mansfield did not hear the context in which the word "scabby" was used.*[lxxx]

*j) Following the exchange Mr Mansfield raised the incident with by calling a number of supervisors.*[lxxxi]

*k) Mr Mansfield asked for the incident to be dealt with through a mediation and thought that that was appropriate in the circumstances.*[lxxxii]

*l) Mr Mansfield refused to cooperate with the investigation into the incident by not providing a written statement.*[lxxxiii] *Mr Barrett also did not cooperate with the investigation.*

*m) The Applicant cooperated with the investigation and provided a written statement.*[lxxxiv] *He was the only person involved to do so.*

*n) The Respondent, through Mr Vaughn Abrams, conducted an investigation and a report was produced.*[lxxxv] *The investigation report made no attempt to ascertain what actually occurred nor did it address the apparent conflicts between the evidence of those involved and present during the incident.*[lxxxvi]

*o) The Applicant attended a meeting on 15 October 2015 at which he was interviewed and then stood down from his employment.*[lxxxvii]

*p) The Applicant provided the Respondent with a written statement on 16 October 2015 as requested, and which included an expression of remorse.*[lxxxviii]

*q) The Respondent termination the Applicant's employment on 6 November 2016.*[lxxxix]*"*

(emphasis added)

**[145]** In relation to the Step 2 Warning, the Applicant's Representative submitted:

*"45. The Applicant was never give a Step 2 warning and the Respondent should not have relied on the purported warning at all in reaching its decision to terminate the employment of the Applicant.*

*46. The Respondent's "BMA Guideline to Fair Play" requires that a copy of any such warning must be given to the employee.*[xc] *In that context, and given that the Respondent relied on the warning, at least in part, it cannot be said that there was a valid reason for dismissal."*

**[146]** The Applicant has stated that the process was rushed as Mr Stockley was proceeding on leave. The leave records produced confirm this and I concur with the following assessment:

*"47. Mr McDermott's evidence should be preferred over that of Mr Stockley's on this point. Mr McDermott did not receive a copy of the Step 2 warning that was purportedly issued to him on 15 July 2016.*[xci] *By reference to the leave records and rosters produced by the Respondent on 28 June 2016 it is clearly apparent that McDermott's recollection that he did not receive the written warning is correct. Further, the evidence of Mr McDermott to the effect that Mr Stockley rushed through the "Just Culture" process was also clearly correct."*

**[147]** The Applicant stated that the Respondent's reliance was on "*a purported previous warning in determining to dismiss the Applicant from his employment. That reliance was unfair for reasons stated elsewhere in these submissions. Those reasons include:*

> *(a) The Applicant was not responsible for the breach in question.*
> *(b) The Applicant was never issued a warning.*
> *(c) The purported warning should not have been relied upon as it was irrelevant to the conduct leading to the dismissal.*
> *(d) The Respondent was advised that the references to the purported warning contained in the show cause and termination letters were incorrect."*

**[148]** The evidence in regard to the Step 2 Warning somewhat undermined its veracity. It was submitted that the warning should not have been considered in connection with the further incident as to whether dismissal was warranted as it related to entirely different allegations.

**[149]** In addition, once the Applicant received a copy of the warning after his dismissal it was then argued the purported warning related to the conduct of Mr Noel White rather than that of the Applicant. The evidence of Mr Stockley was that he accepted that the warning described Mr White's conduct in cross-examination:

> *"PN3748 So the warning that you say was given to Mr McDermott, the written warning, doesn't actually describe his conduct, it describes Mr White's, doesn't it?---It describes the excavator operator, Mr White's conduct, perfectly."*

**[150]** The Applicant submitted the reliance on the purported warning was also unfair in that Mr Stockley was told to issue everyone a Step 2 Warning.[xcii] The Applicant also submitted that the purported warning was unfair and should not have been issued in any event. The Applicant's representative relied on the evidence of Mr McDermott in relation to the alleged conduct and the fact that the Applicant was in fact not at fault.[xciii] Notwithstanding that, the purported warning was irrelevant to the conduct leading to the termination and there was no repeat of the alleged conduct.[xciv]" Whilst there was a breach of the SOP by the Applicant (in separate and lesser terms to that expressed in the warning), it has no connection to the further incident.

**[151]** It was submitted that the dismissal was not sound, defensible or well founded and that the dismissal was capricious and prejudiced. The Applicant submitted that the following mitigating matters must be considered:

> *"a) The type conduct in question was not unusual at the Mine and was tolerated at the Mine.*
> *b) There was no real offense caused by the Applicant's actions.*
> *c) The Respondent erroneously took into account a warning that was not issued to the Applicant, and in any event was irrelevant.*
> *d) The Respondent failed to follow its own policies and procedures in relation to the alleged conduct and the dismissal was capricious and prejudiced."*

**[152]** In this case, the Applicant's representative submitted that th*e Respondent has taken "an irrational view of the incident in that it simply decided that anything to do with the word "scab" should result in dismissal"*. The Applicant claims it was *"apparent that the*

*Respondent was always going to dismiss the Applicant on the mistaken and ill-founded basis of the Doevendans High Court Case acting as a "precedent". This approach prejudiced the outcome and was capricious."*

**[153]** The Applicant also emphasised that "*Mr Weickhardt also erroneously refused to accept that Mr McDermott expressed remorse.*[xcv] The Applicant submitted that, other matters raised by Mr McDermott were treated with disregard or otherwise were dismissed by the Respondent such as; *"the failure to accept Mr McDermott was appropriately remorseful was because the Respondent had already determined that it would dismiss the Applicant on the ill-founded basis that any reference to "scab" regardless of context would result in dismissal. Those reasons were capricious and prejudiced."* The Respondent refuted this, and considered the *Doevendans* case (*CFMEU v BHP Coal Pty Ltd*[xcvi]) provided a proper precedent for the dismissal, where the word 'scab' had been used. In this case 'scabby buggers' was used by the Applicant in a careless comment, in circumstances where the Applicant's performance was impugned.

**[154]** The Applicant sought reinstatement and committed to complying with any requirements of the Respondent.

**[155]** The Applicant strongly argued that *"despite the content of the show cause letter the Respondent had predetermined that dismissal should result simply because there was some reference to the word "scab". The Respondent's erroneous reliance on what it describes as "precedent" made impossible for the Applicant to respond in a manner that might have changed the result."*

**[156]** The criteria in s.387 of the Act are relevant to the consideration of the dismissal.

**(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and**

**[157]** The Commission must consider whether the alleged conduct occurred, and whether the conduct provided a valid reason.

**[158]** The reason for the Applicant's dismissal was given as breaches of the *BHP Billiton Charter Values* and the *BHP Billiton Code of Business Conduct*, given the findings in the investigation.

**[159]** The Show Cause letter details the finding of the investigation as follows:

> *"The investigation has substantiated that on 15 October 2015 you engaged in a verbal altercation with two fellow coal mine workers, a contract employee and a BMA employee. During the verbal altercation, you directed the following comment to the contract employee 'scabs' (or words to this effect), and the following comment to a BMA employee 'you suck dick' (or words to that effect).*
>
> *In your written statement dated 18 October 2015, you acknowledge the comment 'you suck cock' to the BMA employee, and also acknowledged making the comment '…the scabby/grubby…' to the contract employee. In your written statement dated 16 October 2015, you have also acknowledged I was deeply remorseful when I said it was off the cuff not directed at anyone just general stupid comment."*

**[160]** Accordingly, it must be determined whether the conduct, outlined in the show cause letter occurred, and provided a valid reason and whether there was any associated harshness in the decision.

**[161]** The Applicant's representative submitted that the Applicant's evidence in relation to the conversation that occurred on 15 October 2015 must be preferred, despite some slight differences in his recollection of the events that, they submitted, were not extraordinary and did not exhibit an attempt to manufacture untruths.

**[162]** The Applicant also submitted that an adverse inference should be drawn against the Respondent for failing to call Mr Damien Barrett. If the Respondent is arguing that the use of the word scab (in an industrial context) caused offence to Mr Barrett, his evidence would have been significantly relevant and it is telling he has not been brought as a witness. The Respondent in contest argued it was the Applicant's conduct that was at issue.

**[163]** The Applicant also submitted that it was the case that the Applicant's evidence should be preferred over that of Mr Mansfield. Mr Mansfield first gave clear and unequivocal responses attesting that the notes of his interview with Mr Abrams were correct and that he did not hear the context in which the word "scab" was said.[xcvii] However, in cross-examination Mr Mansfield sought to "recraft" his evidence and asserted that he did hear the context.[xcviii]

**[164]** Mr Mansfield stated that during the initial interview, of which notes were taken by Mr Abrams, that he told Mr Abrams that he had called the Applicant a "cunt". The following was conceded at the Hearing by Mr Mansfield:[xcix]

> *"PN 2410 You called Mr McDermott a useless cunt, didn't you?---Yes*
> *PN 2411 You see that doesn't appear in Mr Abrams notes, does it?---No.*
> *PN 2412 Did you tell him that?---Yes*
> *PN 2413You told Mr Abrams that you called Mr McDermott a useless cunt?---Yes."*

**[165]** It is agreed that Mr Abrams did not record that matter in the notes he made[c]. There is a clear inconsistency between the evidence of the witnesses put forward by the Respondent. This demonstrates the nature of the exchange and that the Applicant was responding to such.

**[166]** It is also confirmed there were distinct differences in the notes made by Mr Abrams as to his interviews with Mr Mansfield and Mr Barrett. Mr Mansfield agreed at Hearing that it was the Applicant that left the area following the exchange and both Mr Mansfield and Mr Barrett stayed at the location.[ci] This was conceded by Mr Mansfield as follows:

> *"PN 2496 It was Gary who left the conversation, wasn't it?---Yes.*
> *PN 2497 So Gary left, it wasn't Mr Barrett who left?---No, it was Gary*
> *PN 2498 Does Mr Barrett still work at the mine?---Yes, he does.*
> *PN 2499 Any idea why he's not giving evidence?---No.*
> *PN 2500 Once Gary left what did you do?---Like I said tried to make some phone calls.*
> *PN 2501 Mr Barrett was with you?---Yes.*
> *PN 2502 You weren't waiting for the hot seat crew?---No, not at that stage."*

**[167]** The Applicant submitted that Mr Mansfield's evidence regarding the timeline of the exchange was unreliable. At one stage he stated that the Applicant pulled up right in front of him[cii] and at another point said that he came out and saw Mr Barrett and the Applicant talking.[ciii] The following evidence demonstrates this:

> *"PN 2418 Do you say that Gary didn't come out of the toilet, Mr McDermott?---No, Gary had come up and gone to the toilet, yes.*
> *PN 2419 How do you know that?---He pulled up right in front of us and walked into the toilet.*
> *PN 2420 And then came out?---And then came out of the toilet.*
> *PN 2421 And then you had a conversation with him?---Yes.*
>
> *...*
>
> *PN 2322 These are Mr Abrams' notes of what happened. He says first of all, he said you were having crib, you came out and saw Damien and Gary having a discussion. Is that your recollection of what happened?---I wasn't actually having cribbing myself, mate, no, but I was in that area, the crib hut, yes.*
> *PN 2323 And you came out and saw Gary and Damien having a discussion?---Yes.*
> *PN 2324 You see Mr McDermott says that you started up the conversation between you, yourself and Damien by making some reference to his toilet habits. What do you say to that?---No, I don't recall that, sorry.*
> *PN 2325 So your evidence is that Damien and Gary were talking when you came up to them?---Yes, there was a group of people talking and they were talking, yes."*

**[168]** It must be emphasised that there is no clear uniform evidence that the word 'scab' was used directly at another employee, and further that this was an off-the-cuff exchange between employees where improper language was used between all of them. It is clear that none of them would have envisaged that their exchange would have been repeatedly analysed in the current circumstances. The circumstances of the discussion and conduct are distinguishable from the *Doevendans* case. The participants in the current discussion were all behaving in a casual but somewhat cavalier manner but there was no predetermination or significant hostility present. Nor was the commentary directly demeaning or intimidating. This is in contrast to the case law referred to. However, the comment cannot be condoned and its use by the Applicant is concerning given his length of employment.

**[169]** The Respondent confirmed the Applicant's understanding of the word 'scab' at the hearing and submitted as follows:

> *"PN4258 The evidence comes from the applicant's own admissions. He says he knew what a scab meant. He said he understood a scab to be a piece of dry skin, and when you scratched it pus came out. No misunderstanding. He knew – the evidence was then led from Mr Crompton about what he thought, and Mr Findlay and others about what they thought. But you don't need to go to that. You only need to go to what he understood the word "scab" or "scabby" to mean."*

**[170]** This conclusion (drawn in cross-examination) of the Applicant's understanding of 'scab', does not align with the case law as to the offensive nature of the term. However, it is arguable, as contended by the Respondent, that the combined conduct represented a breach of

the Code and Policies. However, in the circumstances, such a breach did not provide a valid reason for dismissal.

**(b) whether the person was notified of that reason; and**

**[171]** The Applicant was notified of the reasons for the dismissal, however, no clear line was drawn between the use of the word 'scabby' (in the exchange between the men at the workplace) and the breach of the Code in specific terms. In addition, as set out, the Applicant's notification of the warning from the first incident was flawed as I find (in breach of the Guideline) he had not received the warning document at that time, and when received it was not an accurate representation of the circumstances.

**[172]** Procedural issues were identified with the first warning provided by Mr Stockley. The Applicant's evidence was that he considered the Just Culture Decision Tree process was rushed and that he had not been provided with the associated records at that time. His evidence was supported by the production of the leave records which confirmed Mr Stockley was proceeding on leave and did not provide the warning.

**[173]** In considering whether the conduct presented a valid reason, the Applicant's submissions as follows are relevant:

> *"72. When making an assessment of similar treatment the Applicant submits that evidence of comparable cases needs to be presented to the FWC in order for an 'apples with apples' comparison to be made.*[civ] *The Applicant submits there is no evidence before the FWC to indicate that there is any reasonable difference between the conduct of the Applicant and that of those involved in the incidents detailed in the evidence, particularly in the evidence of Mr Crompton.*
>
> *73. The treatment of Mr Mansfield for his comments and the role he played in the incident of 15 October 2015 was inexplicably disproportionate to the treatment of the Applicant. The simple fact is that Mr Mansfield directly called the Applicant a cunt. It cannot be distinguished, or seen as less serious, that the comments made by the Applicant.*
>
> *74. There is no relevant basis upon which to differentiate those incidents from the one in question in these proceedings. The Applicant submits that the conduct involved in those other incidents was clearly more serious than that alleged against the Applicant. The Applicant submits that the failure to properly investigate those other incidents is telling.*
>
> *75. The Applicant further submits that the evidence of the Applicant in relation to the incident must be accepted. The Respondent continues to engage the only other witness to the incident, Mr Damien Barrett, and has failed to call that evidence. The Applicant submits that an adverse inference can appropriately be drawn against the Respondent in those circumstances.*
>
> *76. The Respondent sought to draw parallels between Mr McDermott's conduct and that of other employees. This was primarily done through the evidence of Mr Weickhardt. Each of those examples was clearly shown, in cross-examination, to have involved vastly different circumstances, including physical damage being caused or*

*threatened against other employees. The attempts to compare those matters to Mr McDermott's conduct were frankly ludicrous. In one case the employee had drilled into the head of another employee, and in another had threatened the other employee. Mr McDermott barely, if at all, offended Mr Mansfield. That could, and should, have been resolved by mediation."*

**[174]** The Respondent's necessity to manage its workforce against its required standard of behaviour was acknowledged, and the fact that such procedures cannot accommodate every scenario. However, the current circumstances of the discipline are significantly disproportionate to bring an end to this length of employment, for the reasons as set out against the Code.

**(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and**

**[175]** The Applicant was clearly provided with an opportunity to provide his response in the show cause response even though at the time he had not received the documentation relevant to the first warning. The Interim Decision permitted the additional evidence in relation to the first incident at the hearing, and therefore the Applicant has now had the opportunity to bring his full response; denied at the time, as he did not have the full knowledge of the first incident.

**(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and**

**[176]** The Applicant at each stage was afforded the right to a support person.

**(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and**

**[177]** The deficiency in initially not providing this first warning documentation has been considered. There is disparity between the parties regarding the application of the Step 2 Warning. Further, in relation to the verbal exchange, the Respondent maintained proper training had been provided in relation to the behaviour and conduct required. The use of the word 'scab' on site was not specifically covered in the training or in the warning. There was no warning or specific communication that its use would lead to dismissal, but in the current circumstances the use of other profane words etc would not. The Respondent's requirement to manage its workplace and its dedication to training is acknowledged.

**(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and**

**(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and**

**[178]** In assessing sections 387 (f) and (g), the Respondent is a significant organisation of the Respondent with a dedicated human resource staff and access to expert advice. In this context, the Applicant was critical of the application of the Step 2 Warning and the manner in

which it was conducted and the breach of the procedures by not providing a copy of the warning to the Applicant, until much later when the dismissal was under consideration. This is recognised given this warning was relied on for the dismissal. The Applicant also objected to the manner in which the investigation and dismissal process was conducted by the Respondent. The Applicant emphasised that Mr Weickhardt confirmed he had not reviewed the Applicant's personnel file and therefore had not taken into account all relevant matters prior to reaching a decision of dismissal.

**[179]** The Applicant submitted:

> *"66. It is apparent that despite the Respondent's extensive resources it failed to implement its own policies and procedures. Indeed, in relation to the dismissal the Respondent failed to complete its own "Just Culture" documentation. The Applicant submits that this clearly indicates the predetermination and erroneous reliance on what the Respondent has described as "precedent".*
>
> *67. The Respondent has sophisticated human resource procedure that were not used. This included the just culture process and documentation. Further, clearly set out mechanisms, including the use of mediation, were not implemented despite the content of the Code of Conduct.[cv] The failure by the Respondent to have the matter mediated is telling, especially given Mr Mansfield's request that it occur.*
>
> *68. The Applicant submits that the lack of consideration given to alternatives, and the failure to consider relevant matters such as the Applicant's personnel file, is more inexcusable given the resources the Respondent had at its disposal."*

**[180]** The Applicant contended that even if the Commission was of the view that the conduct was commensurate with a valid reason, when the deficiencies in the process are considered and the differentiation of treatment between employees involved in similar conduct is taken into account, the Applicant's dismissal, when reviewed against the Applicant's lengthy satisfactory employment history, must be considered as harsh, unjust or unreasonable.

**(h) any other matters that the FWC considers relevant**

**[181]** A range of other relevant matters were considered. It is determined, based on evidence given with respect to the supervisor proceeding on leave (after providing the first warning), that the first warning was undertaken in haste and the Applicant was never provided with the written warning document, in contrast to the requirement in the Employer's policy. Given this, it was understandable why the Applicant did not raise his disagreement with it, in his show cause response. It is however, relevant, as reinforced by Mr Coonan, that baseline positive communications were not established by the Applicant in the AMA. However, other employees had also played a role in this incident.

**[182]** The second incident referred to a breach of the Respondent's Code of Business Conduct and that conduct of this nature (in terms of the verbal exchange and the use of the word scabby) was a breach of the Respondent's behavioural standards. The Respondent did not particularise the breach in relation to the words in the 70 pages of the Code (except to state employees must treat others with dignity and respect) and pursued the conduct in terms of a zero tolerance to the use of the word 'scab' at their worksite. The Respondent submitted that it was irrelevant if it was some derivative of that such as 'scabby'. The Applicant's

representative was particularly critical of the general nature of the breach of the Code of Conduct, being a breach of the Employer's standard of working with integrity and being vague and uncertain and also that these policy documents were not universally applied to all incidents across the workforce by the Respondent. The Applicant referred to a range of other incidents involving other employees which were characterised as being far more offensive in terms of the intimidatory conduct and the nature of the language used, than that engaged in by the Applicant. The Respondent argued the Applicant would have been aware of the offensive nature of the word scab at a mine site given the *Doevendans* case.

**[183]** With respect to the use of the words in the second incident, the Applicant submitted:

> *"7. In reply to paragraph [31] the Applicant submits the following:*
>
> *(a) There is no direct evidence that the comments made by Mr McDermott, relating to the alleged use of the word "scab", were viewed as offensive by a recipient. Indeed, there was no recipient and the remarks made by the Applicant were not directed at anyone in particular. Further, the Respondent failed to call Mr Barrett as a witness.*
>
> *(b) In terms of the Code it might be argued that harassment might relate to a single incident, but this is unclear. Further, such definition would require that the recipient viewed the alleged conduct as offensive, which as stated above has not been established.*
>
> *(c) The Applicant has accepted that the comments he made were not appropriate, and indeed appropriately showed contrition. What is clear is that the words said by the Applicant, whilst inappropriate, were not unusual in the context of the mine site, related to at least reciprocal comments made by Mr Mansfield, and were in all the circumstances not so serious as to justify dismissal.*
>
> *8. In reply to paragraph [33] the Applicant submits that the Respondent's training program was inadequate in the context that the Respondent, irrationally and without justifiable reason, has held out that the words allegedly used by the Applicant were of a particularly offensive nature and worse than using the words "cunt" or "slut". Nothing in the Code supports the Respondent's contention and the Respondent, if it wished to hold out such conduct to a higher standard, should have provided training to that effect to put employees on notice."*

**[184]** The Applicant's representative was critical of the Respondent relying on the Applicant's mere utterance of the word scab/scabby as a basis for the termination. The Applicant was also critical of the Respondent's allegation that the use of this word was clearly understood by employees as a breach of the Code and Charter values. The Applicant argued that these workplace documents were lengthy and general in nature and implementation of them in terms of the training had not been undertaken in accordance with the management directions, nor in terms of the timing for such training.

**[185]** The documents made no express reference to a prohibition on the use of the term scab or the repercussions on site in terms of the disciplinary response, if it was used. In cross-examination, Mr Weickhardt's evidence on this position was:

> *"PN3145 Despite the fact that you say it's a most serious term that could be used or most offensive at that site, it's not singled out in that training?---It's not singled out."*

**[186]** Whilst Mr Weickhardt's evidence is recognised, his clear assessment and the intention of the company in managing a large workforce was to ensure that there was a standard of respect for all employees. It is also understood from the Respondent's submissions and evidence and case references that the Employer considered that the use of the word scab was considered to be offensive, and would not be tolerated at the workplace. The Respondent made significant reference to the case of authority of the Federal Court decision in *CFMEU v BHP Coal Pty Ltd*[cvi] (*Doevendans*); and that clearly, the Applicant's conduct was considered against this standard (there is a significant industrial context to these circumstances). However, the Respondent had not communicated the outcome of this case to its workforce nor that they intended to adopt such a standard as a result in managing the workforce, that the use of the term scab in any way would not be tolerated.

**[187]** The circumstances of the conduct of the Applicant in terms of the use of the word scab can be distinguished from that in the *Doevendans* case

**[188]** The Applicant genuinely gave credible evidence on the incident, however it is acknowledged that Mr Coonan in cross-examination identified some issues of credit in terms of variation in the versions of the Applicant with reference to the words he used, and in addition he highlighted with the Applicant, some lack of recollection of the jobsites he had visited in searching for work and other matters. However these did not impact overall on the straightforward nature of the evidence he gave.

**[189]** It is important to note there was some provocation in terms of the exchange, that it was put to the Applicant in derogatory terms, that they were down there to pick up the operators dig rates; a matter that the Applicant was clearly proud of, in terms of him being known as one of the best operators at the work site, for a number of years.

**[190]** It is this that initiated the exchange and created some tension between the parties. The exchange cannot be viewed in isolation from the operations at the worksite, and that the Respondent, as they are at liberty to do, does have a component of labour hire employees at site. There is no doubt that full-time employees of the Respondent are mindful that other employees may encroach on their jobs at the worksite, particularly in what was a constricting coal market.

**[191]** However, the manner in which the term was used had to have been so offensive (in the absence of a clear communication that simply using this word no matter what the context, will result in termination). It was characterised by the Respondent as the most offensive term to be used on a coal mine site. The Applicant's representative made reference to a number of other exchanges between employees and incidents between employees, that would have to be characterised as offensive and concerning, but where no disciplinary action or comparatively less disciplinary action was taken with offending employees. This comparative differentiation of treatment and the lack of clear training or cogent reasoning as to how the dismissal was necessary, given other alternatives to such were not exhausted, are relevant.

**Conclusion**

**[192]** The alleged conduct of the Applicant in the second incident regarding the verbal exchange between the Applicant and others has been considered against the Respondents Code of Conduct and the Respondent's examination of this incident in terms of prior case law dealing with the use of the word 'scab' against the facts and circumstances of the current matter. The first warning has also been taken into account.

*Remedy*

**[193]** The relevant legislative provisions for consideration of the remedy are set out in s.390, s.391 and s.392 of the Act. Section 390 sets out the following:

> ***390 When the FWC may order remedy for unfair dismissal***
>
> *(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:*
>
> > *(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and*
> >
> > *(b) the person has been unfairly dismissed (see Division 3).*
>
> *(2) The FWC may make the order only if the person has made an application under section 394.*
>
> *(3) The FWC must not order the payment of compensation to the person unless:*
>
> > *(a) the FWC is satisfied that reinstatement of the person is inappropriate; and*
> >
> > *(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case ...*
>
> *"**391 Remedy—reinstatement etc.***
>
> *Reinstatement*
>
> *(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:*
>
> > *(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or*
> >
> > *(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.*
>
> *(1A) If:*
>
> > *(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and*

*(b) that position, or an equivalent position, is a position with an associated entity of the employer;*
*the order under subsection (1) may be an order to the associated entity to:*

*(c) appoint the person to the position in which the person was employed immediately before the dismissal; or*

*(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.*

*Order to maintain continuity*

*(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:*

*(a) the continuity of the person's employment;*

*(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.*

*Order to restore lost pay*

*(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.*

*(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:*

*(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and*

*(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement."*

**[194]** The Applicant submitted that if the Commission ordered that the termination was either for no valid reason or was harsh, unjust and unreasonable, that it is appropriate for it to make an order under s.390 of the Act reinstating the Applicant to his former position and for compensation for any lost wages and to maintain the Applicant's continuity of service pursuant to s.391 and s.392 of the Act.

**[195]** The factors for consideration of whether reinstatement is "appropriate" within the meaning of s.390(3)(a) are well settled. If there is a finding that the Applicant was unfairly dismissed, then it must be considered whether there has been a destruction of the relationship

of trust and confidence between the parties, and whether the relationship could be resumed, particularly given the employer is a large organisation, with a large workforce.

**[196]** There was no definitive evidence or reasoning there would not be sufficient trust to make the employment relationship viable and productive. Any difficulty, embarrassment or inconvenience would not be such that, the problems could not be overcome.[cvii] The reasons for the dismissal did not represent significant issues related to the Applicant's performance of his duties.

**[197]** Section 392 relevantly sets out:

> ***392 Remedy—compensation***
>
> *Compensation*
>
> *(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.*
>
> *Criteria for deciding amounts*
>
> *(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:*
>
> > *(a) the effect of the order on the viability of the employer's enterprise; and*
> >
> > *(b) the length of the person's service with the employer; and*
> >
> > *(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and*
> >
> > *(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and*
> >
> > *(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and*
> >
> > *(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and*
> >
> > *(g) any other matter that the FWC considers relevant.*

**[198]** In this matter it is considered that there is not a valid reason, the dismissal is harsh and is disproportionate, and therefore unjust and unreasonable, taking into account its impact and the series of mitigating circumstances. The Applicant submitted, if reinstatement is deemed inappropriate, then pursuant to s.390(3)(b) of the Act, an Order for compensation may be considered. Given the Applicant's age, length of service and family, and prior satisfactory record, it was very likely that he would have continued in employment with the Respondent

for a longer period. The Applicant's limited earnings in the intervening period have been considered.

**[199]** Under the statutory cap set out in s.391(5) of the Act, it was submitted the Applicant should receive the equivalent of 26 weeks of pay, that would have been earned by the Applicant immediately before his dismissal.

**[200]** The Applicant in this matter sought reinstatement and had expressed remorse for his comments. There was no significant evidence (as a result of the use of the words) of intimidation or offence to the employees to the degree that would be expected in the circumstances where the Applicant's employment was terminated for such. Whilst it is acknowledged that it is the Employer's right to properly manage its workforce, particularly a large workforce in an inherently dangerous mine site, proper communication of its policies is required and then in the circumstances, the Employer should be able to expect compliance with such[cviii]. However, the facts and circumstances must be taken into account.

**[201]** It is understandable that the Employer could conclude that the words used by the Applicant represent non-compliance with the Code and the Charter values in terms of the standards of behaviour that the Employer expected at its work site. However, it could equally be construed that the standards of behaviour in terms of the language and the interaction used by the other employees involved, also fell short of the required standards. The use of the language involving 'scab' on the current facts and circumstances against the Code and case authorities did not warrant dismissal.

**[202]** The Respondent in this case had considered the conduct of the Applicant against the *Doevendans* general protections case, regarding the termination of Mr Doevendans who had been an employee at the Saraji mine. Some months prior to the termination of his employment, he had, during a protest, waved a sign (at employees in cars passing a picket line) which read *'No principles SCABS no guts'*. In that matter, the then general manager of the mine stated the word scab which appeared on the sign was inappropriate, offensive, humiliating, harassing, intimidating and flagrantly in violation of BHP's workplace conduct policy. He stated that the sign was antagonistic to the culture at the mine and in conflict with the policy of courtesy and respect. That conclusion was clear on the circumstances.

**[203]** Further, in the Federal Court of Australia Decision in *Maritime Union of Australia v Fair Work Ombudsman*[cix], the Full-Court of the Federal Court commented on the use of the word scab, in the context of a poster calling employees who had worked during a strike 'scabs':

> *"1.It is sometimes thought, in the traditional union movement at least, that to label someone a scab is the worst insult that can be given. At a minimum, it is a call to shame and ostracise that person. It signifies that they have been guilty of unforgiveable, and unredeemable, treachery which will blight their reputation forever.*
>
> *2.The conduct of the appellants in the present case invoked those traditional aims. It involved the publication and circulation of a poster accusing five persons of being scabs. The persons named as scabs were employed by the Fremantle Port Authority as vessel traffic service officers or as small craft masters."*

*3.The facts and circumstances are set out in the judgment of the primary judge on liability (Fair Work Ombudsman v Maritime Union of Australia [2014] FCA 440; (2014) 243 IR 312) ("the liability judgment") and the additional matters relevant to awards of compensation and the imposition of penalties are set out in a separate judgment (Fair Work Ombudsman v Maritime Union of Australia (No 2) [2015] FCA 814; (2015) 252 IR 101) ("the penalty judgment"), both of which judgments are the subject of the present appeal.*

*4.In late 2011, the first appellant (the MUA) through the second appellant (Mr William Tracey) was engaged in negotiations with the Fremantle Port Authority for an enterprise bargaining agreement to cover vessel traffic service officers and small craft masters.*

*5.The primary judge recorded the following matters in the liability judgment:*

> *"13 In October 2011, the VTSOs and small craft masters took part in a ballot as to whether to take protective action in relation to the 2011 negotiations for a proposed enterprise bargaining agreement with the FPA.*
>
> *14.On 27 October 2011, the ballot was declared in favour of taking protected action in relation to the 2011 enterprise bargaining agreement. There were four votes against the motion. Mr Watson was one of the employees who voted against going on strike. He told other employees that he had done so. Mr Daly also voted against going on strike and also told other employees he had done so.*
>
> *...*
>
> *16.On 23 November 2011, Mr Daly resigned from the MUA and also withdrew his authority for Mr Tracey to continue to represent him as his bargaining agent. When Mr Daly told Mr Tracey of this decision, Mr Tracey said to Mr Daly that if that was his position, there was not much he could do about it.*
>
> *17.On 24 November 2011, Mr Tracey notified the FPA in writing that the VTSOs and small craft masters intended to take protected industrial action for a 48 hour period to commence at 5:00 am on 1 December 2011.*
>
> *...*
>
> *19.On 29 November 2011, Mr Donaldson-Stiff resigned as a member of the MUA and also withdrew his authority for Mr Tracey to act as his bargaining agent. He did this by hand delivering a letter to that effect to the MUA office in Fremantle. On the same day, Mr Mawbey also withdrew his authority for Mr Tracey to act as his bargaining agent and resigned as a member of the MUA. Mr Mawbey said that he resigned from the MUA because he disagreed with the tactics that were being used by Mr Tracey, in the sense that Mr Tracey first negotiated for a pay increase and then he sought to change the roster from "four and four" to "four and six".*

*20.The majority of the VTSOs and small craft masters took strike action at the Fremantle port site for a 48 hour period. The strike action commenced at 5:00 am on 1 December 2011 and concluded at 5:00 am on 3 December 2011.*

*21.However, there were a number of VTSOs and small craft masters who worked during the 48 hour period of the strike. The VTSOs who worked were Mr Scott and Mr Mawbey. They were assisted in the control tower by Mr Allan Gray, the harbour master, and Mr Millett, the deputy harbour master. The small craft masters who worked were Mr Strickland, Mr Daly and Mr Donaldson-Stiff. They were assisted by Mr Kevin Edward, the manager of port operations, who, during the strike, worked as a deckhand. The consequence was that the strike action failed to shut down the operations of the port.*

*...*

*28.On 7 and 8 December 2011, Mr Tracey put up scab posters at a number of locations. These locations were on the MUA noticeboards in the crib room at H and J berths in the inner harbour, on the MUA noticeboards in the stevedore foreman's office at KBT in the outer harbour, on the MUA noticeboards in the stevedore crib room at KBT, on a glass fronted noticeboard in the maintenance crib room in the maintenance workshop and in the fire station at the inner harbour.*

*29.Another location where Mr Tracey attached a scab poster was to the bollard at the entry gate to Victoria Quay 3 in the inner harbour. He attached the scab poster to the bollard about 2:30 pm on 8 December 2011. This event was captured on CCTV security footage.*

*30.The scab poster named Messrs Scott, Mawbey, Daly and DonaldsonStiff - each of whom worked during the two day strike - as "scabs". The scab poster also named Mr Watson as a "scab". Even though Mr Strickland had worked during the strike, he was not named on the poster."*

*6.The "scab poster" referred to by the primary judge at [28], [29] and [30] was as follows:*

*ATTENTION*
*SCABS IN FREMANTLE*
*The following people worked while their workmates legally took*
*Protected Action in a dispute with Fremantle Ports for a new*
*Enterprise Agreement:*

*Control Tower – Dave Mawbey*
*Control Tower – Matt Scott*
*Pilot Vessels – John Daly*
*Pilot Vessels – Dave Donaldson-Stiff*
*Pilot Vessels – Doug Watson*

*This treacherous behaviour should stand condemned by all workers in Fremantle. Right across the Port of Fremantle, Wharfies, Seafarers and Port Workers have been campaigning for new Enterprise Agreements.*

*Workers in the control tower and pilot vessels have been doing the same and these lowlifes have turned on their colleagues to do the bosses bidding.*

*THE SCAB*

*After God made the rattlesnake, the toad and the vampire, he had some awful substance left over, with which he made a SCAB.*

*A SCAB is a two legged animal with a corkscrew soul, water logged brain and a combination backbone made of jelly and glue. Where other people have their hearts, a SCAB has a tumour of rotten principles.*

*When a SCAB comes down the street, honest men turn their backs, the angels weep tears in heaven and the devil closes the gates of hell to keep them out. No-one has a right to SCAB, as long as there is a pool of water deep enough to drown their body, or a rope long enough to hang their carcass with.*

*Judas Iscariot is a gentlemen compared with the SCAB for after betraying his mater, he had enough character to hang himself and a SCAB has not. There is no word in the English language that carries so much hatred, scorn, loathing and contempt as the word SCAB.*

*Once so branded a SCAB, they are marked for life. There is no escape. It is infinitely worse than the brand placed upon Cain. It goes with them everywhere, it shadows their every footstep. It never dies, and no wonder, for it is synonym of all that is mean, contemptible and unmanly. It signifies that it is impossible for its owner to descend to lower depths.*

*The SCAB has tried to undermine people who are battling for the bread and butter of their partners and chil-dren. They have sought to defeat their fellows and rivet the chains of oppression around them. Judas would not have sunk so low.*

*The criminal for the penitentiary may, to some degree, rehabilitate their character, but the SCAB is an external fixture, a living monument of self inflicted shame, a reproach to honest people, something that bares the outer resemblance of a person, but from whom the dignity of humanity has departed for ever. As people shun the leper for fear of the physical contamination, so they shun the SCAB for fear of spiritual contamination."*

**[204]** Justice Bromberg in his minority decision in the Federal Court of Australia decision in *Maritime Union of Australia v Fair Work Ombudsman*[cx] characterised the use of the word scab as follows:

*"42.The conduct in issue in this proceeding was the hanging of copies of a poster (called by the respondent ("Ombudsman") the "Scab Poster") at various maritime*

*sites including in Fremantle, Western Australia, describing Messrs Mawbey, Scott, Daly, Donaldson-Stiff and Watson as scabs, and setting out a denunciation of "the Scab" in verse. The content of the scab poster, including the denunciation, is set out in the joint judgment at [6]. It was alleged by the Ombudsman, and accepted by the primary judge, that the scab poster action breached s 346(c) of the Fair Work Act 2009 (Cth) ("FW Act").*

*43.It is well known that the word "scab", in a labour context, expresses criticism or disagreement and is uncomplimentary. The word has a long history of deprecatory use. Originally it referred to a disease of the skin. The cutaneous connection remains present in the word's now-usual meaning: the crust forming over a wound or sore during cicatrisation (first used in around 1400). But by the early 1600s the word "scab" was also in use as a term of abuse and, figuratively, as implying moral or spiritual disease (c.f. W Shakespeare, Coriolanus, I. i. 162–164). By the late 1700s, it had taken on the connotation in issue in these proceedings: "[a] workman who refuses to join an organized movement on behalf of his trade; in extended uses: a person who refuses to join a strike or who takes over the work of a striker; a blackleg; a strike-breaker". The first usage recorded in the Oxford English Dictionary specifically referring to strike-breaking comes, interestingly enough, from a trial. The trial was of certain boot and shoemakers in Philadelphia, a record of which was published in 1806: T Lloyd, The Trial of the Boot & Shoemakers of Philadelphia, on an Indictment for a Combination and Conspiracy to Raise their Wages (B Graves, Philadelphia, 1806)."*

**[205]** The conduct by the Applicant in the current case is distinguishable from that in the above appeal, on the basis that the majority of the appeal judges concluded that the poster was intended to damage the named workers, and caused fear for the personal safety of the persons to whom the comments were directed and the safety of their families and property. The case of McDermott's conduct, can be distinguished from the use of the term (in the above case) with reference to the use of labour hire workers, in response to the Applicant being told that the step up supervisor was there to pick up their dig rates. The statement and language was provocative, the Applicant had prided himself on his excellent operating skills. The circumstances are distinguishable. There was no evidence of unforgivable and unredeemable treachery on the Applicant's part.

**[206]** The current circumstances of the use of the term 'scab' can also be distinguished from an earlier decision as referred to in *Walter Meacle v BHP Coal Pty Ltd* [cxi] in which I concluded that dismissal was warranted for the use of the word 'scab' at a BHP mine site. The following extract from that decision is included to demonstrate the contrast in the circumstances between cases with a significant industrial context and the current case; the summary of the Federal Court included in the *Walter Meacle* decision is as follows:

*"[23] It is appropriate at this time to briefly summarise the findings of Lander J of the Federal Court in relation to the conduct of the Applicant the subject of these proceedings. Not all of the findings of the Federal Court will be referred to in this decision but only those most relevant. The whole of the Federal Court decision has, however, been considered.*

*[24] The Federal Court decision highlights the, at times, "heated" nature of the bargaining process involving the Respondent and its employees. The Respondent, on*

*29 July 2011,corresponded with the various Unions involved in bargaining. An excerpt of the correspondence reads:*

> *"BMA has been made aware of threatening, intimidating and otherwise inappropriate conduct by the demonstrators. On this basis, the demonstration which your unions organised, managed and co-ordinated was not peaceful.*
>
> *In particular BMA understands that:*
>
> - *employees and contractors were told to 'go home', 'fuck off', 'fuck off home', 'go home, dogs, and don't fucking come back!'as they entered or exited the mine. The words 'you're scabs, you're scabs, you've got no morals' were also yelled at employees and contractors as they entered or exited the mine;*
>
> - *banners with the words 'No principles Scabs No guts' were displayed at the entrance to the mine;*
>
> - *signs were placed on the traffic control devices contrary to the approved traffic control plan;*
>
> - *the registration or identification details of contractor vehicles, which entered or exited the site, were recorded and displayed on a chalk board that was mounted on a CFMEU Norwich Park Lodge branded trailer facing the site entrance road;*
>
> - *employees and contractors were video recorded or otherwise filmed as they entered or left the mine site; at approximately 1am on 28 July 2011, an individual was standing in the middle of the road taking video footage (before he was asked to return behind the barriers by local security); and*
>
> - *loud music was played over loud speakers, which interfered with the safe operation of communications between a traffic controller and personnel involved in road works that occurred at the front entrance to the site."*

*[25] The alleged conduct primarily took place in relation to an employee, Mr Loader, who had decided to resign his membership of the Union and to cease participating in industrial action. It was alleged that the Applicant made rude gestures, and yelled offensive remarks at Mr Loader while he attempted to cross the picket line and enter the mine site.*

*[26] At paragraph 28 of the Federal Court decision Lander J summarised part of the allegations as follows:*

> *"Mr Loader said that Mr Meacle has a very distinct voice. The window of Mr Loader's vehicle was down and as he passed Mr Meacle he heard Mr Meacle yell out 'scab cunt', whilst at the same time raising a finger on both hands and moving his hands up and down."*

*[27] Further at paragraph 35 his Honour stated:*

> *"...Mr Meacle's own evidence was that he was 'yelling out ... along with other members around me'."*

*[28] And further at paragraph 41:*

> *"Mr Citadella said that he was told by Mr Loader that "Mr Meacle had both arms in the air giving him the finger and yelling abuse and calling him 'you scab cunt'."*

*...*

*[32] Further in relation to the use of the word "scab" his Honour found:*

> *"A "scab" is a derogatory term, which is uttered for the purpose of criticising and upsetting the person to whom it is directed.*
>
> *The signs were maintained at the picket line to intimidate and embarrass Mr Loader for crossing the picket line...."*

*[34] Further and specifically in relation to Mr Meacle's conduct, I determined as follows:*

> *"I find that Mr Meacle said and did what Mr Loader claims, and he did so for the purpose of humiliating and harassing Mr Loader, because Mr Loader had resigned from the union and crossed the picket line. It follows therefore, in my opinion, that Ms Taylor was right to arrive at her conclusion in her investigation that Mr Meacle had done what Mr Loader had claimed he had done. Mr Stewart was also right to accept that recommendation.*
>
> *That conduct, which I find Mr Meacle guilty of, was inconsistent with the purpose of the picket line, which was not designed to intimidate or put people in fear. It is also inconsistent with the union policy of not involving individual identification of people as they go through the line. His conduct was outside the reason for the protest.*
>
> *Mr Meacle knew what he said in the picket line and knew that what he said was in breach of the company's Code of Conduct. It was conduct of which Mr Meacle was aware the union would disapprove.*
>
> *Accepting Mr Loader's evidence that Mr Meacle yelled out at him "scab cunt" and raised a finger on each hand and moved his hands up and down, supports the finding arrived at by Ms Taylor, which was relied upon by Mr Stewart at the time that he gave the show cause letter to Mr Meacle."*

*[61] The behaviour of Ms Meacle, it was submitted, was a deliberate and wilful breach of both the Policy and the Code of Conduct. Further it was submitted that such breach was a serious breach.*

*…*

*[71] The facts of the matter are that there had been a sustained period of industrial action. The employee at whom the Applicant's conduct was directed, Mr Loader, was an employee who had ceased participating in the protected industrial action and had decided to work. The Federal Court decision documents a series of events in which references were made to Mr Loader, specifically by the use of the word "Loader" on signs and at one point even a noose hanging above a sign that referred to Mr Loader. It is noted however that these further instances were not the subject of specific findings in the Federal Court decision nor did they form the basis of the alleged misconduct of the Applicant. They are referred to as part of the consideration of the circumstances of the matter. The final determination in this matter has not relied on these further instances.*

*[72] Relevantly to this decision are his Honour's findings in the Federal Court decision that the Applicant was aware of some of these surrounding circumstances; in particular, Mr Meacle was aware of the signs making specific reference to Mr Loader as a "scab".*

*[73] Further the Federal Court decision accepted that the purpose of the signs was to intimidate and embarrass Mr Loader for choosing to cross the picket line".*

*…*

**[207]** In the *Walter Meacle* decision I noted:

*"[70] While it is accepted that the use of the word "scab" on its own may not, in certain circumstances, cause offence, the authorities are clear that consideration must be had to the circumstances, as a whole, as before the decision-maker. In this matter, the Federal Court has found that the use of the word is derogatory and uttered for the purpose of criticising and upsetting. The particular facts and circumstances as before the relevant decision-maker must be taken into account."*

**[208]** The findings of Landers J regarding the conduct of Mr Meacle (in contrast to the Applicant), at paragraphs 234 and 235, in the decision state:

> *"That conduct, which I find Mr Meacle guilty of, was inconsistent with the purpose of the picket line, which was not designed to intimidate or put people in fear. It is also inconsistent with the union policy of not involving individual identification of people as they go through the line. His conduct was outside the reason for the protest.*
>
> *Mr Meacle knew what he said in the picket line and knew that what he said was in breach of the company's Code of Conduct. It was conduct of which Mr Meacle was aware the union would disapprove."*

*[100] The Applicant also specifically conceded the conduct occurred:*

> *"I'll stop you there. So again the conduct the court found you had engaged in was shouting or swearing at Mr Loader?---That is correct, yes.*

*And you're threatening him?---Yes, that's correct.*

*And humiliating?---Yes.*

*It was insulting and name calling?---Yes.*

*I also put it to you it was also intended to isolate him or alienate him from other people, wasn't it?---Yes, that's (indistinct).*

*Single him out and make him different to everybody else?---That's correct."*

...

*[102] The evidence supports the conclusion that the Applicant engaged in the conduct in the manner alleged by the Respondent. The Applicant was aware of both the Policy and Code of Conduct and was aware that employees had the right to engage or not to engage in industrial activity or have an industrial affiliation. The Applicant however ignored these matters and engaged in the conduct causing insult and intimidating Mr Loader. The conduct is serious and is a valid reason for dismissal."*

**[209]** I concluded in those circumstances; where Mr Meacle's comments were directly made with the purpose and in the circumstances which he knew were aimed at being insulting, threatening and humiliating to the other employee, that the dismissal of Mr Meacle was not harsh, unjust or unreasonable.

**[210]** I have also taken into consideration the decision of *Foley and Martin v BHP Coal Pty Ltd*[cxii], where employees (who had been suspended on pay) were reinstated after periods of unpaid suspension to impose a significant financial penalty. This case, determined in 2001, by (then) Vice President Ross; was in relation to alleged misconduct at a BHP mine site. The conduct referred to particular circumstances aimed at another employee. I do not intend to repeat all of the alleged conduct but to reference the circumstances in which the term 'scab' was used:

*"[4] It is relevant to note at this point that there were two other signs used during the dispute which also referred to Mr Brake. One consisted of an "A" frame, about two metres square, placed on the top of a box trailer. In his written statement Mr Evans described the sign in the following terms:*

*"... it displayed words on both sides. At the very top were the words "Ricky you're an infection" and immediately under these words, on both sides of the frame, was the BHPC logo printed in black, right next to the letters "BHP". Under this sign, again on both sides of the frame, in the centre of the sign in large black type was the word "Staff" and immediately below that, again on both sides of the frame, was the word "Scab". This word was in a circle which was brightly coloured. Under this were the words "Even your dogs are scabs".*

...

*.. on both sides of these words, were the names of a number of staff employees who are employed by BHPC at the mine. ... Next to the name "Ian Brake", I saw what appeared to be the words "Wrist Slasher"."*

**[211]** The misconduct in this case took place on the picket line and this was considered to be a relevant factor in determining whether the disciplinary action taken was disproportionate. It was confirmed in recounting the circumstances that the industrial dispute in question at that time was protracted and that employees had been on strike some five weeks and that BHP staff had been used to continue to operate the mine .The case involved the Applicants in the matter using signs in relation to those employees that crossed the picket line.

**[212]** Both the employees had 5 to 6 years' service and like Mr McDermott, the evidence suggested their past service had been satisfactory. There has been further judicial reflection on the use of the term scab since the time of that decision. The Federal Court decision, set out above in *Maritime Union of Australia v Fair Work Ombudsman*[cxiii], more recently referred to conduct regarding the use of the term scab that is considered to be deliberate and serious in terms of a personal attack on another employee in contrast to the conduct of the Applicant currently.

**[213]** The use of the word 'scab' cannot be condoned, however, what characterises the offensive nature of the use of the word in these cases is the industrial context and how it has been used in contrast to the current circumstances.

**[214]** In the current matter under consideration, there is similar reference to other employees using other obscene language. The cross-examination of the General Manager of the mine site demonstrated a pre-determination of the use of the word and that alternatives to dismissal were not considered.

> *"PN2816 What is this industrial connotation you are talking about? Well, basically the word 'scab', it is an abhorrent word. It is a word used by employees when they think that a contractor is coming in to take their job. It is designed to be as offensive as possible and to hurt as much as possible to the labour hire employee or the contractor so that they don't continue doing it. It is a form of intimidation. It is a form of harassment and a form of actually targeted at a labour hire or a contractor.*
> *PN2817 Wouldn't it depend on the context? No, in any context it is completely unacceptable.*
> *PN2818 That is just your own view. You are just stating what your view on the use of the word is? That's not my own view. I actually consulted very widely. Before this, I hadn't worked in an industrial setting such as this and so I wanted to make sure that I understood the mining context. In the mining context it is an abhorrent word and this is said on a mine site.*
> *PN2819 What about the word 'cunt'? What about it?*
> *PN2820 Do you take the same view about that? Is that an abhorrent word? That's an inappropriate word. It is not nearly the same severity as the word 'scab'.*
> *PN2821 What about 'slut'? If you call someone a 'slut'? Yes it's not - not as bad as the word.*
> *PN2822 Not as bad? No, there is no word which as bad as the word 'scab'.*
> *PN2823 You have taken this from conversations with people in the industry? Yes, I have consulted widely to make sure I understand the industrial context of the word.*
> *PN2824 Which people? Look, I can't - I can't list every single person. But, you know, it is an extremely bad word and I don't think that is in dispute from my understanding. I mean, it's - if you want me to elaborate, it was one of those words*

*where essentially you can - it is like, in my mind, a black person being called a 'nigger' in the deep South of America. It is off the scale in terms of abhorrentness. And it is one of those traits that you cannot change, right? So, you know, you can call someone a lazy bastard and they can work harder. But, you know, a scab, it relates to the fact that this person cannot change their employment status. They cannot change the fact they are a labour hire person. You are actually fundamentally attacking something about a person that they can't change.*

*PN2825 That all depends on context, though, doesn't it? The context is that it is a mine site coming into an industrial renegotiation of the enterprise agreement with - - -*

*PN2826 Come on, are you serious? - - - with the person who was coming there, Gary perceived this person to be taking his job because he was getting replaced on the digger by a contractor. So the context, if you say - it actually makes you think 'scab' was being used directly at and targeted at and trying to cause maximum pain towards the labour hire employee.*

*PN2827 How on earth did you reach that conclusion? Did Mr McDermott say that is what he was trying to do? Did the other employees involved say he was trying to do that? Look, all I can say is that the word here, I believe that it was directed at and overheard by the labour hire employee and that I think it is an abhorrent word to use.*

*PN2828 But calling someone a 'cunt' or a 'slut' that is not as bad, that is fine? No, that's not what I am saying at all. I think they are inappropriate words as well and, in fact, I don't enjoy using those words now either.*

*PN2829 Yes, sure? But I am saying they are as bad as the word 'scab'. The 'scab' words stands on its own.*

*PN2830 So was it directed at or was it overheard? It was both. I mean, as my statement says in paragraph 12, it was directed - I determined that it was directed at and overheard by the employee.*

*PN2831 How do you overhear something that you're being told straight to your face? Well, you use your ears. I mean, it's - - -*

*PN2832 Overhear? Heard by or overhear, I mean, it was heard by and it was directed at and whether it was overheard or heard by, to me they're essentially the same.*

*PN2833 So you mentioned some upcoming negotiations? Correct.*

*PN2834 What's that got to do with this? Look, it's a moment of tension on the site because you know, the last industrial negotiations resulted in strikes and contractors coming in. There was an incident there where the word "scab" was used, where it resulted in the person's dismissal, and so it's a time of high tension for the people on the site.*

*PN2835 It was on a picket line, wasn't it? Correct.*

*PN2836 During industrial action? Correct.*

*PN2837 Yes. There's no mention of upcoming negotiations or disputation or anything like that in the investigation report, is there? No, but it's one of the factors that I took into account in my decision-making.*

*PN2838 Was that ever put to Mr McDermott? What?*

*PN2839 The industrial context, this idea of the agreement being up for renewal or negotiations? No, that wasn't in the show cause letter.*

*PN2840 Was it serious misconduct? There was, in my view.*

*PN2841 So you dismissed Mr McDermott for serious misconduct? Well, it was a serious - it was a serious breach of the code of business conduct.*

*PN2842 Now, you'd be aware - - - ? I mean, in my mind, sorry to interrupt, it was so serious that there was no other reasonable course of action to take.*
*PN2843 Okay, we'll start with that. You'll be aware Mr Mansfield raised the possibility of a mediation? I was aware that that's what Mr Mansfield wanted.*
*PN2844 Yes, and why was that simply dismissed? Well, I went through the Just Culture tree, according to the process that we talked about here, and if you'd like me to, I found that there was an intentional and deviant violation of such severity that the only reasonable course of action, unfortunately, was to terminate him.*
*PN2845 So you didn't consider mediation? I went through the process, yes, and found the only thing I could do by following this process, the previous process, was to terminate him.*
*PN2846 Did you consider mediation? As I said, I went through the process and thought that this was the only reasonable outcome. I rejected all other possible outcomes.*
*PN2847 I understand what you're saying, but I'm asking you a question; did you consider mediation as an alternative to dismissal? After I went - I mean, my obligation was to follow the process. I followed the process. After I followed the process, it said I should terminate. There was no sense in mediating if you're going to terminate.*
*PN2848 You read the investigation report? I did.*
*PN2849 You saw it there, you must have noted that Mr Mansfield - - - ? I did.*
*PN2850 - - - talked about mediation? I did. I did.*
*PN2851 So why wasn't it considered? Why weren't his views taken into account? Well, because my job is to follow the procedure, like we talked about before, in terms of actually I have to follow the Just Culture. I have to then go and do it. If it had come out as being unintentional or a lapse or something like that, it would have been a different outcome. It may not even have required mediation. If this had come out differently, it might have been reinstatement back into the workforce with no mediation required. But it did not."*

**[215]** Clearly, communicating there will be a zero tolerance approach to the use of the word 'scab' on site may well clarify the situation. Currently there is comparative differentiation in this matter between the use of this word and other equally offensive terms by other employees. This is not to say that the Applicant should not be held responsible for the use of the word in connection with the reference to labour hire contractors allegedly taking employees work. The Applicant was remorseful for the use of the term in this way. However it must be considered that in the conversation with the Applicant an equally derogatory approach and language was used with the Applicant.

**[216]** It is acknowledged that, as in the *Harbour City Ferries*[cxiv] case, an employer has the right to set a policy for the standard of conduct for employees, and not to expect to have such debated. It is fair and reasonable for the employer to have such approach to the use of the word 'scab' where it is clearly set out to employees .Whilst the Employer considered that the *Doevendans* decision (as it related to the conduct of an employee from the Saraji mine) was well known to all employees and that they should've been well aware that arising from this decision the use of the term 'scab' on site would not be tolerated. However it cannot be automatically assumed that because a Federal Court decision had dealt with particular circumstance that employees will be aware and that ruling translates to how a scenario will be enforced on site.

**[217]** The *Doevendans* case does have significant differences to the matter under consideration currently. The conduct in that case was alleged to have been repeated and was directly designed to be intimidating and offensive, and premeditated in terms of the production of a sign with the word 'scab'.

**[218]** The Employer is often faced with the excuse that the use of this language is the culture of the mine site and that robust exchanges are normal and therefore often proposed as acceptable. The Employer, as set out, does not find such conduct acceptable and goes to significant efforts to train their people regarding the standards of behaviour warranted in the workplace. Their approach is acknowledged and understood and it will be of concern that exchanges using the word 'scab' continue to be put to forensic analysis as to the intent and nature and circumstances of the exchange. However to date this is how the use of the word has been determined in the case law. It is open to the Employer to avoid such deliberation of circumstances and to communicate a zero tolerance attitude and policy, to the use of the word 'scab' on site.

**[219]** Direct communication to the workforce setting out the Employer's clear position would eliminate potentially any defence in relation to the use of this word and should clarify the nature of the language used on a mine site and the Employer's view of such in terms of the disciplinary responses. It is accepted that the Code of Conduct cannot deal with every specific scenario and that the BHP Code of Conduct does seek to support the appropriate standard of conduct and to manage the workplace by affording dignity and respect to all at their workplace. Such an approach must be supported. However, in the circumstances where there had not been direct communication regarding the *Doevendans* decision and such was relied on, the resulting disciplinary outcome of an employee with 12 years' service is harsh in the current circumstances.

**[220]** These conclusions in relation to the marked difference between the circumstances of the *Doevendans* incident and that involving the Applicant were not taken into account by the decision maker. In fact, he drew a correlation on the basis that both cases involve the use of the word scab and his view that it was a significantly offensive term to use on site and the termination of employment was directly warranted based on that assessment. The consideration of the Applicant's termination was deficient, as the exchange was wrongly characterised as being similar to that in the *Doevendans* matter and that appropriate alternatives to termination, were not given real consideration. The evidence of the employees was also that the matter had escalated disproportionately after the exchange and that there was also no real persuasive evidence that any of these employees could not have mended their workplace relationships or in fact could not work with the Applicant if reinstated.

**[221]** It is acknowledged that there is some recognised tension on the mine site with the use of labour hire employees in order that the Employer, which is their entitlement, can be operationally responsive to the changing coal market, and the Applicant was referring to this in the second incident. However, the evidence of the exchange demonstrated that this was an off the cuff remark made by the Applicant, not specifically directed at any employee and certainly not in the industrial context as seen in the case law. The termination of his employment is disproportionate to the circumstances where it had not been made clear to employees that the use of the word scab in any circumstances would result in dismissal. However, the language used in the exchange was a breach of the Code of Conduct and is still considered to be a serious matter, given the Employer's emphasis on maintaining respect and integrity for all at the workplace. The Applicant conceded the conduct in terms of the words

'scabby buggers' and the other words as he set out in his recount of the exchange. Mr Coonan also demonstrated that there was a breach of the standard operating procedure in relation to the first warning which gives rise to a real safety concern for this Employer.

**[222]** In all of the circumstances, I have considered the submissions on the interim earnings and related matters and also the Respondent's submissions regarding the nature of the breach and that reinstatement, if awarded, should be coupled with a heavy discounting of the period in recognition of the breaches of the Code of Conduct and SOP at the mine site. In recognition of these breaches and to act as a deterrent for other such breaches and conduct at the workplace, I decline to make an order restoring lost remuneration. I do not consider, taking into account all of the circumstances and that the Applicant had some awareness of the *Doevendans* case, that the continuity of remuneration between the dismissal and the reinstatement is warranted given both incidents. A separate Order [PR585766] will reflect this.

**[223]** I Order accordingly.


COMMISSIONER

*Appearances*:

*Mr R Anderson*, Legal Officer, CFMEU, for the Applicant
*Mr M Coonan*, Partner, and *Ms C Jenkins* Herbert Smith Freehills for the Respondent

*Hearing details:*

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*Final written submissions:*

Applicant – 25 July 2016.
Respondent – 25 July 2016.

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[i] [2016] FWC 2706.

[ii] Annexed to Gary McDermott's statement, marked "GM03."

[iii] Annexed to Gary McDermott's statement, marked "GM04."

[iv] Submissions of the Applicant, at [56].

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

[vi] Print S 4213 at [23].

[vii] *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1 at 14.

[viii] PN1767 and PN1769.

[ix] PN2340.

[x] PN2397.

[xi] *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 at 465.

[xii] [2010] FWA 2211; *Bumford v Rio Tinto Aluminum (Bell Bay ) Limited* [2007] AIRC 1082; *Lawrence v Coal & Allied Mining Services Pty Ltd T/A Mt Thorley Operations/Warkworth* [2010] FWA 6750; *Mayer v Transfield Services (Australia) Pty Limited* [2013] FWC 5340.

[xiii] *Makin v Glaxosmith Kline Australia Pty Ltd* [2010] FWA 2211 at [129].

[xiv] PR963023 26 September 2005.

[xv] Ibid at [132] .

[xvi] Ibid at [137].

[xvii] Witness Statement of Gary McDermott, paragraph 2.

[xviii] Witness Statement of Gary McDermott, paragraph 11.

[xix] Witness Statement of Gary McDermott, paragraph 45.

[xx] Witness Statement of Gary McDermott, paragraph 56.

[xxi] Witness Statement of Gary McDermott, paragraph 59.

[xxii] Witness Statement of Gary McDermott, paragraph 66.

[xxiii] Witness Statement of Gary McDermott, paragraph 71.

[xxiv] Witness Statement of Mick Findlay, paragraph 6.

[xxv] Witness Statement of Mick Findlay, paragraph 13.

[xxvi] Witness Statement of Mick Findlay, paragraph 10.

[xxvii] Witness Statement of Mick Findlay, paragraph 21 & 22, annexure "BC03."

[xxviii] Witness Statement of Mick Findlay, paragraph 28.

[xxix] Exhibit 1, paragraph 25; Exhibit 4, paragraph 23; Exhibit 5, paragraph 10; Exhibit 5, paragraph 11.

[xxx] Exhibit 4 at paragraph 22; Exhibit 1 at paragraph 27.

[xxxi] Applicant's Outline of Submissions at paragraph 42.

[xxxii] Exhibit NF-1 to Exhibit 8

[xxxiii] Exhibit 16 at paragraph 27

[xxxiv] Attachment GM-01 to Exhibit 1

[xxxv] Annexure VA-3 to Exhibit 11.

[xxxvi] Annexure VA-5 to Exhibit 11

[xxxvii] Attachment GM05 to Exhibit 1

[xxxviii] Exhibit 1 at paragraph 41

[xxxix] PN2296; PN 2344 & PN 2713 & PN276.

[xl] Applicant's Outline of Submissions at [55].

[xli] Exhibit 11 at paragraph 23.

[xlii] *Walter Meacle v BHP Coal Pty Ltd* [2013] FWC 2331.

[xliii] [2013] FWC 2331 at [70].

[xliv] *Myers v. 2evolve Pty Ltd* [2016] FWC 2921.

[xlv] Exhibit 4, paragraph 10.
[xlvi] Exhibit 11 at paragraph 50.
[xlvii] Annexure DW-2 to Exhibit 14.
[xlviii] Anneure DW-2 to Exhibit 14.
[xlix] Anneure DW-2 to Exhibit 14.
[l] Attachment GM06 to Exhibit 1.
[li] Attachment GM06 to Exhibit 1.
[lii] F2, Question 301.
[liii] PN519.
[liv] Exhibit 11 at paragraph 43.
[lv] *Paul Swain v Ramsey Food Packaging Pty Ltd* (U No. 20400 of 1999) at [105].
[lvi] Exhibit 14 at paragraphs 16 – 28, 32 – 35.
[lvii] Applicant's Outline of Submissions at [34].
[lviii] Exhibit 11 at paragraphs 6 to 9.
[lix] Annexure VA-7 at page 6 to Exhibit 11.
[lx] PN 288 & PN 289.
[lxi] Exhibit 1 at paragraph 25.
[lxii] *Parmalat Food Products Pty Ltd v Mr Kasian Wililo* [2011] FWAFB 1166 at [249].
[lxiii] Applicant's Outline of Submissions at [4(f)], [4(p)], [4(r)] and [4(s)].
[lxiv] Exhibit 14 at 33.
[lxv] Exhibit 14 at 25.
[lxvi] Exhibit 14 at 25.
[lxvii] PN 2955.
[lxviii] *Brambleby v Australian Postal Corporation* [2014] FWCFB 900.
[lxix] Exhibit 14 at paragraph 25.
[lxx] Exhibit 1, paragraph 2.
[lxxi] Exhibit 1, paragraphs 30 and 31.
[lxxii] Exhibit 1, paragraphs 32 and 37.
[lxxiii] Exhibit 1, paragraph 37.
[lxxiv] Exhibit 1, paragraphs 37 and 39.
[lxxv] PN2432.
[lxxvi] Exhibit 1, paragraph 40.
[lxxvii] Exhibit 1, paragraph 40.
[lxxviii] Exhibit 1, paragraphs 41 and 43.
[lxxix] PN2461.
[lxxx] PN2340.
[lxxxi] PN2362 and PN2363.
[lxxxii] PN2381 to PN2384.
[lxxxiii] PN2387.
[lxxxiv] Exhibit 1 "GM03".
[lxxxv] Exhibit 11, paragraph 55.
[lxxxvi] Exhibit 11 "VA06".
[lxxxvii] Exhibit 1, paragraph 55.
[lxxxviii] Exhibit 1, paragraphs 56 and 57.
[lxxxix] Exhibit 1, paragraph 69.
[xc] See "GM01" to Exhibit 1, at page 3.
[xci] Exhibit 2, paragraph 59.

[xcii] PN3744.
[xciii] Exhibit 1, paragraphs 11 to 29.
[xciv] Exhibit 1, paragraph 28.
[xcv] PN2955.
[xcvi] [2014] HCA 41.
[xcvii] PN2340.
[xcviii] PN2397.
[xcix] PN2413.
[c] Exhibit 11 "VA2".
[ci] PN2496.
[cii] PN2419.
[ciii] PN2323.
[civ] *Sexton v Pacific National (ACT) Pty Ltd*, unreported, PR931440 at [36].
[cv] PN2194.
[cvi] [2014] HCA 41.
[cvii] *Perkins v. Grace Worldwide (Australia) Pty Ltd* (1997) 72 IR 186 at 191 – 192 per Wilcox CJ, Marshall and North JJ.
[cviii] *Harbour City Ferries Pty Ltd v Mr Christophe Toms* [2014] FWCFB 6249.
[cix] [2016] FCAFC 102.
[cx] [2016] FCAFC 102.
[cxi] [2013] FWC 2331.
[cxii] PR905419.
[cxiii] [2016] FCAFC 102.
[cxiv] [2014] FWCFB 6249.