DECISION

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

Joshua Robinson

v

Wulguru Steel Pty Ltd
(U2023/10605)

COMMISSIONER JOHNS MELBOURNE, 13 JUNE 2024

Application for an unfair dismissal remedy

Introduction

[1] Sometime before 10 October 2023 someone ground the picture of a penis and words into the paint work on the roof of a tanker owned by Puma Energy Holdings Pty Ltd (**Puma Energy**). At the time work was being undertaken on the tanker by Wulguru Steel Pty Ltd (**Employer/Respondent**).

[2] After a short investigation, Wayne Landrigan, the Respondent's General Manager, determined that Joshua Robinson (**Applicant**) was the culprit principally because, (Mr Landrigan claims) Mr Robinson admitted to the conduct. This led to Mr Robinson being sacked by the Respondent for serious misconduct.

[3] Mr Robinson denies any wrongdoing. He also denies making any admissions to Mr Landrigan.

[4] Consequently, on 27 October 2023, Mr Robinson made an application to the Fair Work Commission (**Commission**) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy in respect of his dismissal by the Respondent. The Applicant seeks compensation in the amount of $24,225 (being 17 weeks pay from the date of dismissal, 10 October 2023, to 5 February 2024).

[5] For the reasons that follow, I have determined that the dismissal was not unfair and decided to dismiss the application.

Procedural history

[6] The matter was allocated to my Chambers for determination on 29 November 2023.

[7] The matter was listed for a mention/directions hearing on 11 December 2023.

[8] On 11 December 2023, the Applicant appeared on his own behalf and Mr Bob McKay appeared for the Respondent in his capacity as the Director. In furtherance of the matter, I begun by resolving the preliminary matters set out below.

Permission to be represented

[9] This was not a relevant consideration as neither party appeared with a paid agent or a lawyer.

Conference or Hearing

[10] I sought submissions from the parties about whether the Commission should conduct a conference (s. 398) or a hearing (s. 399).

[11] Taking account the fact that both parties were self-represented and what would be the most effective and efficient way to resolve the matter, I decided to conduct a determinative conference.

The issues in dispute

[12] I expressly noted during the mention/directions hearing that in circumstances where there is a factual contest about the facts of the dismissal, the Respondent would need to call the witnesses who had allegedly seen the Applicant defacing the fuel tank.

The directions

[13] After consultation with the parties, a timetable was set down for the determination of the matter. The determinative conference was initially listed for 23 January 2024.

The conciliation conference

[14] Having resolved the above preliminary matters, both parties agreed to me attempting to conciliate the matter (on the condition that neither party would object to me ultimately determining the matter should the conciliation be unsuccessful). Both parties confirmed that they understood the process. Consequently, the recording was turned off and a conciliation attempted, albeit unsuccessfully.

The determinative conference

[15] I issued directions in furtherance of the application which required the Applicant to file his material first by 29 December 2023. He did not do so despite a reminder email sent on the same day.

a) On 2 January 2024, my Associate contacted the Applicant via telephone about the non-compliance. The Applicant noted the reason behind the non-compliance to be due to delay in accessing legal aid as he was not sure how to overcome the two witness statements against him. The Applicant was asked to seek an extension formally via email to which he complied. On the same day, I issued amended directions providing the Applicant until 16 January 2024 to file his material. The determinative conference was instead listed for 5 February 2024.

b) On 16 January 2024 at 5:15 pm, my Associate contacted the Applicant via telephone and noted that his material was due at 4 pm. The Applicant noted that he forgot but will file the same tomorrow.
c) On 17 January 2024, the Applicant filed his material which only consisted of an outline of submissions.
d) On 1 February 2024, the Respondent filed its material which consisted of an outline of submissions and four witness statements.
e) On 2 February 2024, my Chambers sent an email to the parties' making some preliminary observations about the evidence in preparation for the determinative conference. In particular, the Applicant was put on notice that in the absence of a witness statement from him, he would not be able to cross-examine the Respondent's witnesses. The Applicant did not file any material in reply.
f) On 4 February 2024, the Applicant requested via email that the determinative conference listed on 5 February 2024 to be adjourned so that he could seek legal advice. The request was denied.
g) At the beginning of the determinative conference on 5 February 2024, the Applicant again pressed the adjournment request.[1] Notwithstanding the fact that the Applicant had been aware of the case against him since at least 11 December 2023, after having heard from the parties, the Applicant was provided a further opportunity to file a witness statement by 4 pm (Melbourne time) on 22 February 2024 and the determinative conference was adjourned on that basis.[2]
h) On 22 February 2024, the Applicant filed a witness statement. However, it was only sent to the Respondent and some 40 minutes beyond the deadline. The Respondent filed a s.399A application on the basis of the Applicant's delay on multiple occasions, but ultimately withdrew the application before it could be decided.[3]
i) Due to unforeseen circumstances the determinative conference did not occur until 27 March 2024.

[16] In advance of the determinative conference the parties filed materials which were compiled in a Digital Tribunal Book (**DTB**). For completeness I set out below the documents relied upon by the parties. I have had regard to all these material in coming to this decision:

Exhibit	Document title	Date
1	Form F2	27-10-2023
2	Email from the Respondent attaching form F3	16-11-2023
2.1	Form F3	16-11-2023
2.2	Email titled "FW: Crude Drawing ground into Tank Roof"	10-10-2023
2.3	File note	10-10-2023
2.4	Termination letter	11-10-2023
2.5	Email titled "Final Pay & Debt Recovery"	12-10-2023
2.5.1	Payslip	various
2.5.2	Payroll deduction form	various

3	The Applicant's outline of submissions	17-01-2024
4	The Respondent's outline of submissions	01-02-2024
4.1	Witness Statement - Landrigan	30-01-2024
4.2	Witness Statement - Landrigan - Attachment A - ROBINSON, Josh Employment Contract	22-04-2021
4.3	Witness Statement - Landrigan - Attachment B - Puma Energy Email 10.10.23	10-10-2023
4.4	Witness Statement - Landrigan - Attachment C - Correspondence re. Final Pay	12-10-2023
4.5	Witness Statement - Landrigan - Attachment D - Seek Job Search	23-01-2024
4.6	Witness Statement - Cox	30-01-2024
4.7	Witness Statement - Pike	30-01-2024
4.8	Witness Statement - Marshall	30-01-2024
5	Supplementary Witness Statement - Landrigan	02-02-2024
6	The Applicant's witness statement	22-02-2024
6.1	Signed page of the witness statement	22-02-2024
7	The Respondent's s.399A application	23-02-2024
8	Email from the Respondent	26-02-2024
8.1	Email from the Applicant to the Respondent	22-02-2024
8.1.1	Signed page of the witness statement	22-02-2024
8.2	Email from the Applicant to the Respondent	22-02-2024
8.2.1	The Applicant's witness statement	22-02-2024

[17] At the determinative conference, the Applicant represented himself and gave evidence on his own behalf. The Respondent was represented by Mr Bob Mckay. The Respondent called four (4) witnesses as follows:

(a) Mr Wayne Ian Landrigan – General Manager

(b) Mr Linton James Cox – Workshop Manager

(c) Mr Lachlan Hunter Pike – Boilermaker

(d) Mr Christopher Marshall – Boilermaker

[18] All witnesses made themselves available for cross-examination (although the Applicant did not cross-examine Mr Marshall[4] or Mr Cox[5]).

[19] During the determinative conference, Mr Lachlan Pike drew a picture of what he saw on the roof of the fuel tank. It is a picture of a penis with the words 'Skinny Pe'. The picture became Exhibit 9 in the proceedings and looked like this,

[20] On 5 April 2024, my Chambers received an email from the Applicant (the Respondent was not copied) attaching a screenshot of an email. The email said as follows:

> 'Dear commissioner Johns I have received the transcripts from Andrew, Emile, I'm currently having service issues in my area, I have screenshot my reply email and have sent to you in this email to ensure you and other parties have received my reply, I hope wulguru/Bob Mckay and Andrew have seen this as well as these are not the transcripts I was referring to'

[21] The screenshot was of an email sent to the Commission's transcription services provider, Epiq, and said as follows:

> 'Dear Commissioner Johns ,I have just received the transcripts sent by Andrew,Emile ,these however are not the transcripts I was referring too, you would need to go further back to an earlier recorded phone call where we spoke one on one with you and you have stated to me what wulguru steel alleges I had done to warrant my dismissal.in this conversation we attempted mediation'

[22] I have decided to identify this correspondence as Exhibit 10 in the proceedings. However, I am not satisfied about the relevance of the correspondence. It seems to me that the Applicant was interested in obtaining transcripts of what happened in conciliation to demonstrate some inconsistency in the Respondent's evidence. No transcript was taken of the conciliation conference. Even if it had been, it would not have been admissible.

Factual findings

[23] I make the following factual findings. I do so because the matters were either, agreed between the parties, or not otherwise substantially contested, or because I have made a finding of fact for reasons I explain in this decision.

a) The Respondent is a privately owned Australian steel fabrication company.[6]
b) On 29 April 2021, the Applicant commenced employment with the Respondent in the position of boilermaker.[7] The Applicant earned around $74,100 per annum.[8]
c) In September 2023, the Respondent was engaged to complete remediation works to the roof of a fuel tank on the client site of Puma Energy in Townsville.[9] The tank was designated *Tank 3320* or *Tk3320*.
d) The employees engaged on the Tk3320 project were the Applicant, Lachlan Pike, Chris Marshall, and Nathan Odgers.[10]
e) Mr Odgers is an apprentice and is known on site as 'Skinny Pete'.[11]
f) Mr Pike says that, on 19 September 2023,[12]

> *I witnessed Josh Robinson dye grinding into the tank roof and wondered why there was grinding happening as it didn't form part of the scope of works were were undertaking.*
>
> *Subsequently, I went over to Josh to see what was wrong. It was then that I noticed graffiti of a penis ground into the tank roof.*
>
> *When I asked Josh what he was doing he told me that it was just a bit of fun and that he was bored. I said to him that it can be fixed by grinding the mascoat down and just painting over with some gal paint. We can then tell the client that it was just a mistaken cleat location. Josh responded with words to the effect that he didn't care and that it can stay there.*
>
> *Later that day I mentioned Josh's graffiti to my colleague, Chris Marshall who said words to the effect that it was up to Josh to fix and went back to work.*

g) Mr Pike says the penis was 'about the size of your hand'[13] and that it had a 'scrotum'.[14]
h) Mr Marshall says that, on 19 September 2023,

> *… whilst working on the Tank 3320 refurbishment project, it was brought to [his] attention by Lachlan Pike that some graffiti had been seen on the tank roof. Lachlan confirmed to [Mr Marshall] that he had witnessed Josh Robinson grind the graffiti (consisting of a penis and words on the side) into the tank coating.*
>
> *At the time, given that we were very busy and that I was working in the capacity as a worker, I thought very little of it and continued working.*[15]

i) Mr Pike further says that, on 6 October 2023,[16]

> *… whilst we were completing the works on other parts of the tank, I commented to Josh that the graffiti was still there. Josh said words to the effect, "that it can say there" and "I don't give a fuck if I lose my job.*
>
> *As I was a worker and not a supervisor, I went back to completing my tasks on the tank.*

j) Neither Mr Pike nor Mr Marshall thought to report the graffiti to their superiors.

k) No one took a photo of the penis graffiti (somewhat strange in 2023 when it seems everything is photographed). Mr Landrigan explained that for safety reasons photos could not be taken.[17] He further explained that, although they could have used 'intrinsically safe' phones to take a photo, they 'didn't think about it.'[18] Having regard to the seriousness of the matter, this is very odd.

l) At 10.48 am on 10 October 2023, representatives of the Respondent (including Mr Landrigan) received an email from the Maintenance Coordinator at Puma Energy, Marc Philpott, with a complaint (**Complaint**). The Complaint was headed 'Crude Drawing found into Tank Roof.' The Maintenance Coordinator went on to write:[19]

> *It was very disappointing walking the tank today & finding a Penis & wording ground into the paint work of the Tank Roof.*
>
> *This behaviour is totally unacceptable & must not be tolerated.*
>
> *I would hope that Abraham / Wulguru address this issue with the their (sic) people here on site & let it be known that if the offender is known & found they will be removed from site & have their access to Puma revoked. I would hope the offender is found & removed from site.*
>
> *This also has a reflection on your company & the behaviours of your employee's.*

m) Linton Cox (the Workshop Manager at Abrahams Steel and Pipe Fabrications) was contacted by Mr Philpott. Mr Philpott asked Mr Cox whether he had seen his email. Mr Cox said he had not. Following the conversation with Mr Philpott, Mr Cox checked his emails. Mr Cox then decided to interview two employees on the site, Mr Marshall and Mr Pike. Mr Cox's evidence is that both Messrs Marshall and Pike laid the blame with the Applicant. Mr Cox did not take written statements from either worker. It was Mr Pike's evidence[20] that Mr Cox asked him to draw what he saw, and he did. However, what Mr Pike drew on 10 October 2023 was not tendered in evidence.

n) Mr Pike confirmed that he was interviewed by Mr Cox.[21] He further confirmed that he told Mr Cox that he had witnessed the Applicant perform the graffiti works.[22]

o) Mr Marshall confirmed that he was interviewed by Mr Cox.[23] He further confirmed that he told Mr Cox '… it was Josh Robinson, and that Lachlan Pike had witnessed the occurrence.'[24]

p) Mr Landrigan contacted Mr Cox because Mr Cox had also received the Compliant. Mr Cox advised Mr Landrigan that 'he had interviewed his employees on site … regarding

the allegation from [Puma Energy]. [Mr Cox] confirmed that 2 employees had witnessed the damage to Puma's property, and both confirmed that the damage was performed by employee, Josh Robinson.'[25]

q) Mr Landrigan called the Workshop Manager for the Respondent and asked that the Applicant be sent to his (Mr Landrigan's) office.

r) At around 2.30 pm on 10 October 2023 the Applicant attended a meeting with Mr Landrigan. Mr Landrigan's file note of the meeting states the following,

> *I proceeded to advise Josh I had received a complaint from our client (PUMA) following his attendance on site. I provided details of the complaint to Josh and asked for Josh to respond to the allegation. Josh denied the allegations. I then proceeded to advise there were witnesses to the said incident. Josh then admitted he had used his grinder to cause damage to the client asset. Josh then asked what he could do to rectify the damage that he had caused to the property.*
>
> *Due to the nature of his actions, I advised Josh that this was considered serious misconduct which results in instant dismissal. I advised for Josh to collect his tools and belongings and leave the business premises immediately.*

s) The Applicant denies making any admissions. I deal with this contest in the evidence below.

t) At around 2.40 pm on 10 October 2023, the Applicant was dismissed effective immediately.

u) On 11 October 2023, the Applicant received a letter confirming the termination of his employment[26] signed by the Respondent's Commercial Director, Bob Mckay. It stated,

> *We are writing to you about the termination of your employment with Wulguru Steel Pty Ltd.*
>
> *On 10 October 2023, in a meeting with Wulguru Group General Manager, Wayne Landrigan, you confirmed that you were responsible for intentionally causing damage to a client's assets on their site by using a grinder to draw an offensive picture.*
>
> *In addition to the cost of the damage caused by defacing the client's property, your actions are responsible for bringing the integrity of the Wulguru Group and its employees into disrepute. This in turn has caused a financial impact to Wulguru through the loss of pending contracts with this client.*
>
> *Your actions are considered serious misconduct and as a result your employment is being terminated immediately.*
>
> *....*

v) Despite the claim of financial damage there was no evidence that this had occurred by 11 October 2023 (i.e. the day after the Complaint).

w) On 12 October 2023, the Applicant received an email detailing final payments to be made to him. He was paid up until the date of the termination (10 October 2023). He

was paid outstanding leave entitlements less an amount he owed to the Respondent in respect of a loan for a heavy duty Adflo helmet with a remaining balance of $2,151.40.[27] The Applicant had on 25 July 2023 signed a payroll deduction form.[28] The deductions meant that the Applicant received no final payment.[29]

x) On 19 October 2023 Mr Landrigan received a phone call from a representative of Puma Energy who advised him that the Respondent was 'not successful in being appointed to the Townsville SMP Maintenance Project – Tanks 3310, 3325, 3330, and 3360.' Mr Landrigan says he was told 'that the recent staff actions on Tank 3320 did not reflect well on the Wulguru Group and was a factor in not being appointed to the project.' Mr Landrigan estimates that the loss of revenue is about $3m. However, there were no direct evidence from Puma Energy about the value of the contracts and why they were cancelled.

y) On 27 October 2023, the Applicant filed the current application before me.[30] In his application he denied any wrongdoing. However, I note that,

   i. at no time between when he is alleged to have made an admission (on 10 October 2023) and 27 October 2023, and

   ii. at no time in response to the letter of termination (sent on 11 October 2023),

   did the Applicant deny any wrongdoing, nor the making of an admission.

z) On 16 November 2023, the Respondent filed a response to the unfair dismissal application.[31] It did not raise any jurisdictional objections. Further, it declined to participate in a conciliation conference.

[24] As stated above, the Applicant denies the allegation and admitting to the same during the meeting on 10 October 2023. Therefore, there is a factual contest to be resolved.

Protection from Unfair Dismissal

[25] An order for reinstatement or compensation may only be issued where the Commission is satisfied the Applicant was protected from unfair dismissal at the time of the dismissal.

[26] Section 382 sets out the circumstances that must exist for the Applicant to be protected from unfair dismissal:

> '**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.'

[27] There is no dispute, and the Commission, as presently constituted, is satisfied, the Applicant has completed the minimum employment period and was covered by a modern award. Consequently, the Commission, as presently constituted, is satisfied the Applicant was protected from unfair dismissal.

[28] I will now consider if the dismissal of the Applicant by the Respondent was unfair within the meaning of the FW Act.

Was the dismissal unfair?

[29] A dismissal is unfair if the Commission is satisfied, on the evidence before it, that all of the circumstances set out at s.385 of the FW Act existed. Section 385 provides the following:

> '**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.
>
> Note: For the definition of ***consistent with the Small Business Fair Dismissal Code***: see section 388.'

Was the Applicant dismissed?

[30] A person has been unfairly dismissed if the termination of their employment comes within the definition of 'dismissed' for purposes of Part 3–2 of the FW Act. Section 386 of the FW Act provides that:

> '**386 Meaning of *dismissed***
>
> (1) A person has been ***dismissed*** if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.'

[31] There is no dispute, and the Commission, as presently constituted, is satisfied, the Applicant has been dismissed.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[32] A person has not been unfairly dismissed where the dismissal is consistent with the Small Business Fair Dismissal Code (**the Code**).

[33] The Respondent did not contend that the Code applied. Therefore, this is not a relevant consideration.

Was the dismissal a genuine redundancy?

[34] The Respondent did not submit I should dismiss the application because the dismissal was a case of genuine redundancy. Therefore, this is also not a relevant consideration.

Harsh, unjust or unreasonable

[35] Having been satisfied of each of s.385(a),(c)-(d) of the FW Act, the Commission must consider whether it is satisfied the dismissal was harsh, unjust or unreasonable. The criteria the Commission must take into account when assessing whether the dismissal was harsh, unjust or unreasonable are set out at s.387 of the FW Act:

> '**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.'

[36] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410 at 465 by McHugh and Gummow JJ as follows:

> '.... It may be that the termination is harsh but not unjust or unreasonable, unjust but not

> harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.'

[37] I am under a duty to consider each of these criteria in reaching my conclusion.[32]

[38] I will now consider each of the criteria at s.387 of the FW Act separately.

Valid reason - s.387(a)

[39] The Respondent must have a valid reason for the dismissal of the Applicant, although it need not be the reason given to the Applicant at the time of the dismissal.[33] The reasons should be 'sound, defensible and well founded'[34] and should not be 'capricious, fanciful, spiteful or prejudiced.'[35]

[40] The Respondent alleged that the Applicant had engaged in serious misconduct. In the letter terminating the employment of the Applicant, the Respondent alleged that the Applicant:

a) drew an offensive image on the Tk3320 (**Picture Conduct Reason**); and
b) alleged that the Picture Conduct 'caused a financial impact to [the Respondent] through the loss of pending contracts with [Puma Energy]' (**Financial Impact Reason**).

[41] I reject the Financial Impact Reason. On the evidence of Mr Landrigan, the Respondent only found about the loss of work from Puma Energy on 19 October 2023. That is one week after the letter of termination was sent to the Applicant. It necessarily follows that the Financial Impact Reason was not known to the Respondent at the time of the dismissal. Therefore, it can not have been a valid reason for the dismissal on 10 October 2023.

Consideration

[42] As noted above, there is a factual contest about the Picture Conduct Reason. What appears certain is that there was an offensive picture ground into Tank 3320. Mr Philpott's email sent at 10.48 am on 10 October 2023 attests to having scene it while 'walking the tank today…'.

[43] What is less certain is who drew the image of the penis. The Applicant denies he did it. Mr Pike says he did.

[44] The relevant test that I must have regard to is as follows (footnotes omitted):[36]

> '[23] When the reason for the dismissal relates to the employee's conduct, it is necessary for the Commission to determine, on the balance of probabilities, whether the alleged conduct occurred, and if so, whether it was a sufficient reason for termination. Further,

> "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed on reasonable grounds after sufficient enquiry that the employee was guilty of the conduct which resulted in the termination".'

[45] Therefore, I am required to determine whether the conduct in question occurred in order to 'properly determine whether there was a valid reason for the termination'.[37]

[46] The disputed evidence about the alleged conduct is as follows:

a) On or around 19 September 2023.
    a. The Respondent's version of events: Mr Pike witnessed the Applicant dye grinding on the roof of the fuel tank a penis with words on either side to say 'skinny Pete' which was the nickname for Mr Odgers.[38] The Applicant told Mr Pike that he did it because it was 'a bit of fun and that he was bored' and did not really care if someone found out.[39] Mr Pike mentioned the same to Mr Marshall who noted that it was a matter for the Applicant to fix.[40]
    b. The Applicant's version of events: The Applicant denies the allegation and contended that if Mr Pike did witness the same he would have told someone or made a report.[41]
b) On or around 6 October 2023.
    a. The Respondent's version of events: Mr Pike witnessed the graffiti remained on the tank and spoke with the Applicant who responded 'it can stay there' and 'I don't give a fuck if I lose my job'.[42]
    b. The Applicant's version of events: The Applicant denies the allegation.
c) 10 October 2023.
    a. The Respondent's version of events: During the meeting the Applicant admitted to the conduct and asked what he could do to rectify the damage.[43]
    b. The Applicant's version of events: The Applicant denies admitting to the conduct and instead contended that Mr Landrigan was extremely angry during the meeting and did not believe the Applicant's denial and yelled for the Applicant to 'pack [his] shit and fuck off'.[44]

[47] The Applicant makes bare denials and accusations of inconsistencies in the Respondent's evidence. The Applicant relied on the case of *Emma Horan v Tren Trading Pty Ltd t/a Dubbo Early Learning Centre* [2019] FWC 3249 where Deputy President Sams found no valid reason for dismissal where there were inconsistencies between the allegations made by the employer's decision maker and the witnesses.[45] The inconsistency relied upon by the Applicant concerned the name engraved around the penis. The Applicant says that, during a conciliation conference in the Commission it was alleged that the name was that of Mr Philpott, but that, before me it was the name of 'Skinny Pete'.[46]

[48] Of course, what was said in a conciliation conference is not admissible in the substantive hearing. The only evidence before me is that the name 'Skinny Pete' appeared. That is consistent with what Mr Pike drew.

[49] The fact that there were words ground onto the roof of the tank has been consistent. It

was first noted in the Puma Energy's complaint email, then the Respondent's file note, then the statement of Mr Landrigan, then the statement of Mr Marshall, and then again during Mr Pike's cross-examination. However, I note that it was not until we saw the drawing by Mr Pike that the evidence was that the words were 'Skinny Pete'.

[50] The only reason that the Applicant advances for me not believing Mr Pike is that he did not report the conduct he observed. Mr Pike explained under cross-examination why he did not report the incident:[47]

> 'The Commissioner: Mr Pike, why is it that you didn't report the matter? I mean it occurred round about 19 September?
>
> Mr Pike: Mm-hm.
>
> The Commissioner: You say, other than speak to Mr Marshall about it, you don't do anything else; is that right?
>
> Mr Pike: Yes, that's correct.
>
> The Commissioner: Why is that?
>
> Mr Pike: Well, when you work side by side with people and you're working in close quarters with everyone, and people make mistakes, people have brain farts, and you hope that they sort of fix it on their own. I've made plenty of mistakes in the past and, you know, like I can live with those mistakes and that's fine, but, you know, like I give people the opportunity to fix it and right their own mistakes, and that's why I didn't report him. You know, like if it had have been cleaned up and fixed, no one would have been the wiser and we wouldn't be here right now.
>
> So I just - I gave him - some would call it a second chance to do the right thing, but I wasn't going to fix his mistakes for him, and I wasn't going to report him, but, you know, in the grand scheme of things, we lost out a lot of money from that job and lost - not only did they lose their name, but they - the money - they lost their name in that industry as well, and that's just something you can't get back and, you know, like I sort of feel sorry for him a little bit that we've had to go through this, and this whole thing, as well as, you know, losing millions of dollars in revenue and, you know, also like losing their name at Puma, which we still do a lot of work for, but we don't do - well, sorry, they still do a lot of work for, but just not as much because of what's happened, and it's just a shame for me. That's all.
>
> The Commissioner: I guess what I don't understand is this: you care about the reputation of Wulguru, don't you?
>
> Mr Pike: Yes, I do, yes.
>
> The Commissioner: And you knew that there was a graffiti penis on the top of a tank, didn't you?

> Mr Pike: Yes.
>
> The Commissioner: You knew it was going to be returned to the client?
>
> Mr Pike: Yes. So, at that point, I didn't know a finish date for the whole project. I was just there to work on the project. I didn't know a finish date, I didn't know the clients were inspecting it. I just sort of - yes, I didn't know that it would escalate to the situation it was in. Otherwise, if I had have known it would have escalated, I would have, you know, gone and seen my supervisor, but I just was sort of hoping that he would have taken the initiative to clean it off, and then we'd be done, and everyone would be none the wiser, but, you know, I care about Wulguru's reputation, but I also, you know, try to give people a chance to redeem themselves as well, and obviously that was a bad judgment call on my behalf.'

[51] Mr Pike's explanation for not reporting the matter is reasonable. He did not want to 'dob' on a work colleague. It is clear he comes from the school where to 'dob' is to be un-Australian. He thought the Applicant would fix the issue.

[52] The fact that Mr Pike did not 'dob' is not sufficient for me to find that he is not telling the truth. In fact Mr Pike struck me as a witness of truth. He had no reason to not be truthful.

[53] Consequently, I somehow need to resolve the contest in the evidence between the Applicant and Mr Pike. It is a classic (but, actually, not too common) example of one witness saying one thing, and the other something completely different (and irreconcilable).

[54] However, a disbelief in one witness does not mean that I must accept the evidence of the other. I do not have to accept either contention for what happened. If the evidence is so scarce I am entitled to make no finding about what actually happened.

[55] I am not here to decide if the Applicant engaged in serious misconduct. I need only decide:

a) if he engaged in the picture graffiti; and, if so,
b) if it is a valid reason for dismissal.

Did the Applicant engage in the picture graffiti?

[56] What I have struggled with in this matter is that:

a) No one has put forward a hypothesis about why the Applicant would draw the graffiti and put his livelihood at risk. What the Applicant is alleged to have done, makes no sense to me. If the evidence had been that he had just had an argument with 'Skinny Pete', maybe that would have explained the graffiti. But, that was not the evidence. There is no explanation. The closest hypothesis was advanced by Mr Pike; he described the conduct as a 'brain fart'.
b) The Applicant has not put forward a credible hypothesis about:
    i. why Mr Pike would be lying; nor
    ii. why Mr Pike, Mr Marshall, Mr Cox and Mr Landrigan would be involved in

a conspiracy against him.

[57] I put the conspiracy issue to the Applicant during the hearing:

> 'THE COMMISSIONER: Well, Mr Robinson, what I'm struggling with is that Mr Philpott writes this email complaining about the graffiti, and then Mr Landrigan goes around and conducts an investigation about it, or asks about it; we've got Mr Cox confirming that Mr Philpott called him about it and that he spoke to Mr Marshall and Mr Pike; we've got Mr Pike saying he saw you do it and that he spoke to you about it, and we've got Mr Marshall saying that, contemporaneously on 19 September, Mr Pike reported it to him. Are you saying that there's some big conspiracy between these four people - five people.
>
> MR ROBINSON: Not between four or five, just within the only eye witness, Lachlan Pike. I believe he wrote it. I didn't touch or grind a penis in the tank. He's the only one who ever saw it. I'm not denying the fact that any of the other witnesses were spoken to. It's just that it's not five, it's just the one eye witness that claims he saw me do what I believe he did. I didn't do it.
>
> THE COMMISSIONER: Why didn't you put to him that he did it when he was here?
>
> MR ROBINSON: Because I was advised in a legal aid thing to not theorise, to let you be the judge. I've been advised to not theorise within this case.'

[58] It not having ever been put to Mr Pike, I reject the contention advanced by the Applicant in closing submissions that Mr Pike drew the penis.

[59] The relevant standard of proof in this matter is the 'balance of probabilities'. As was recently explained by Justice Lee in *Lehrmann v Network Ten Pty Limited* (**Lehrmann**) [2024] FCA 369,

> 98 … the "balance of probabilities", is often misunderstood. It does not mean a simple estimate of probabilities; it requires a subjective belief in a state of facts on the part of the tribunal of fact. A party bearing the onus will not succeed unless the whole of the evidence establishes a "reasonable satisfaction" on the preponderance of probabilities such as to sustain the relevant issue: *Axon v Axon* (1937) 59 CLR 395 (at 403 per Dixon J). The "facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied": *Jones v Dunkel* (1959) 101 CLR 298 (at 305 per Dixon CJ). Put another way, as Sir Owen Dixon explained in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (at 361), when the law requires proof of any fact, the tribunal of fact must feel an *actual persuasion* of its occurrence or existence before it can be found.
>
> 99 Justice Hodgson put it differently, but to the same effect, by observing that when deciding facts, a civil tribunal of fact is dealing with two questions: "not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a

> reasonable decision": see D H Hodgson, 'The Scales of Justice: Probability and Proof in Legal Fact-finding' (1995) 69 *Australian Law Journal* 731; *Ho v Powell* [2001] NSWCA 168; (2001) 51 NSWLR 572 (at 576 [14]–[16] per Hodgson JA, Beazley JA agreeing).
>
> 100 Whatever way it is put, a "[m]ere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact": *NOM v DPP* [2012] VSCA 198; (2012) 38 VR 618 (at 655 [124] per Redlich and Harper JJA and Curtain AJA); *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431; (2012) 10 ASTLR 164 (at 176 [51] per Campbell JA, Bergin CJ in Eq and Sackville AJA agreeing).
>
> ….
>
> 102 …, in Briginshaw, Dixon J (at 362) emphasised that reasonable satisfaction is not attained independently of the nature and the consequence of the fact to be proved, and his Honour referred to the seriousness of the allegation, the inherent unlikelihood of the alleged occurrence, or the gravity of the consequences flowing from the finding in question as matters which could all properly bear upon whether the court is reasonably satisfied or feels actual persuasion.

[60] In the present matter the Respondent makes a serious allegation of misconduct. The consequences of me finding that the Applicant engaged in drawing of the graffiti have serious repercussions for the Applicant. It will mean that I find that he lied to his employer when first confronted with the allegation and continued that lie before the Commission. It will result in a public finding that he was dishonest in his evidence. That finding will be published on the World Wide Web for all to read, including future prospective employees. It may affect his ability to earn income in the future.

[61] Consequently, because of the seriousness of the allegation and the consequences flowing from a finding that the Applicant drew the graffiti, these are matters that must bear upon whether I am reasonably satisfied that the Applicant drew the graffiti. That does not change the standard of proof from anything other than the 'balance of probabilities', but it does mean I need the evidence to be sufficient to actually persuade me that he engaged in the conduct he is accused of.

[62] In *Lehrmann* Justice Lee goes on to explain 'The Importance of Contemporaneous Representations.' His honour quotes Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Limited*[48] has stating a what Justice Lee calls a 'helpful working hypothesis, rather than something to be enshrined in any rule'[49], that,

> *'… the best approach … is … to place little if any reliance at all on the witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.'*

[63] As Justice Lee further observed 'contemporaneous records are a far surer guide as to what happened than ex post facto accounts or rationalisations, or unverifiable assertions as to what people "felt"'.[50]

[64] In the current matter there are no contemporaneous notes of the interviews that Mr Cox says he undertook with Messrs Pike and Marshall. I wish he had. However, I have no reason to believe that Mr Cox did not undertake the exercise of interviewing both men.

[65] The contemporaneous documents that do support a finding that the Applicant drew the graffiti are:

a) The file note taken by Mr Landrigan on 10 October 2023; and
b) The Termination of Employment letter sent on 11 October 2023.

[66] Both documents refer to the Applicant's admission that he drew the graffiti. At no time between 11 October 2023 and 27 October 2023 (when the present application was filed) did the Applicant write to the Respondent to deny that he had made the admission. Further, the Applicant did not take nor keep any contemporaneous file notes of his own. Consequently, both documents support a finding that the Applicant drew the graffiti.

[67] As noted above in the procedural history of the matter, the Applicant was provided every opportunity to put his best case forward. Having considered all the evidence including:

a) the contemporaneous documents (referred to above),
b) the evidence of Mr Pike about what he:
    i. saw on 19 September (that he was able to draw – Exhibit 9) and 6 October 2023,
    ii. reported to Mr Marshall, and
    iii. told Mr Cox on 10 October 2023
c) the evidence of Mr Marshall about what Mr Pike reported to him on 19 September and what he (Mr Marshall) reported to Mr Cox on 10 October 2023,
d) the evidence of Mr Cox about what both Messrs Pike and Marshall told him on 10 October 2023,

on the balance of probabilities, I am satisfied that the Applicant drew the penis graffiti and admitted to the same on 10 October 2023.

[68] Beyond a bare denial by the Applicant, there is simply no evidence before me to convince me that the Applicant did not draw the penis. I add to this that, as a witness, the Applicant had a motivation to lie. None of the other witnesses had a similar motivation to either lie or be in cahoots with each other to target the Applicant for dismissal.

[69] For these reasons I am actually persuaded that the Applicant drew the graffiti.

[70] I must now turn to whether the conduct was a valid reason for the dismissal.

Does the picture graffiti equate to a valid reason for dismissal?

[71] A single foolish, dishonest act may not always, in the circumstances of a particular case, justify summary dismissal.[51] And so, in this matter the Applicant may have been better to have admitted to the conduct and claimed it was a 'brain fart', or found some other reason why he

drew the graffiti. That reason may not have excused his behaviour, but it may have explained it. It may have caused me to downgrade the seriousness of the conduct. However, in the present matter that is not how the Applicant played his cards. He denied he engaged in the conduct at all. It was an all or nothing defence.

[72] For the reasons above I have found that, on the balance of probabilities, the Applicant drew the graffiti.

[73] The meaning of 'serious misconduct' is set out at regulation 1.07 of the *Fair Work Regulations 2009* (Cth) which says as follows:

> '(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.'

[74] Clause 3.3 of the Applicant's employment contract also says as follows:[52]

> 'The company may terminate your employment immediately by giving written notice to you and without being required to provide any compensation or payment in lieu of notice if you:
>
> (a) engage in serious or gross misconduct;
> (b) breach a fundamental condition and/or commit a fundamental breach of the conditions of your employment;
> (c) commit an act of fraud or dishonesty;
> (d) engage in any conduct which, in the reasonable opinion of the company, might tend to injure the reputation or business of the company;
> (e) fail or refuse to comply with any lawful direction given to you by the company through its authorised representative.'

[75] The Respondent submitted that (footnotes omitted),[53]

> '15. The Respondent determined that the Applicant's conduct met the definition of serious misconduct pursuant to regulation 1.07 of the Fair Work Regulations and warranted summary termination pursuant to the Applicant's employment contract because:

> a. The Applicant's actions were wilful and deliberate and were so far outside the scope of what is accepted and required of an employee so as to be inconsistent with the continuation of the employment contract; and
>
> b. The Applicant's conduct caused serious and imminent risk to the reputation and profitability of the Respondent's business, a risk which materialised when:
>
> i. The Respondent's client advised that the actions of the individual responsible reflected on the Respondent;
>
> ii. The Respondent's client advised that the incident impacted on the decision not to award a lucrative contract to the Respondent resulting in significant loss of revenue for the Respondent; and
>
> iii. The Respondent had to pay two employees for a period of 4 – 5 hours to repair the damage caused by the Applicant which also prevented those employees for being able to perform their ordinary duties for the Respondent.
>
> 16. The Respondent submits that the Applicant's conduct amounted to serious misconduct and accordingly, summary termination in accordance with the Applicant's employment contract was appropriate and reasonable in the circumstances.'

[76] The Respondent also submitted unchallenged evidence from Mr Landrigan that due to the conduct, it lost lucrative contracts with Puma Energy which amounted to some $3 million dollars.[54] However, the loss of profitability was not yet realised at the time of the dismissal.

[77] Therefore, the question is whether the conduct injured the reputation of the Respondent, and if so, whether it was sufficient reason for termination.

[78] The first query is obvious, the email from Puma Energy was in no way unambiguous. They were unhappy in no uncertain terms with the Respondent. The reputation of the Respondent was damaged.

[79] The second query is assisted by the Applicant's own submission during the determinative conference, being that the Respondent is the 'largest engineering company in Townsville'.[55] Therefore, the conduct did have serious and imminent risk to 'the reputation, viability or profitability of the employer's business'. The conduct was also in breach of the employment contract. Whilst the loss of contracts had not yet been realised, the Respondent would have been alive to the adverse impact of the conduct with not only Puma Energy but its other clients. I am thus satisfied that the conduct was sufficient reason for the termination without the need to decide whether the conduct was serious misconduct.

[80] Consequently, I find that there was a valid reason for the dismissal.

Notification of the valid reason - s.387(b)

[81] Notification of a valid reason for termination must be given to an employee protected

from unfair dismissal before the decision is made,[56] in explicit terms[57] and in plain and clear terms.[58] In *Crozier v Palazzo Corporation Pty Ltd*[59] a Full Bench of the Australian Industrial Relations Commission dealing with similar provision of the *Workplace Relations FW Act 1996* stated the following:[60]

> '**[73]** As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.'

Consideration

[82] The Applicant was notified of the valid reason for dismissal on 10 October 2023. Being satisfied that the Applicant admitted to the conduct, I find the Applicant was notified of the reason for the dismissal.

Opportunity to respond - s.387(c)

[83] An employee protected from unfair dismissal must be provided with an opportunity to respond to any reason for dismissal relating to the conduct or capacity of the person. This criterion is to be applied in a common-sense way to ensure the employee is treated fairly and should not be burdened with formality.[61]

Consideration

[84] In the present matter the Applicant says he was not given an opportunity to respond. He says that in the meeting on 10 October 2023 Mr Landrigan accused him of drawing the graffiti and told him to 'pack [his] stuff and fuck off.'

[85] Mr Landrigan's file note of the meeting tells a different story.

[86] Being satisfied that the Applicant admitted to the conduct during the meeting on 10 October 2023, I find the Applicant was provided an opportunity to respond.

Unreasonable refusal by the employer to allow a support person - s.387(d)

[87] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present.

Consideration

[88] The Applicant did not request a support person. Therefore, this is a neutral consideration.

Warnings regarding unsatisfactory performance - s.387(e)

[89] Where an employee protected from unfair dismissal is dismissed for the reason of unsatisfactory performance, the employer should warn the employee about the unsatisfactory performance before the dismissal. Unsatisfactory performance is more likely to relate to an employee's capacity than their conduct.[62]

Consideration

[90] The Applicant was not dismissed for unsatisfactory performance. Therefore, this is a neutral consideration.

Impact of the size of the Respondent on procedures followed - s.387(f)

[91] The size of the Respondent's enterprise may have impacted on the procedures followed by the Respondent in effecting the dismissal.

[92] The size of the Respondent's enterprise is some 189 employees.

Consideration

[93] I find the size of the employer's enterprise did not impact on the procedures followed in effecting the dismissal.

Absence of dedicated human resources management specialist/expertise on procedures followed - s.387(g)

[94] The absence of dedicated human resource management or expertise in the Respondent's enterprise may have impacted on the procedures followed by the Respondent in effecting the dismissal.

Consideration

[95] In the absence of any evidence, I should find that the procedures were impacted. Any competent HR professional would have advised a better course of action and investigation to be conducted. For example, in the first instance the Respondent could have obtained written witness statements from Messrs Pike and Marshal, retained the picture drawn by Mr. Pike at the time and requested a photo of the graffiti from Puma Energy. These materials could then have been used as the basis of a show cause process where the Applicant would have been conscious of the allegations against him.

Other relevant matters - s.387(h)

[96] Section 387(h) provides the Commission with a broad scope to consider any other matters it considers relevant.

[97] The Applicant raised the following matters,[63]

a) that he lives in a rural area and thus finding alternative employment is difficult;
b) that he had an unblemished work record which should have been taken into consideration by the Respondent; and
c) that he had been applying for other jobs since termination and thus has been trying to mitigate his losses.

[98] The Respondent raised the following matters,[64]

a) that trust and confidence is a necessary ingredient of an employment relationship and the Applicant's conduct has eroded the same; and
b) that the Applicant's tenure was relatively short, some two and a half years.

[99] The Applicant's first and third matters relate to remedy and are not relevant to this factor. In any event, the Respondent submitted unchallenged evidence of 21 job openings for the role of boilermaker in Townsville as at 23 January 2024,[65] and the Applicant conceded that he did not submit any evidence in support of him mitigating his losses.[66] In considering the application of s.387(h) I have not considered these matters.

[100] The Applicant's second matter is relevant. However, it would have been more so, had he not denied engaging in the conduct. He could then have argued that the dismissal was harsh because the economic consequences for him outweighed the gravity of infantile graffiti. That is not how he ran his case. Consequently, I was required to find whether the Applicant drew the graffiti and whether that conduct was a valid reason for dismissal. On both counts I found against the Applicant. It necessarily follows that I have also found that he was not a witness of truth in the matter.

[101] The Respondent's first factor relied on the Full Bench decision of *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198 where there were some statements made in respect of the appropriateness of the reinstatement. It seems to me that the Respondent wished to highlight that it had a sufficient reason for dismissal because it no longer had confidence in the Applicant. The Respondent's second factor and its relevance was not further expanded upon. However, I am not satisfied that either of these factors further assists the Respondent, in fact in some sense it detracts away from it because,

a) of the harsh impact of the dismissal following the infantile graffiti as a one off stupid act (had it been admitted and true remorse demonstrated);
b) had he been provided the opportunity, the Applicant may have been able to redeem himself through other disciplinary actions such as requiring the Applicant to apologise to Puma Energy, invite the Applicant to pay for the cost of removing the graffiti and/or giving the Applicant a first and final warning; and
c) Puma Energy did not call for the sacking of the culprit and merely their removal from the site.

[102] Overall, having taken into consideration both the Applicant and the Respondent's other relevant matters,

a) I am not satisfied that the Applicant's other relevant matters weigh in favour of the dismissal being unfair; and

b) I am not satisfied that the Respondent's other relevant matters weigh in favour of the dismissal not being unfair.

Conclusion

[103] Having considered each of the matters specified in s.387, the Commission, as presently constituted, is satisfied the dismissal of the Applicant was not unfair.

Conclusion

[104] The Commission, as presently constituted, is satisfied that the Applicant was protected from unfair dismissal and that the dismissal was not unfair. Therefore, no remedy is due to the Applicant. His application must be dismissed.

[105] An order will be issued with this decision [PR774371].

COMMISSIONER

Appearances:

Mr J Robinson for himself
Mr B McKay on behalf of the Respondent

Hearing details:

2024
Melbourne (video using Microsoft Teams)
5 February & 27 March.

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<PR774370>

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[1] Transcript (5 February 2024), PN6.

[2] Transcript (5 February 2024), PN40-49.

[3] Transcript (27 March 2024), PN11.

[4] Transcript (27 March 2024), PN212.

[5] Transcript (27 March 2024), PN267.

[6] https://www.wulgurusteel.com/history/

[7] The Digital Tribunal Book (DTB), Exhibit 4.2, p 50.

[8] DTB, Exhibit 2.1, p 16.

[9] DTB, Exhibit 4, p 41.

[10] DTB, Exhibit 4.7, para 3, p 71.

[11] Transcript (27 March 2024), PN150.

[12] The Applicant rejects Mr Pike's recollection. I address the inconsistency in their evidence below.

[13] Transcript (27 March 2024), PN151.

[14] Transcript (27 March 2024), PN153.

[15] DTB Exhibit 4.8, para 3 and 4, p 73.

[16] The Applicant rejects Mr Pike's recollection. I address the inconsistency in their evidence below.

[17] Transcript (27 March 2024), PN230.

[18] Transcript (27 March 2024), PN241.

[19] DTB, Exhibit 4.3, p 53.

[20] Transcript (27 March 2024), PN167.

[21] DTB, Exhibit 4.7, para 10, p 72.

[22] DTB, Exhibit 4.7, para 11, p 72.

[23] DTB, Exhibit 4.8, para 4, p 73.

[24] Ibid.

[25] DTB, Exhibit 4.4, para 8, p 48.

[26] DTB, Exhibit 2.4.

[27] DTB, Exhibit 4.4, p 54.

[28] DTB, Exhibit 4.4, p 59.

[29] DTB, Exhibit 4.4, p 56 – 57.

[30] DTB, Exhibit 1.

[31] DTB, Exhibit 2.

[32] *Sayer v Melsteel* [2011] FWAFB 7498.

[33] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-378.

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

[35] Ibid.

[36] *Mr Palestina Milovale Masoe v MMA Vessel Operations Pty Ltd* [2016] FWC 1178, [23].

[37] *King v Freshmore (Vic) Pty Ltd* [2000] AIRC 1018, [29].

[38] Transcript (27 March 2024), PN148; see also DTB, Exhibit 4.7.

[39] DTB, Exhibit 4.7.

[40] DTB, Exhibit 4.7 & 4.8.

[41] DTB, Exhibit 6.

[42] DTB. Exhibit 4.7.

[43] DTB, Exhibit 4.1.

[44] DTB, Exhibit 6.

[45] DTB, Exhibit 3, p 34.

[46] Transcript (27 March 2024), PN179-187.

[47] Transcript (27 March 2024), PN139-145.

[48] [2013] EWHC 3560 (Comm).

[49] *Lehrmann v Network Ten Pty Ltd* [2024] FCA 369, 123.

[50] *Lehrmann v Network Ten Pty Ltd* [2024] FCA 369, 124.

[51] *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903 at para 61.

[52] DTB, Exhibit 4.2, p 51.

[53] DTB, Exhibit 4, pp 43-44.

[54] DTB, Exhibit 5.

[55] Transcript (27 March 2024), PN87.

[56] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41].

[57] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[58] *Previsic v Australian Quarantine Inspection Services* Print Q3730.

[59] (2000) 98 IR 137.

[60] Ibid at 151.

[61] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[62] *Annetta v Ansett Australia Ltd* (2000) 98 IR 233, 237.

[63] DTB, Exhibit 3, p 38.

[64] DTB, Exhibit 4, p 45.

[65] DTB, Exhibit 4.1, p 49.

[66] Transcript (27 March 2024), PN99-102.