



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Zoran Mojanovski

v

BlueScope Steel Limited

(U2024/2763)

DEPUTY PRESIDENT CROSS

SYDNEY, 5 JULY 2024

Application for an unfair dismissal remedy- alleged serious misconduct in breach of respondent's policies- hearsay evidence - dismissal manifestly unjust - reinstatement appropriate -continuity ordered.

Introduction

[1] On 8 March 2024, Mr Zoran Mojanovski (the Applicant) lodged an application pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act). The Applicant had been employed by BlueScope Steel Limited (the Respondent). The Applicant commenced his employment with the Respondent on or about 29 January 1991. The Applicant was notified of his dismissal on 21 February 2024, and was dismissed by the Respondent on that date.

[2] In the hearing of the matter Mr A Kentish, Legal Officer of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Services Union of Australia (the CEPU), appeared for the Applicant, and Ms A DeBoos of Kingston Reid Solicitors appeared, with permission, for the Respondent.

[3] On 22 April 2024, directions were issued to program the manner in which the Application was to proceed to hearing (the Directions).

[4] The parties complied with the Directions. In particular:

(a) On 6 May 2024, the Applicant filed an Outline of Submissions (the Applicant's Submission) and a Statement from the Applicant with annexures;

(b) On 20 May 2024, the Respondent filed an Outline of Submissions (the Respondent's Submission), a statement of Mr Jeff Robinson, Maintenance Improvement Manager of the Respondent, with annexures, and a statement of Ms Katrina Tully, the Electrical Services Manager of the Respondent, with annexures; and

(c) On 27 May 2024, the Applicant filed an Outline of Submissions in Reply (the Applicant's Reply Submission), and a reply statement of the Applicant.

[5] On 5 June 2024, outside of the Directions and the day before the hearing of the Application (the Hearing), the Respondent filed a further statement of Ms Tully.

The Reason for Dismissal

[6] The matter involved an allegation that on 16 January 2024, the Applicant threatened physical violence toward another employee (who will be referred to as the Complainant) by yelling out the car window towards the Complainant words to the effect of “*You’re a dead mother***er. I’m gonna get you*”, as the Complainant drove past the Applicant.

[7] The Applicant was terminated by letter dated 21 February 2024 (the “Termination Letter”). The material parts of that letter regarding reasons for dismissal were as follows:

Dear Zoran,

*This letter is to advise you of the termination of your employment with BlueScope’s ASP Manufacturing business from today, 21 February 2024. This termination is due to your threat of physical violence towards another employee, when you yelled out the car window to him words to the effect of, “You’re a dead mother***er. I’m gonna get you.” This was a serious breach of our Code of Conduct (How We Work) and Bullying, Discrimination, Harassment and Sexual Harassment Guideline.*

The Company has considered all of the information available, including the responses you have provided to the Company on this matter.

The Company considers the substantiated conduct constitutes serious misconduct, and as such, the Company does not consider that you are entitled to the payment of notice. However, the Company will pay you 5 weeks ordinary pay in recognition of your long standing employment with the Company.

Background Facts

[8] As noted above, the Applicant commenced his employment with the Respondent on or about 29 January 1991.

[9] At the time he was dismissed, the Applicant was a Level 4 Electrician under the *BlueScope Port Kembla Steelworks & Spring Hill Enterprise Agreement 2022* (the Agreement). His job title was Instrumentation Tradesperson, and he did the work of an electrician/instrument fitter.

(a) First and Final Warning

[10] Prior to September 2023, the Applicant was never subject to any disciplinary action in his employment.

[11] In July 2023 an anonymous complaint was received through the Bluescope Business Conduct Reporting Hotline (the Complaint). The Complaint raised concerns about the

Applicant's treatment of a number of people including the Complainant. Not all of the complaints made against the Applicant were substantiated. The complaints related to the Complainant that were subsequently found to be substantiated by the Respondent were that the Applicant:

(a) From late 2022, at a frequency of approximately several times a day for a number of months, said to the Complainant words to the effect of, "*Fuck you [Name]. I hate you*", and "*Shut up [Name] you dickhead*";

(b) At a job at the Hot Strip Mill, when the Complainant and another employee named in the Complaint met him late due to being asked to do a job by someone else, the Applicant angrily swore and yelled at them words to the effect of, "*I'm trying to fucking help you. You're not fucking interested*"; and

(c) Acted in an intimidating and threatening manner, including a threat of physical violence, when in a morning meeting he leant forward with the Complainant facing him, pointing with his finger and stating words to the effect of, "*Oh yeah, you want to be a fucking man in front of everyone? Let's see what kind of man you are outside the gates.*"

[12] An investigation was conducted into the Complaint by Ms Nicole Lane, Senior People Business Partner HR, Manufacturing (the Investigation). I note that Ms Lane was not called as a witness in the proceedings though she was present at the Hearing. Mr Robinson stated that but for contacting the Applicant he had no involvement in the Investigation, and that Ms Lane had carriage of the Investigation, and conducted the meeting with the Applicant and subsequent interviews with those involved. His evidence in the Hearing was that he was "...presented with the investigation results". Ms Tully was also not involved in the Investigation.

[13] The Applicant was on annual leave when the Investigation commenced, and was stood down and did not return to work following his annual leave, which concluded on 15 August 2023, until the conclusion of the Investigation.

[14] The Applicant returned to his residence after being overseas at 10:30 pm on 15 August 2023. On 16 August 2023 at approximately 8:45 am the Applicant returned a message from Mr Robinson. On that date a letter of allegations was sent to the Applicant.

[15] On 7 September 2023, Mr Robinson was advised of the findings of the Investigation. On 12 September 2023, Mr Robinson met with the Applicant to provide him with the findings of the Investigation. During that meeting Mr Robinson handed the Applicant a document that outlined the substantiated and partially substantiated allegations from the Investigation. Mr Robinson also read directly from that document out loud to provide the Applicant with an outline of the findings. Mr Robinson invited the Applicant to a further meeting on 13 September 2023, where the Applicant could provide a response to the findings, though by consent that meeting was postponed to 18 September 2023.

[16] On 18 September 2023, Mr Robinson met with the Applicant. Two other persons were present as witnesses. During that meeting, the Applicant provided a response to each of the substantiated findings. He expressed:

- (a) confusion and questioned the basis of the allegations made;
- (b) his desire to continue in his role;
- (c) that his relationships with colleagues were positive, as evident from the well-wishes he received before departing for his holiday;
- (d) acknowledgment of his tendency to often speak loudly; and
- (e) an apology if his behaviour had caused offence.

[17] The Applicant also raised the possibility of the Complainant's involvement in the Complaint. The Respondent's record of what the Applicant said in that regard was "*He wondered if [the Complainant] was trying to get out of the department??"* While Mr Robinson thought the reference to the Complainant was peculiar as the Complaint was lodged anonymously, it became apparent in the Hearing that the names of the persons involved in the Complaint were provided to the Applicant. Indeed, the letter of allegations sent on 16 August 2023 clearly outlined the names of each employee involved in the Complaint including the Complainant.

[18] The Applicant also raised 20 employee witnesses who could provide evidence regarding the third allegation of conduct at a morning meeting and stated that such employees subsequently advised him they had not been contacted.¹

[19] On 26 September 2023, Mr Robinson conducted a further meeting with the Applicant where given a first and final warning. That warning stated:

Dear Zoran,

Re: First and Final Written Warning - Bullying and Inappropriate Workplace Behaviours

Bluescope conducted a workplace investigation into a number of allegations made against you that involved bullying, harassment and inappropriate workplace behaviour.

The outcome of the investigation was that a number of the allegations were substantiated. On 12 September 2023, you were given a copy of the allegations that had been substantiated. At that meeting you were advised that the Company would like to hear your response to the findings that a number of allegations were substantiated. On 18 September 2023, you provided an extended response to each of the allegations and also made a number of submissions on other matters that you believed we should take into account prior to reaching a decision.

The substantiated allegations

The substantiated allegations are:

- *That you have bullied and harassed a number of other employees.*
- *That you have threatened another employee with violence*
- *That you have failed to report a motor vehicle collision and asked other employees to not report the incident.*

These are serious matters.

We have taken the following additional matters in account in reaching our decision:

- *You have acknowledged that these are serious matters.*
- *You deny the allegations and have provided an extended response to give context to each of the matters both to the investigators and in your response to the findings.*
- *You have over 32 years of service with the Company.*
- *You have not had any previous allegations of similar inappropriate behaviour of this type.*
- *You have an otherwise good work ethic and high expectations of others.*

Outcome

This behaviour undermines our aim to foster a respectful and inclusive workplace environment. Specifically, it is a breach of the following policies:

- *Our Bond, which says, “We choose to treat each other with trust and respect,” and Our Code of Conduct- How We Work Policy, which says ‘We are a place of belonging Everyone should feel comfortable to bring their whole self to work without fear or discomfort.’*
- *Bullying, Discrimination, Harassment and Sexual Harassment Guidelines, which outlines, 'BlueScope's commitment and proactive approach to preventing any form of bullying, discrimination, harassment and sexual harassment and affirms our commitment to providing safe, respectful, inclusive and flexible workplaces. We do not tolerate bullying, discrimination, harassment or sexual harassment in any form.'*

Next Steps

You are being issued with this Warning Letter. I urge you to take this letter seriously. Please be aware that any further instances of this nature will lead to further disciplinary action, up to and including termination of your employment.

It is my expectation that you will take steps to review your behaviour to eliminate its negative impact on the workplace.

To assist you with this review you will be required to change your behaviour and understand my expectations that are aligned with company policies and guidelines:

- *Review the How We Work Policy and complete the training.*

- *Review and understand the Bullying, Discrimination, Harassment and Sexual Harassment Guidelines.*
- *Set up a series of review meetings to discuss any issues or concerns you may have, and to ensure that you complete the training review set out above.*

To assist you with a successful and productive return to the workplace it has been decided that you should undertake another role in a different Department with the business. Details of that role will be discussed with you.

I understand this letter may be a concern for you. I will provide you with any support that you may feel you require. This would include (but is not limited to) use of our Employee Assistance Program (EAP) which can be contacted directly on 1300 361 008. These services are free to our employees and their immediate family and remain private and confidential at all times.

[20] Apparently Mr Robinson, at some stage in the investigation of the Complaint and prior to 12 September 2023, was provided with what he described as a “substantial” and “detailed” report of interviews and conclusions. That report was not put into evidence by the Respondent. The explanation for the non-production of that report was given by Mr Robinson, and was as follows:

I look after the apprentices at the steelworks, I'm part of the employment process and we spend a lot of time trying to care for them. They're young people and part of that is their mental health and their psychosocial safety and one of the reasons why we did not include, I believe, the report is to try and protect those young individuals from further exposure to stress and anxiety which, as I understand, is why [the Complainant] is not here today as well and so we did not want to expose them to that ongoing anxiety and so that is why their names were not included and the report was not included is my understanding.

[21] Contrary to the above assertion, and as noted above, the letter of allegations sent on 16 August 2023 to the Applicant outlined the names of each employee involved in the Complaint, including the Complainant.

[22] Although the Applicant’s position had moved to the Energy Services Department, his reporting structure was retained within the Electrical Services Department. The Applicant was directed to undergo, and did complete, refresher training focusing on BlueScope's Bullying, Discrimination, Harassment and Sexual Harassment, as well as BlueScope's Code of Conduct. The Applicant was directed not to contact any of the apprentices from his previous department.

(b) 16 January 2024

[23] On 16 January 2024 at around 3:48 pm, Ms Tully received a phone call from Mr Mortlock, the Complainant’s Supervisor, who said he had just been contacted by the Complainant, who he described as being very upset at the time. Mr Mortlock had advised the Applicant to meet with Ms Tully. At about 4.00pm, the Complainant arrived in Ms Tully’s office. Ms Tully stated she could see that the Complainant was considerably shaken up and

was visibly distressed. Ms Tully produced handwritten notes from her conversation with the Complainant.

[24] Ms Tully stated that the Complainant told her that he had just had what he described as an unpleasant encounter involving the Applicant during his commute home that afternoon. The Complainant told Ms Tully that he exited the site gate and was driving with his window down when he noticed the Applicant stopped at the intersection on Flagstaff Road. He said that the Applicant's car moved into the intersection and the Complainant had to drive around him to turn right into Flagstaff Road. The Complainant told Ms Tully that as he drove past the Applicant, the Applicant yelled out of his open window words to the effect of "you're a dead motherfucker, I'm gonna get you". The Complainant told Ms Tully that he then continued driving for a little while before stopping by the side of the road to call Mr Mortlock.

[25] Ms Tully stated that the Complainant told her that he felt like he was facing repercussions from the Applicant who suspected him of filing the anonymous complaint that triggered the previous investigation that resulted in the First and Final Warning. The handwritten note of the meeting taken by Ms Tully refers to "coping backlash" (sic.), does not refer to any anonymous complaint, and states the names of the two other employees that were involved in the Complaint that triggered the previous investigation that resulted in the First and Final Warning, and continues "...colluded against him to get him sacked" and "report from BF", which I assume means best friend.

[26] Ms Tully also stated that the Complainant shared another incident from several months earlier, during which the Applicant's son and his friends were seated behind him at a local pub and staring at him. Although there was no altercation, the Complainant told Ms Tully that he felt intimidated. That was not recorded in Ms Tully's handwritten note, though there was a note "Been getting stairs (sic) from him".

[27] Ms Tully asked the Complainant to provide statement outlining the events that had occurred. The Complainant provided a statement by email at 7.25am the following day. That statement repeated what he had said to Ms Tully regarding the alleged incident on 16 January 2024, but went on address the Complaint that triggered the previous investigation that resulted in the First and Final Warning. His statement included the following:

- HR meeting with Nicole Lane (and the typist), Tuesday, 1 August 2023 at 1pm.

This occurred because HR approached me and organised a meeting which was held on Tuesday, 1 August 2023.

Nicole advised me that there has been a number of complaints from other staff against [the Applicant's] behaviour towards bullying, harassing and intimidating younger trade staff, which has included myself over these years. At no stage did I make this complaint. I was purely asked to confirm if these incidents had occurred.

HR assured me that this was anonymous, confidential and nobody would find out that I am speaking about [the Applicant]. I was also asked not to talk about this to anybody else or there would be serious consequences.

Some time had passed and I heard through the grapevine at work that Zoran was accusing myself and two others of colluding against him of trying to get him sacked. I reported this straight away to Craig my Supervisor. Craig said to leave this with him and he will sort this out. Then more time had passed and my co-worker (whom I will not name because clearly I feel confidentiality has been breached) had spoken face to face with Zoran. [the Applicant] said to my co-worker, “ [the Complainant] and these two other people colluded against me to get me sacked”.

While at work I sometimes see Zoran from a distance and I get the stare down and feel very uncomfortable. I ignore him.

I feel that HR has not kept this confidential and protected me as promised.

[28] The Complainant was not subsequently formally interviewed about what had occurred, or asked to respond to the Applicant’s version of events, because, as Ms Tully stated in her evidence, “I felt we had all of the information we needed”.²

(c) The Investigation

[29] Ms Tully arranged a meeting with the Applicant for 8.00am on 17 January 2024, in order to “hear the Applicant's side of the story before forming any conclusions”. The Applicant was provided the opportunity to have a support person however he declined, though he did not know what the meeting was about and thought it was about a transfer.

[30] The Applicant was visibly emotional and teary during the meeting. Minutes of the meeting record the following:

Ms Tully:

- *There has been a report that yesterday at 3:45 there was an interaction between you and another person.*

The Applicant:

- *I came under the bypass bridge. There was no interaction. I finish at around 3:30 on plant. What’s the allegation?*

Ms Tully:

- *The report was that you slowed down your car and yelled out the window.*

The Applicant:

- *I came under bypass and went up Flagstaff Rd. I rang up my mate. I came to the intersection. I was on my phone. I stopped. I remember [the Complainant] went this way (up the hill). He looked at me. He drove.*

Ms Tully:

- *The allegations is that you yelled out the window, “You’re a dead motherfucker. I’m going to get you.”*

The Applicant:

- *OK. I stopped. I didn't say that.*
- *I'm in a hole now. I'm feeling victimised*

[31] In the meeting the Applicant repeatedly referred to victimisation, false allegations, and to the Complainant pulling “*stunts*” of making false allegations when he wanted to get out of departments.

[32] The evidence of the Applicant as to what occurred on 16 January 2024, was that he was waiting to turn right onto General Office Road. He looked to his left and saw two cars going along General Office Road. When he saw them, they were maybe 20 metres away. The Applicant then looked right to see if the road was clear and then went to look back left again. It was at that time that he saw the Complainant in his vehicle turning across in front of him and into Flagstaff Road. The Applicant remembered they had eye contact. The Complainant didn't stop. The Applicant didn't shout at him or say anything to him. The Applicant stated that his window was up because it was a very warm day, and he had previously been stopped on the side of the road while making a telephone call. He has air conditioning and doesn't usually drive with his window down. After the Complainant's vehicle had gone past the Applicant joined General Office Road and pulled in behind the car of Kate Saunders.

[33] Ms Tully checked with Kate Saunders who was at the intersection at the time of the alleged incident, but stated Ms Saunders saw nothing. Ms Tully also sought to access to video footage of the alleged incident but stated that the position of the cameras did not capture the alleged incident.

[34] On 18 January 2024, Ms Tully said she called the Applicant at 12.18pm and asked about his wellbeing. She said the Applicant mentioned that he had contacted the Police to ask if his employer could do anything about something that happened outside of the workplace. The Applicant specifically denied he called the Police.

[35] On 23 January 2024, Ms Tully received a text message from the Complainant stating that the police had instructed him to provide Ms Tully with the case number. The Applicant stated he had never been contacted by the Police.

[36] Given Mr Mortlock's supervisory role and his close working relationship with the Complainant, Ms Tully said she took into account his perception of the Complainant, who he described as being notably timid and less resilient compared to others. Ms Tully also considered Mr Mortlock's opinion on the Applicant given their close working relationship, which aligned with her own experiences with the Applicant, where she stated she observed him to be expressive and outspoken, displaying verbal aggression at times.

(d) Preliminary Findings, Show Cause and Termination

[37] Ms Tully stated she made the following preliminary findings:

- (a) *[The Applicant] did yell out the car window words to the effect of, "You're a dead motherfucker. I'm gonna get you" (sic) to [the Complainant] on 16 January 2024;*

- (b) *This was a threat of physical violence;*
- (c) *It appears to have been an attempt to victimise another employee due to [The Applicant's] belief that [the Complainant] had made previous allegations against him;*
- (d) *The conduct constituted a breach of BlueScope's Code of Conduct (How We Work) (Code of Conduct) and Bullying, Discrimination, Harassment and Sexual Harassment Guideline (Guidelines).*

[38] The Preliminary Findings were based of what Ms Tully described as “*the following key factors*”:

- (a) *The promptness with which [the Complainant] contacted Mr Mortlock. In particular, I found it compelling that [the Complainant] immediately called Mr Mortlock to report the incident and then immediately came to see me;*
- (b) *[the Complainant's] evident distress during our conversation on 16 January 2024. In particular, I found that [the Complainant] distress was genuine;*
- (c) *[the Complainant's] decision to contact the police and consideration of applying for an AVO. In particular, I considered this aspect lent credibility to his account as it suggested that he was genuinely concerned about his safety, rather than an attempt at raising a vexatious claim;*
- (d) *The absence of any request from [the Complainant] for a department transfer, which contradicted [The Applicant's] allegation. Also, that would not be a likely outcome from this report given that they no longer work together;*
- (e) *[The Applicant's] remarks that the incident occurred outside of work and his assertion that there were no witnesses and thus no recourse;*
- (f) *The fact that [The Applicant] is already placed on a Warning; and*
- (g) *[The Applicant's] belief that [the Complainant] raised the anonymous complaint that led to the Previous Investigation.*

[39] Based on the Preliminary Findings, a show cause notice was sent to the Applicant on 30 January 2024. Responses were provided by the CEPU and the Applicant himself on 13 February 2024. The Applicant, and the CEPU continued to dispute the Preliminary Findings. The CEPU response contained the following:

It is also entirely unclear what if anything BlueScope has done to interrogate the factual allegation, including its credibility and/or consistency with other evidence. BlueScope's opacity in this respect does not inspire confidence in any of its factual findings.

[40] The Applicant's employment was terminated in a meeting on 21 February 2024, at which he was handed the Termination Letter.

Credibility of the Applicant

[41] The Applicant was the only witness before the Commission who could assist regarding what did, or did not, occur on 16 January 2024. He was quite emotional in his evidence, however I found that to be entirely understandable in circumstances where he had lost his employment of 31 years on the basis of allegations he convincingly disputed and denied. Overall, the Applicant's evidence was consistent, considered and compelling.

Absence of the Complainant

[42] In her first statement, Ms Tully gave the following evidence:

84. *It is BlueScope's position that it will not require [the Complainant] to participate in these proceedings unless he wants to, particularly given the nature of [the Applicant's] conduct towards him.*

85. *On 14 May 2024 at 3:24 pm I called [the Complainant] to discuss these proceedings and ascertain if he wanted to be involved as a witness. Our conversation was as follows:*

Me: "I have something that I need to discuss with you regarding the issue with Zoran. The case will be going to court in the coming months. There is no pressure but if you would like to be involved as a witness you are welcome."

Complainant: "Wow, I can't believe it is going to court. I'd rather not be involved if that's ok but thanks for asking. I want this all to be over."

[43] I note that the conversation referred to above occurred 6 days prior to the filing of the Respondent's materials.

[44] In her second statement. Ms Tully, extraordinarily, amended her evidence, as follows:

14 May 2024 conversation with [the Complainant]

4. *At paragraph 85 of my First Statement, I detailed a conversation I had with [the Complainant] about his involvement in these proceedings. In that conversation, [the Complainant] firmly declined any participation.*

5. *However, I did not include any further details from that conversation in my First Statement. I understood that [the Applicant] would have access to this information once the Respondent's material was filed. Given my understanding of the complex relationship between [the Applicant] and [the Complainant], and the fact that I believed [the Applicant] had threatened [the Complainant], I did not disclose the full extent of our discussion in an effort to protect [the Complainant].*

6. *I was particularly concerned for [the Complainant's] mental wellbeing and wanted to maintain a safe and comfortable work environment for him.*

7. Having read [the Applicant's] Additional Material, where he states at paragraph 4 of his outline of submissions in reply that the 'Respondent proposes to call no direct evidence of the event', I provide more details of BlueScope's position as set out in paragraphs 84 to 86 of my First Statement.

8. I now provide the full conversation that I had with [the Complainant] after telling him that I needed to discuss the nature of these proceedings with him, expanding on paragraph 85 in my First Statement:

[the Complainant]: "Oh, my God, it's going to court. I can't believe it. Now he is going to get me."

[the Complainant]: "He knows where I live. Do you think he's gonna burn my car?"

Me: "I just want to give you the opportunity to come and give you evidence."

[the Complainant]: "Wow, I can't believe it is going to court. I'd rather not be involved if that's ok but thanks for asking. I want this all to be over'.

9. During this conversation, [the Complainant] was audibly distressed, and he sounded like he was in tears.

10. In consultation with others, Bluescope chose to respect [the Complainant's] wishes by not calling him as a witness. In my discussions with People and Culture at Bluescope, the reasons we decided to respect this position is:

(a) As part of its Speak Up culture, Bluescope encourages employees to come forward with complaints about inappropriate and unsafe workplace behaviour and in doing so, Bluescope represents to employees that they will be safe when they do so and will be protected from victimisation. As an employer, we are concerned that in light of this, if we then require employees to give evidence at hearings which arise because of a decision made by Bluescope, it will undermine this supportive process and act as a deterrent to speaking up, not just for that employee but for others; and

(b) [the Complainant] came across to me at all times as being particularly vulnerable, scared and distressed about the situation and his interactions with [the Applicant].

We did not consider it appropriate to risk his psychological well being any further by requiring him to give evidence.

3 June 2024 conversation with [the Complainant]

11. On 3 June 2024, Mr Aicken and I spoke with [the Complainant] again, to determine if his position had changed and he was now comfortable to provide evidence in these proceedings.

12. [the Complainant] responded with words to the effect of:

'Thanks for letting me know, but I don't want to be involved'.

13. I recall [the Complainant] being very resolute and adamant about not wanting to be a part of the proceedings due to [the Applicant's] involvement. It was clear to me that [the Complainant] wanted nothing to do with [the Applicant].

[45] Section 59 of the Evidence Act provides:

59 The hearsay rule—exclusion of hearsay evidence

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an asserted fact.

[46] While an exception to the hearsay rule applies where a person who made a previous representation is not available to give evidence about an asserted fact,³ “unavailability” of a person to give evidence is defined at Clause 4 of Part 2 of the Dictionary of the *Evidence Act* as:

4 Unavailability of persons

(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

- (a) the person is dead; or
- (b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence; or
- (c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability; or
- (d) it would be unlawful for the person to give the evidence; or
- (e) a provision of this Act prohibits the evidence being given; or
- (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success; or
- (g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

(2) In all other cases the person is taken to be available to give evidence about the fact.

[47] The Complainant was clearly not unavailable. He simply chose not to be involved and the Respondent chose not to seek to compel the Complainant to give evidence, citing a claimed duty of care to the Complainant. Each contact by Ms Tully was by telephone and no medical certification was sought.⁴

[48] In the Hearing, the evidence of Ms Tully that recorded statements and complaints of the Complainant were dealt with the following decision recorded on transcript:⁵

...One of the overriding principles of unfair dismissals is a fair go all 'round to all participants and it would be a complete abrogation of that obligation to allow a respondent to rely on a complaint and not call the complainant when the complainant is clearly available and so, in relation to the objection to paragraph 17, I would uphold it.

I note that it remains as Ms Tully's evidence as to what she was told but it cannot be admitted as to the truth of what it is said [the Complainant] complains about. For completeness, I would note that that would also apply to the document that is KT2 (the note of the 16 January 2024 conversation) in so far as that document is relied on to establish the truth of the complaint. ...

[49] While it is correct to observe that the Commission is not bound by the rules of evidence and procedure, the Commission 'may inform itself in relation to any matter before it in such manner as it considers appropriate'. Further, s.577(a) provides that the Commission must perform its functions and exercise its powers in a manner that 'is fair and just'. The hearsay rule is fundamentally concerned with issues of fairness, and the Commission will give consideration to its application in an appropriate case. In this matter, it was abundantly unfair for the complaint made to be advanced as hearsay evidence without affording the Applicant an opportunity to test it's veracity.

Applicant's Submissions

[50] The Applicant submitted that the dismissal is unfair because there was no valid reason for the dismissal, because the Applicant did not yell the alleged threat out of his car at the Complainant.

[51] To find that the Applicant did make the threat, the Commission would have to be satisfied that both windows happened to be down on both vehicles, and that someone could hear anything as coherent and as long as the alleged threat as they passed in a moving vehicle.

[52] The Applicant was on a final warning and months before had transferred to another part of the business. The evidence is that he was happy and work. It was inexplicable that the Applicant decided suddenly to scream threats at the Complainant as he passed him at the intersection, the Complainant being a man that he hadn't spoken to since June of 2023.

[53] The Applicant submitted that the Commission would need to find that he had lied under oath to uphold the dismissal. There is no reason to make such a finding and the Applicant was not shaken in his evidence in relation to the incident. What the Applicant said occurred has been consistent. He hasn't departed from his version of events through the investigation or the Hearing.

[54] The case of the Respondent advances is little more than allegations. The Complainant has not come to the Commission to give evidence of his version of events. The Respondent has not provided any evidence that the Complainant was medically unfit to attend, and obviously

there's been no attempt to compel him as a witness. There does not even appear to have been a formal witness statement taken.

[55] The Applicant submitted the *Briginshaw* principle applied in the circumstances. The allegations were serious enough to warrant summary dismissal, and in fact are serious enough to be of a criminal nature. The task of the Commission is to determine, on the evidence before it, whether the misconduct occurred. The only reasonable finding in these circumstances is that the misconduct did not occur. In that circumstance, there is no reason why the Applicant should not be reinstated to his position. The Applicant also sought an order for continuity of employment and loss of income.

Respondent's Submission

[56] The Respondent accepted this matter rests almost entirely on whether or not a valid reason for dismissal can be established, and in looking at that question, the role of the Commission is squarely to determine whether or not, on the balance of probabilities, subject to the *Briginshaw* test, the Commission can find that the Applicant did, in fact, say the threat to the Complainant.

[57] Regarding the absence of the Complainant, the Respondent described it as a forensic decision of the Respondent, but accepted the Commission's ruling in relation to the hearsay nature of the evidence.⁶ The Respondent submitted there was still enough circumstantial evidence to support the conclusion that it was more likely than not that the Applicant did yell the words at the Complainant. In particular:

- (a) At the intersection the drivers would have come within close contact with each other at the time that the Complainant was moving past the Applicant who was stationary;
- (b) Ms Tully's contemporaneous note of what was said to her by the Complainant immediately after the alleged event, and his state of apparent distress;
- (c) Ms Tully's receipt of the Complainant's email of complaint that was consistent with the note of Ms Tully that she took of the conversation she had the day before;
- (d) Ms Tully's evidence about a text message that she received from the Complainant about a police report;
- (e) The submitted absence of any evidence as to why the Complainant would have been making such a detailed and consistent complaint;
- (f) The Respondent submitted it was open to the Commission to find that there was a very clear motivation for the Applicant to be upset or angry at the Complainant due to the allegations that were made involving the Complainant in the September 2023. In relation to the September 2023 report, the Respondent's submission was:⁷

In relation to establishing whether or not the actual misconduct occurred, the contents of the investigation report are not relevant because Ms Tully didn't take

the contents of the investigation report or the findings into account when establishing whether or not the conduct occurred. She took into account that there was a history and the fact of the previous allegations because she concluded that that provided a motive.

However, it was submitted that Ms Tully relied on the September allegations in the “second step” of determining whether dismissal was appropriate;⁸

(g) The evidence about what was said during the meeting the next day with the Applicant, where Ms Tully claimed the first person to raise the Complainant’s name was the Applicant;

(h) Other evidence about what was said during the meeting the next day with the Applicant, where Ms Tully claimed the Applicant made comments such as “*He’s out in the real world. How can it come back to work?*”; and

(i) In what was submitted to be “...*compelling to be able to draw a conclusion that the conduct occurred...*”,⁹ that Ms Tully stated that at 12.18pm on 18 January 2024, the Applicant said that he had called the Police to ask if his employer could do anything about something that happened outside of the workplace. The Respondent submitted:¹⁰

Now, [the Applicant] denies that this conversation occurred, but we say that the evidence of Ms Tully should be accepted in that regard because Ms Tully has no reason to lie, has no reason to concoct such an elaborate tale, whereas [the Applicant] does have a reason to lie. He loves his job. He wants his job back.

It is squarely within his interests not to tell the truth in relation to that particular statement, whereas Ms Tully has no, if you like, skin in this game. She was not in a position where she needs to be making up statements about [the Applicant] going to the police.

[58] The Respondent submitted that if the Commission is able to draw the conclusion that the conduct actually occurred, there's no reason that it would not be a valid reason for dismissal. The words are threatening, and if the Commission was minded to accept the evidence in relation to the prior warning based on the material before it, they are certainly threatening when viewed against the conduct which was alleged in the first warning.

[59] The Respondent submitted that the Applicant was provided with the full allegations that were made against him. They are quite simple and he was given the opportunity to provide a fulsome response, both verbally and in writing to the allegations, as well as a fulsome response to the proposed decision to dismiss. He took that opportunity, as did his union, to provide a fulsome response to both of those items.

[60] The Respondent accepted that if the Commission finds that the conduct did not occur, then naturally the usual order that may flow from that is reinstatement. However the Respondent noted the evidence of Ms Tully regarding the responsibility that BlueScope has towards its employees to manage their health and safety, and particularly any psychosocial risk that may

be posed to those employees, and submitted that compensation would be the more appropriate remedy.

Consideration

[61] There are no jurisdictional objections to the Applicant's application being determined by the Commission. Specifically, I am satisfied that:

- (a) the Applicant was dismissed at the initiative of the employer (ss 385(a) 386(1)(a));
- (b) his unfair dismissal application was lodged within the 21 day statutory time limitation found at s 394(2) of the Act;
- (c) the Applicant is a person protected from unfair dismissal in that:
 - i. he had completed the minimum employment period set out in ss 382 and 383 of the Act; and
 - ii. an enterprise agreement, the *BlueScope Port Kembla Steelworks & Springhill Enterprise Agreement 2022* applied to his employment (s 382(3)(b)(ii));
- (d) his dismissal was not a case of genuine redundancy (s 385(d)); and
- (e) his dismissal was not a case involving the Small Business Fair Dismissal Code, as the Respondent employed approximately 7,000 employees at the relevant time (s 385(c)).

[62] As I have just concluded that the above criteria have been satisfied, this leaves only the question of whether the Applicant's dismissal was 'harsh, unjust or unreasonable,' and therefore an unfair dismissal. To this end, I must direct attention to s 387 of the Act, dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair. It is trite to observe that each of the matters must be considered and a finding made on each of them, including whether they are relevant or not; for example whether a person was refused an opportunity to have a support person present may be irrelevant, if the request was not made, or the employee declined to take up the offer.

[63] I must consider the question of whether the Applicant's dismissal was 'harsh, unjust or unreasonable' and therefore an unfair dismissal, pursuant to the considerations outlined in s.387 of the Act dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair.

[64] Section 387 of the Act identifies the matters that the Commission must take into account in deciding whether a dismissal was "harsh, unjust or unreasonable:"

- (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.*

(a) Valid Reason

[65] The reasons relied upon by the Respondent were outlined in the Termination Letter in which the Respondent advised the Applicant that a decision had been made to dismiss him from employment. There the reasons were listed as:

*This termination is due to your threat of physical violence towards another employee, when you yelled out the car window to him words to the effect of, “You’re a dead mother***er. I’m gonna get you.” This was a serious breach of our Code of Conduct (How We Work) and Bullying, Discrimination, Harassment and Sexual Harassment Guideline.*

[66] In *Department of Social Security v Uink*,¹¹ a Full Bench of the Australian Industrial Relations Commission found:

The Commission is bound to consider whether, on the evidence in the proceedings before it, the termination was ‘harsh, unjust or unreasonable’ provided that the evidence concerns circumstances in existence when the decision to terminate the employment was made.

....

Findings made by an inquiry established by the employer will be relevant to the Commission’s determination of the issues before it provided it is established that:

- the employer conducted a full and extensive investigation into all of the relevant matters as was reasonable in the circumstances;

*- the employer gave the employee every reasonable opportunity to respond to allegations;
and*

- the findings were based upon reasonable grounds.

[67] In *Rode v Burwood Mitsubishi*,¹² another Full Bench of the Australian Industrial Relations Commission held:

We agree with the appellant's submission that in order to constitute a valid reason within the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason.

In determining a s.170CE application for relief the Commission is bound to consider, for itself, whether, on the evidence in the proceedings before it the termination was "harsh, unjust or unreasonable".

[Footnote omitted]

[68] While it is trite to observe that were the alleged threat to have been made, there is no doubt it would constitute a serious breach of the Code of Conduct and Bullying, Discrimination, Harassment and Sexual Harassment Guideline, there was a complete absence of evidence before me to substantiate that any threat was made.

[69] I have found the Applicant to be consistent, considered and compelling in his denial of the allegations. In accepting the Applicant's evidence I consequently find that there was no threat of physical violence towards another employee, and so no valid reason for dismissal.

[70] I note that the Respondent has advanced nine points of circumstantial evidence in support of their submission that there were valid reasons for the dismissal. Although that submission is remarkably close to the proscribed standard that the Respondent acted in the belief that the termination was for a valid reason, I deal with those nine alleged grounds below:

(a) I do not accept that at the intersection the drivers would have come within close contact with each other at the time that the Complainant was moving past the Applicant who was stationary. I accept that the Applicant's window was up because he had just been on a phone call, as the Applicant advised the Respondent in the interview of 17 January 2024, and the response to the show cause dated 13 February 2024. It was a January day, described by the Applicant as hot, and the Applicant's car had air conditioning. I can perceive of no reasonable explanation for the Applicant driving with his windows down, particularly as it was immediately after making a phone call where I would have expected the Applicant's window to be closed;¹³

(b) Ms Tully's note of what was said to her by the Complainant immediately after the alleged event, and his state of apparent distress, is not proof that the alleged event occurred. It is merely that a complaint was made. That it was made allegedly immediately did not somehow make it true.

(c) Similarly, Ms Tully's receipt of the Complainant's email of complaint and its asserted consistency is not proof that the alleged event occurred. It is merely that a complaint was made.

(d) Ms Tully's evidence about a text message that she received from the Complainant about a police report is also not proof that the alleged event occurred. It is merely proof that a report was made to Police apparently about the alleged incident.

(e) The submission regarding the absence of any evidence as to why the Complainant would have been making such a detailed and consistent complaint completely disregards the consistent evidence of the Applicant that from the time of the Complaint that resulted in the First and Final Written Warning, and in the investigation of the 16 January 2024 alleged incident, the Applicant had been raising comments previously made by the Complainant. Just one example, from cross-examination, was:

THE WITNESS: He told me himself. I asked him, 'How did you get back into our department?' Because once they leave after 12 months the only time we see them is when we go to their new departments and we'll bump into them, 'How are you going? How are you finding your new area?' And they'll move, move, move. But he left, he came straight back. 'What happened?' 'Such and such happened, you know, I was getting' - I can't even remember the exact words, but there was something that happened between him and a gentleman or gentlemen. I don't know, we didn't get into detail. And he came back, and when he was telling me he was laughing. 'I got back, I got to where I wanted.'

When you started your answer you said, 'He did something like this.' Can you explain what something like this means? --- He put in allegations against, like I said a person or persons. Like I worked in that department. That's where I was seconded to, right, and no one mentioned it about the incident to me, right, what happened between him and - between [the Complainant] and that department, right. And [the Complainant] told me this years before this, 'I got in trouble with [the Complainant].' When he wants to move he just pulls a stunt. He told me that. That was his words, and he laughed, and I find - found that like strange.

That such evidence, that was repeated throughout the proceedings, could not be tested was solely due to the failure of the Respondent to call or compel the Complainant.

(f) Regarding the Respondent's submission that Ms Tully took into account that there was a history and because of the previous allegations she concluded that that provided a motive, that submission was tied to the submission that the Applicant suspected that the Complainant was involved in the Complaint.

There was no suspicion because there was actual knowledge. The Applicant repeatedly referred in his evidence to the letter of 16 August 2023, where the Complainant and others involved in the Complaint were specifically named. His evidence was:¹⁴

Did you conclude then that it was [the Complainant] that had made the complaint against you? --- No. I was - I was given the notes. These allegations I was given the very first day I got back from Europe. I didn't step foot in work. I didn't know what was - Jeff

Robinson - Craig Mortlock said, 'I can't talk to you, you've got to talk to Jeff.' I rang Jeff. Jeff goes, 'I can't go into details, but I am standing you down with pay.' Nicole Lane talked to me over the phone and she emailed me these straight away. So if you have a close look their names are attached, they're attached to these allegations. I didn't know

...

Yes. So did you make an assumption that [the Complainant] was somehow involved in the investigation? --- It states his name here.

Even if it is accepted that some motive existed, it would be properly expressed as having not been acted on in relation to any complainant for months, and only acted upon without present cause at a fleeting traffic interaction. There are no reasonable grounds for such an assumption.

(g) The claim that in the meeting with the Applicant, the first person to raise the Complainant's name was the Applicant was not supported by the evidence. The repeated challenge to the Applicant on this point was based on notes taken by Ms Lane of the meeting with the Applicant on 17 January 2024. It was put to Applicant on numerous occasions that he was the first to mention the Complainant,¹⁵ but he rejected the proposition. However, when tested about the accuracy of those notes, the evidence of Ms Tully was:¹⁶

Do you see that there - and what is KT3? --- That's notes taken by Nicole Lane at the time of the meeting.

And you agree, do you, that that's not a transcript of what was said? --- No. It was notes taken at the time.

For instance, there doesn't seem to be an entry in the notes about the exchange that we just described. That's right, isn't it? --- Not word for word. No.

(h) The other evidence about what was said during the meeting on 17 January 2024 with the Applicant, where Ms Tully claimed the Applicant made comments such as *"He's out in the real world. How can it come back to work?"*, were clearly made in argument based on the premise of even if the Complainant is accepted, how can there be an adverse effect. The Applicant never departed from explicit denial of the allegation.

(i) In regard to the alleged *"compelling ... conclusion"* that at 12.18pm on 18 January 2024, the Applicant said that he had called the Police, I firstly observe that the enquiry allegedly made of Police does not in itself make sense. I do not consider any reasonable person, whom I consider to include the Applicant and Ms Tully, would ask the Police if the employer could do anything about something that happened outside of the workplace. It makes no sense as an enquiry directed at the Police, and I do not consider the enquiry was made.

However I specifically reject the submission that Ms Tully has no reason to lie, whereas the Applicant did have a reason to lie. I have made my findings in relation to the credibility of the Applicant. In contrast, I note that Ms Tully provided in her two statements, two different versions of the same conversation with the Complainant. By doing so, Ms Tully disclosed at the very least a propensity to *"filter"*, unacceptably, evidence presented to the Commission.

[71] None of the nine points of circumstantial evidence advanced by the Respondent support their submission that there were valid reasons for the dismissal.

[72] The Applicant has been denied substantive fairness as none to the grounds of dismissal were fair grounds.

[73] While unnecessary to consider arising from the above conclusions regarding valid reasons, I consider there would also appear to be procedural unfairness present in the dismissal. The brief chronology is that the Complainant made his complaint on 16 January 2024, and provided an email at 7.25am the following morning. Ms Tully arranged a meeting with the Applicant for 35 minutes later at 8.00am on 17 January 2024, in order to “*hear the Applicant's side of the story before forming any conclusions*”.

[74] While the Applicant raised various exculpatory points, not the least of which was whether his car window was down, none of those points were raised with the Complainant. The evidence of Ms Tully was:¹⁷

Thank you. Did you subsequently bring him [the Complainant] in and talk to him and interview him in relation to what had occurred in a formal way?--- No.

Why not? --- I felt we had all of the information we needed.

[75] The absence of the any ventilation and/or consideration of the matters raised by the Applicant establishes procedural unfairness.

Other s.387 Matters

[76] I note that, but for paragraph (h) of s.387, there were no other issues between the parties regarding other matters raised by s.387 of the Act and I formally note that:

- (a) The Applicant accepts he was notified of the reasons for his dismissal.
- (b) The Applicant does not dispute that he was afforded an opportunity to respond to the allegations.
- (c) The Applicant does not contend that he was refused a support person.
- (d) The Applicant accepts he was not dismissed for unsatisfactory work performance.
- (e) The Applicant submits that the Respondent employs a large number of employees and that it is not likely that the size of the enterprise impacted on the procedures followed in effecting the dismissal.

[77] Regarding other matters (s.387(h)), the Applicant referred to his very lengthy years of service. The Respondent accepts that the Applicant has a lengthy period of service, however, the Respondent referred to the observation by Deputy President Sams in *Richard Steel v Hitachi Power Tools Australia Pty Ltd T/A Hitachi Power Tools*,¹⁸ that long periods of service can be

a "double edged sword", in the sense that a lengthy period of service can work for, or against a finding of unfairness, particularly in cases involving breaches of Company policies, where an employee's long experience and familiarity with the business, (or just plain commonsense), should lead to better judgement.

[78] The Applicant also referred to the effect of the dismissal on the Applicant and his family, however, the Respondent submitted that given the serious misconduct engaged in by the Applicant, such effect on the Applicant's family cannot tip the scales.

[79] The conclusion regarding the absence of any valid reasons disposes of the above two submissions of the Respondent.

Conclusion Regarding s. 387

[80] After consideration of the relevant matters outlined in s.387 of the Act, I am satisfied, for the reasons outlined above, that the Applicant's dismissal was harsh, unjust and unreasonable within the meaning of s. 387 of the Act. His dismissal related to conduct that could not be found to have occurred.

Remedy

[81] The Applicant seeks reinstatement to his former position without loss of continuity of service, and with back-pay. Reinstatement is strongly opposed by the Respondent. Determining a remedy for unfair dismissal is governed by the provisions of Ch 3, Part 3-2, Div 4 of the Act, which provides as follows in relation to reinstatement:

Division 4—Remedies for unfair dismissal

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.”*

Remedy

[82] It will be immediately apparent that determining a remedy for an unfairly dismissed employee essentially involves a preliminary finding by the Commission as to whether it is satisfied that reinstatement is inappropriate. It is only upon a finding that reinstatement is inappropriate that the Commission can move on to consider compensation as the alternative to reinstatement.¹⁹

[83] As will be clearly apparent from my conclusions regarding the complete absence of valid reasons, I have concluded that the Applicant did not undertake the conduct alleged of him. In those circumstances, reinstatement of the Applicant is not inappropriate.

Conclusion

[84] I find that reinstatement of the Applicant is not inappropriate. I order that the Applicant be reinstated.

[85] I also make an order that the Respondent pay to the Applicant lost remuneration for the period from his dismissal to the date of his reinstatement, less the five weeks notice paid on termination, and monies earned in mitigation of his loss in the period since the dismissal.

[86] Reinstatement of the Applicant shall be effected within 21 days of the date of this Decision or such earlier time as may be agreed by the parties.

[87] Further, I propose to make orders pursuant to s. 391(2) of the Act to maintain the continuity of the Applicant’s employment, as if his dismissal had not occurred.



DEPUTY PRESIDENT

Appearances:

Mr A Kentish on behalf of the Applicant.

Mr Z Mojanovski the Applicant.

Ms A DeBoos on behalf of the Respondent.

Hearing details:

Sydney.

6 June 2024.

In-Person.

Final written submissions:

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¹ Transcript PN 160 to 166 and 460.

² Transcript PN 930.

³ S.63 *Evidence Act*.

⁴ Transcript PN 1014 to 1023.

⁵ Transcript PN 677 to 678.

⁶ Transcript PN 1064 and 1141.

⁷ Transcript PN 1114.

⁸ Transcript PN 1115 to 1120.

⁹ Transcript PN 1131.

¹⁰ Transcript PN 1131 and 1132.

¹¹ Print P7680.

¹² Print R4471, at [19] and [20].

¹³ Transcript PN 339.

¹⁴ Transcript PN 171 and 173.

¹⁵ Transcript PN 392, 399, 405, 409, 422 and 433.

¹⁶ Transcript PN 967 to 969.

¹⁷ Transcript PN 929 and 930.

¹⁸ [\[2019\] FWC 1195](#) at [201].

¹⁹ See: *Holcim (Australia) Pty Ltd v Serafini* [\[2011\] FWAFB 7794](#).