



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Pece Calovski**

v

**Opal Packaging Australia Pty Ltd**  
(U2023/10560)

COMMISSIONER MATHESON

SYDNEY, 28 JUNE 2024

*Application for an unfair dismissal remedy – forklift incident – unintentional – alleged brake failure – failure to test for cause asserted by Applicant – deficiencies in investigation – reinstatement – back pay.*

[1] Mr Pece Calovski, (Applicant) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Opal Packaging Australia Pty Ltd (Respondent). The Applicant seeks reinstatement and/or compensation,<sup>1</sup> with reinstatement being his preferred remedy.

## **When can the Commission order a remedy for unfair dismissal?**

[2] Section 390 of the FW Act provides that the Commission may order a remedy if:

- (a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and
- (b) the Applicant has been unfairly dismissed.

[3] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

## **When is a person protected from unfair dismissal?**

[4] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (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.

### **When has a person been unfairly dismissed?**

**[5]** Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission 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.

### **Background**

**[6]** The uncontested factual background to the matter is as follows:

- The Applicant commenced working for the Respondent on 10 December 2020 as a machine operator before moving into the role of corrugator floater.
- In his role of corrugator floater, the Applicant was required to perform various tasks including driving forklifts and working on a cardboard stacker.
- On 27 June 2023, the Applicant was the driver of a grab forklift that was the subject of an incident at the Respondent's premises. The cause of the incident is a matter in dispute between the parties.
- After the incident the Applicant was suspended from forklift duties but otherwise continued to perform duties on the cardboard stacker until being suspended from all duties on 11 October 2023.
- On 3 October 2023 the Respondent wrote to the Applicant stating that it had received reports from Adapt-A-Lift (the lessor of and entity that services the forklift) and SafeWork NSW regarding the incident and that the reports "confirm that there was not fault in the braking system on the grab forklift."<sup>2</sup> That letter went on to make allegations that the Applicant:
  1. failed to operate the "grab forklift" in a safe manner causing extensive damage and created a safety incident that could have resulted in injury and or loss of life; and

2. despite being informed that the reports from Adapt-A-Lift found that the braking system for the grab forklift was in perfect working order, the Applicant had not been willing to accept any responsibility for the incident despite being given the opportunity to do so. The Respondent said this occurred in circumstances where:
  - (a) in a statement of 27 June 2023 the Applicant said that he tried to apply the brake and his foot pushed the pedal to the floor, the pedal provided no resistance and felt soft, there was no braking and the grab forklift kept moving;
  - (b) in a subsequent meeting on 4 July 2023 the Applicant was informed that the report from Adapt-A-Lift stated that the braking system for the grab forklift was in good working order, was again given the opportunity to state what had occurred and did not accept any responsibility for the incident in that meeting.<sup>3</sup>
- The letter of 3 October 2023 required the Applicant to attend a meeting on 5 October 2023 to respond to the allegations and invited him to have a support person present.
- On 9 October 2023 the Applicant responded to the letter of 3 October 2023 in writing. In that letter the Applicant maintained that during the incident on 27 June 2023 he applied the brake, his foot pushed it to the floor, it was soft and provided no resistance and the grab forklift kept moving.<sup>4</sup>
- On 11 October 2023 the Respondent wrote to the Applicant advising him that it had completed its investigation and:
  - found on the balance of probabilities that the incident on 27 June 2023 was due to his “failure to operate the forklift in a safe manner, in line with [his] training, which led to a serious accident that could have resulted in loss of life;”
  - did not accept his explanation for the incident;
  - was considering terminating his employment on the grounds of misconduct;
  - invited the Applicant to a meeting to provide him an opportunity to provide any further information he believed was relevant before a final decision was made;
  - notified the Applicant of his immediate suspension from work.<sup>5</sup>
- On 13 October 2023 a meeting was held between the Applicant and Respondent.
- On 13 October 2023 the Applicant also responded in writing to the letter of 11 October 2023 raising a number of concerns including, by way of summary:
  - that the investigator of the incident, Mr Alastair Conway, was not impartial;
  - that statements of Adapt-A-Lift referred to in the incident report were contradicted by the service manual;

- concerns regarding the service history in relation to the grab forklift;
- that SafeWork NSW and the Respondent had relied on reports from Adapt-A-Lift who the Applicant considered was not impartial;
- that the Respondent had breached its enterprise agreement during the investigation process.<sup>6</sup>
- The Applicant also indicated in his letter of 13 October 2023 that he:
  - had been truthful throughout the investigation process;
  - thoroughly enjoyed working for the Respondent;
  - would never intentionally endanger his colleagues;
  - had been operating forklifts for 30 years without incident.<sup>7</sup>
- On 16 October 2023 the Respondent responded to the Applicant’s letter of 13 October 2023 confirming that the allegation that he did not accept responsibility for the incident was substantiated because his explanation was inconsistent with:
  - an email from the SafeWork NSW Inspector that said:

“The decision has been made that as the forklift operator Mr Pece Calovski has already been suspended from using the forklift at the workplace since the incident that Safework NSW will allow the PCBU to continue to manage the incident and not use our powers under Clause 110 of the WHS Act 2011 [noting that the reference to “clause 110 of the WHS Act 2011” should have been a reference to regulation 110 of the *Work Health and Safety Regulations 2011* (NSW)].

It is an expectation that the PCBU will ensure that Mr Calovski is able to operate high risk work competently and safety (sic) prior to being allowed to use forklifts in the premises...”; and
  - the report provided to SafeWork NSW by Adapt-A-Lift on 25 July 2023 in response to a Notice to Give Information to SafeWork NSW issued to Adapt-A-Lift pursuant to section 155(2) of the *Work Health and Safety Act 2011* (NSW) which confirmed that confirmed the forklift brakes were in working order.

The letter of 16 October 2023 invited a further written response ahead of a meeting.

- A meeting was held on 18 October 2023 between the Applicant and Respondent.

- On 19 October 2023 the Respondent provided the Applicant with a letter notifying him of the termination of his employment on the grounds of “misconduct”, stating specifically that:
  - on 27 June 2023 the Applicant failed to operate the grab forklift in a safe manner, causing extensive damage and created a safety incident that could have resulted in injury and or loss of life; and
  - despite being informed that the reports from the forklift manufacturer, Adapt-A-Lift, found that the braking system for the grab forklift was in perfect working order he had not been willing to accept any responsibility for the incident despite being given the opportunity to do so.
- The Applicant’s employment was terminated with immediate effect on 19 October 2023 and the Applicant was paid in lieu of notice.
- At the time of his dismissal the Applicant’s ordinary weekly earnings were \$1,528.55.

### **The hearing**

[7] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[8] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing for the matter (s.399 of the FW Act).

### **Permission to appear**

[9] The Respondent sought to be represented before the Commission by a lawyer.

[10] Relevantly, s.596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[11] Section 596(2) provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter before the Commission only if:

- (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
- (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
- (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

[12] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the FW Act.<sup>8</sup> The decision to grant permission is a

two-step process. First it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.<sup>9</sup>

[13] On the question of representation the Respondent submitted that:

- there are some complex issues arising in the matter that relate to the interaction with the work health and safety regime;
- the Applicant was represented by an experienced lawyer and advocate in Mr Martin of the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU);
- it would be unfair to allow registered organisations to be able to have adequate legal representation in circumstances where the Respondent did not.

[14] The Applicant did not object to the Respondent being represented by a lawyer.

[15] I was satisfied that there was complexity in relation to the matter having regard to the matters in contest between the parties, particularly relating to the question of whether there was a valid reason for the dismissal in the context of a very serious safety incident. In this regard there was a significant volume of materials filed and a significant number of witnesses involved in the proceedings, including two SafeWork NSW inspectors who were ordered to attend the Commission and a witness that the Applicant had put forward as an expert. The competing positions of the parties regarding the cause of the serious safety incident was to require detailed testing of the evidence, including via a process of cross examination of multiple witnesses. Having considered those matters, I determined that allowing the Respondent to be represented by a lawyer would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

[16] I therefore decided to exercise my discretion to grant permission for the Respondent to be represented pursuant to s.596(2)(a) of the FW Act.

[17] Accordingly, at the hearing held across 29 and 30 January 2024, the Respondent was represented by Mr Latham, initial I, of counsel and the Applicant was represented by Mr Martin, initial J, of the AMWU.

### **Witnesses**

[18] 14 witnesses gave evidence to the Commission.

[19] The Applicant gave evidence on his own behalf and the following witnesses also gave evidence on his behalf:

- Adam Williams, an employee of the Respondent, elected Health and Safety Representative and former colleague of the Applicant who was working the day of the incident;

- Rajiv Deo, employed by the Respondent as a ‘grab driver’ and who was working the day of the incident;
- Feng Li, employed by the Respondent as a Machine Operator and who was working the day of the incident; and
- Ahmet Sayan, employed by the Respondent as a Corrugator Operator, ‘Father of the Chapel’, an elected Health and Safety Representative and who was not working the day of the incident.

**[20]** The following witnesses gave evidence on behalf of the Respondent:

- Derek Sporn, employed by the Respondent as Health and Safety Business Partner;
- Ahmad Ibrahim-Elgarhy, employed by the Respondent as Site Manager;
- Rod Harris, employed by the Respondent as National Operations Manager;
- Glenn Wilson, employed by the Respondent as Production Manager;
- Alastair Conway, employed by the Respondent as Day Shift Manager;
- Tom Paraskevopoulos, employed by Adapt-A-Lift Group Pty Ltd as a Service Technician;

**[21]** Todd Brennan is an employee of Forkpro Australia Pty Ltd.<sup>10</sup> Mr Brennan’s evidence in relation to his qualifications and experience was that:

- he completed an apprenticeship in Automotive Engineering in 1985;
- he then obtained a role as a Warrant Affairs manager with Toyota’s Forklift Division and over the next 18 years was promoted to roles including Assistant National Service Manager (Forklift Division), National Service Manager (Forklift Division), Customer Service Manager responsible for parts and service operations (Forklift Division) and Operations Manager - Second in charge of Toyota's Industrial Equipment Division;
- all roles with Toyota’s Industrial Equipment Division included forklift technical and forklift operator training, as well as acting in industry advisory roles. This included acting as Chairman for the Australian Forklift and Industrial Truck Association (AFITA) Engineering Committee as well as representing Toyota on several Australian Standards committees;
- he formed Forkpro Australia in 2002 and since doing so has consulted on forklift safety matters to many major corporations and agencies, including providing expert opinions to SafeWork NSW and WorkSafe Victoria in relation to workplace safety incidents involving forklifts;
- he has a Diploma in Workplace Health and Safety.<sup>11</sup>

[22] In December 2023 Mr Brennan was engaged by the Respondent, via its representative, to provide an expert report, addressing specific questions, and to be available to give evidence during the hearing.<sup>12</sup> In doing so, Mr Brennan was asked by the Respondent's representative to consider the following documents:

- the Report of the Respondent's ICAM (Safety) investigation (which is referred to elsewhere in this decision as the Spurl Investigation Report);
- the Hyster Periodic Maintenance Manual that covers the forklift (Forklift Manual);
- the SafeWork NSW inspection report (SafeWork Inspection Report);
- the Job Service Card enclosing details of the post-incident inspection undertaken by Adapt-A-Lift (Job Service Card);
- the Applicant's response dated 9 October 2023 (Applicant's First Response);
- the Applicant's response dated 13 October 2023 (Applicant's Second Response).

[23] Mr Brennan provided his report to the Applicant's representative on 10 January 2023 (Brennan Report).<sup>13</sup> The Brennan Report states:

- it has been prepared on the basis of information received;
- except as otherwise stated, Mr Brennan does not imply and it should not be construed that he has verified any of the documents provided to him or that his enquiries could have verified any matter which a more extensive physical examination might disclose;
- Mr Brennan was not requested to investigate the incident on site;
- Mr Brennan has not tested the forklift involved in the incident;
- any conclusions drawn are from the documents provided to him and all opinions given are Mr Brennan's.<sup>14</sup>

[24] The Brennan Report indicates that in addition to the documents provided by the Applicant's representative he also considered:

- Australian Standard AS 2359.2-2013 Powered Industrial Trucks Operations;
- *Work Health and Safety Regulation 2017* (NSW);
- Unit of Competency TLILIC0003 - Licence to operate a forklift truck;
- Hyster brochure S135-155FT Series; and
- Hyster S135-155FT Series technical guide.



[25] The Brennan Report also indicates that Mr Brennan has relied on the following assumptions:

- the term “Grab Forklift” is a term used to describe the counterbalance type forklift that is fitted with a special Bolozoni Auramo brand paper roll clamp and this clamp is not made by the forklift manufacturer Hyster;
- the forklift had sufficient speed and momentum to cause significant damage in a relatively straight line over an approximate 10m distance;
- the forklift was tested post incident to determine the stopping distance at full speed and the distance was approx. 7m;
- the distance between the impacted bollard and the fire safety door is 9m.<sup>15</sup>

[26] The following representatives of SafeWork NSW also gave evidence during the proceedings:

- Emma Afeaki;
- Corey Myers.

### **Submissions**

[27] The Applicant filed submissions in the Commission on 22 December 2023. The Respondent filed submissions in the Commission on 15 January 2024. Final written submissions were filed by the Applicant on 25 January 2024.

### **Has the Applicant been dismissed?**

[28] A threshold issue to determine is whether the Applicant has been dismissed from his employment.

[29] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

- (a) the Applicant’s employment with the Respondent has been terminated on the Respondent’s initiative; or
- (b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[30] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[31] There was no dispute and I find that the Applicant’s employment with the Respondent terminated at the initiative of the Respondent. I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

### **Initial matters**

[32] Under s.396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.

#### ***Was the application made within the period required?***

[33] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[34] It is not disputed and I find that the Applicant was dismissed from his employment on 19 October 2023 and made the application on 26 October 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

#### ***Was the Applicant protected from unfair dismissal at the time of dismissal?***

[35] I have set out above when a person is protected from unfair dismissal.

#### ***Minimum employment period***

[36] It was not in dispute and I find that the Respondent is not a small business employer, having 15 or more employees at the relevant time.

[37] It was not in dispute and I find that the Applicant was an employee, who commenced their employment with the Respondent on 10 December 2020 and was dismissed on 19 October 2023, a period in excess of 6 months.

[38] I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

#### ***Application of an enterprise agreement***

[39] It was not in dispute and I find that, at the time of dismissal, the *Opal Fibre Packaging National Enterprise Agreement 2022* applied to the Applicant's employment.

[40] Further, it was not in dispute and I find that, at the time of dismissal, the Applicant was earning \$1,528.55 per week translating to an annual rate of earnings of \$79,484.60. This is less

than the high income threshold, which, for a dismissal taking effect on or after 1 July 2023, is \$167,500.

[41] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

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

[42] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code if:

- (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
- (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[43] As mentioned above, I find that the Respondent was not a small business employer within the meaning of s.23 of the FW Act at the relevant time, having in excess of 14 employees (including casual employees employed on a regular and systematic basis).

[44] I am therefore satisfied that the Small Business Fair Dismissal Code does not apply, as the Respondent is not a small business employer within the meaning of the FW Act.

***Was the dismissal a case of genuine redundancy?***

[45] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

- (a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[46] It was not in dispute and I find that the Applicant's dismissal was not due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[47] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

[48] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

***Was the dismissal harsh, unjust or unreasonable?***

[49] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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.

[50] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>16</sup>

[51] I set out my consideration of each below.

**Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?**

[52] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"<sup>17</sup> and should not be "capricious, fanciful, spiteful or prejudiced."<sup>18</sup> However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>19</sup>

[53] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>20</sup> "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 termination."<sup>21</sup>

***Submissions***

[54] By way of summary the Applicant initially submitted that there was no valid reason for the dismissal related to the Applicant's capacity or conduct because:

- the forklift was scheduled to have its 4000 hour service on 9 March 2023 and this service was required to be performed pursuant to the Hyster periodic maintenance manual however the Respondent did not service the forklift at that time as there was another forklift that had broken down and needed to be serviced;<sup>22</sup>
- on 27 June 2023 the brakes of the forklift he was driving malfunctioned when he attempted to undertake a routine park of the forklift and there is no evidence that the Applicant was driving in a manner that was unsafe;<sup>23</sup>
- the failure to service the forklift contributed to the brakes malfunctioning, thereby causing the incident.<sup>24</sup>

[55] After considering the evidence of the witnesses during the hearing the Applicant's position remained unchanged and the Applicant continued to submit that the incident arose because he pressed down on the brake and it went soft.<sup>25</sup> The Applicant submitted that there were numerous failures to properly service and inspect the forklift, the possibility that the brakes failed cannot be excluded and the possibility of brake failure is arguably likely.<sup>26</sup> In particular, the Applicant submitted that:

- the service records indicate that 'preventative maintenance within an agreed scope of work' is narrower in scope than a 4000 hours service and a *Jones v Dunkel* inference is available to the Commission given that the person who is said to have conducted the service, Mr Pereira was not called as a witness;<sup>27</sup>
- Mr Paraskevopoulos failed to test the brake fluid for contamination, which has a high likelihood of soft pedal (including the temporary malfunctioning of the brake);
- the Commission cannot be satisfied that the brakes didn't fail because this test was never done;
- had the test been done, the Commission would be in a position to know whether brake failure was possible;
- because the Commission does not know whether brake failure did or did not happen there cannot be a valid reason for dismissal.<sup>28</sup>

[56] The Applicant submitted that the Commission would need to be satisfied to the Briginshaw standard of the serious allegation that he lied<sup>29</sup> and that given that the evidence demonstrates that the Applicant's version of events is plausible and that the failure to service the forklift increased the risk of that plausibility, it can't be found that the Applicant was a liar.<sup>30</sup>

[57] The Applicant submitted that if the Commission did not accept that the brakes failed and found there was an accident, this does not give rise to a valid reason.<sup>31</sup> In particular the Applicant submitted that:

- even if it could be established that the brakes did not malfunction and, instead the incident was caused by the Applicant's error, the decision to terminate the Applicant is bereft of any valid reason as at worst, the incident was the result of a mistake which led to damage of plant and equipment;<sup>32</sup>
- it's possible that the Applicant's foot could have slipped off the brake but this is unknown and it is not open on the evidence that the Applicant hit the accelerator because it's possible that if you take your foot off the accelerator the forklift rolls and that could easily cause the damage;<sup>33</sup>
- the damage could have been significantly mitigated had there been adequate barricades in place.<sup>34</sup>

**[58]** The Applicant submitted that the evidence in the proceedings establishes that the Applicant was not driving erratically or speeding and it was noted that Mr Conway and Mr Ibrahim-Elgarhy considered the incident to be an accident.<sup>35</sup>

**[59]** The Applicant also submitted that the Respondent's purported concern as to the Applicant's unwillingness to accept responsibility for the incident is artificial and if the Respondent was so concerned about this aspect they would not have required the Applicant to continue to work full-time (including regular overtime) for three and a half months after the incident.<sup>36</sup>

**[60]** The Applicant submitted that the Respondent bears the evidentiary onus concerning the question of whether there was a valid reason for the dismissal.<sup>37</sup>

**[61]** By way of summary the Respondent submitted that there was a valid reason for the Applicant's dismissal because:

- the Respondent has both common law and statutory obligations to ensure the safety of its employees and has a common law duty to ensure a safe workplace<sup>38</sup> and there are very serious risks associated with contravention of these obligations;<sup>39</sup>
- SafeWork NSW has said that forklift operation is a high-risk activity which continues to cause workplace deaths and injuries and to increase awareness began a forklift safety compliance project in June 2021;<sup>40</sup>
- the Applicant was driving a forklift and collided with an orange and blue cylindrical drum causing it to bend around a yellow bollard which was dislodged from the floor.<sup>41</sup>The forklift then collided with other items of plant and equipment (including the gas feed line to the boiler which led to the release of gas) before coming to its final stopping place after colliding with a roller door and fire safety door, causing the fire safety door to fly off its hinges/frame and land a few metres away. The Respondent submits those 'actions were inherently dangerous';<sup>42</sup>
- in putting forward that the brakes failed, the Applicant lied and this was significant in that it showed his untrustworthiness and put forward a version of events that if true may have led to a prosecution of the Respondent under work health and safety legislation.<sup>43</sup>

[62] The Respondent submitted that:

- the Applicant's position upon hearing the evidence appeared to be that there was a possibility of water in the brakes, which turned into gas and then condensed back into water, meaning that the brakes could initially work, would then fail, and would then continue to work again<sup>44</sup> and there was no evidence of this having occurred;<sup>45</sup>
- the scenario put forward by the Applicant is contrary to the evidence before the Commission, including that the Adapt-A-Lift technician found no fault with the brakes;<sup>46</sup>
- there is no evidence that Adapt-A-Lift did not do the tests it said it had done and witnesses gave evidence in relation to the work that *had* been done;<sup>47</sup>
- there is no evidence of a failure to service the forklift which contributed to brake malfunction<sup>48</sup> and rather the evidence shows that the forklift was properly maintained and there was no fault in the brakes;<sup>49</sup>
- while the Applicant submits the damage caused was the Respondent's fault in failing to implement adequate barriers to protect the boiler and other plant, the Applicant does not explain how this would have reduced any risk to pedestrians caused by a forklift careering through the workplace.<sup>50</sup>

[63] The Respondent submitted that the evidence establishes that had the Applicant taken his foot off the accelerator, the forklift would have slowed and stopped before travelling nine metres from the bollard and before hitting the fire door so hard that it knocked the fire door off its hinges.<sup>51</sup> The Respondent said that the forklift would have slowed further by hitting the bollard and gas main.<sup>52</sup>

[64] The Respondent agreed that the Briginshaw standard applies<sup>53</sup> and having heard the evidence the Respondent submitted that at the heart of the matter was that the Applicant maintained that the brakes were defective in circumstances where there was no evidence that they were defective and a lot of evidence that they were not.<sup>54</sup> The Respondent submitted that the Applicant had provided no rational explanation as to why the brakes were defective.<sup>55</sup>

[65] The Applicant submitted that if the incident was the cause of an accident on the part of the Applicant it would not constitute a valid reason. The Respondent submitted that this submission proceeds on the basis that misconduct involves something more than mere negligence, error of judgement or innocent mistake and does not take into account:

- the many cases which show that gross negligence may be grounds for a finding of misconduct justifying summary dismissal;<sup>56</sup>
- the statutory definition of serious misconduct set out in Regulation 1.07 of the *Fair Work Regulations 2009* (Cth)(Regulations) which states that serious misconduct includes conduct that 'causes serious and imminent risk to the health and safety of a person'.<sup>57</sup>

[66] The Respondent submitted:

- the Applicant does not contend that there was no serious and imminent risk to the health and safety of a person and the Commission must find that the Applicant committed an act of serious misconduct unless it finds that there was in fact a brake malfunction;<sup>58</sup>
- in any event, the statutory test does not require the employer to prove misconduct. Rather, the statutory test is whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect of the safety and welfare of other employees);<sup>59</sup>
- the Applicant's conduct or capacity clearly had an adverse effect on the safety and welfare of other employees and a decision to terminate on that basis was clearly a valid reason unless the Commission found there was a brake malfunction (submitting that this finding would be contrary to the evidence);<sup>60</sup>
- the Applicant is left with a difficult task in that he must prove there was in fact a brake malfunction, he cannot and as such the Commission should find that there was a valid reason.<sup>61</sup>

[67] The Applicant submitted that the definition of serious misconduct set out in the Regulations includes *both*:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; and
- conduct that causes serious and imminent risk to:
  - the health and safety of a person; or
  - the reputation, viability or profitability of the employer's business.<sup>62</sup>

[68] The Applicant submitted there is no evidence before the Commission of the Respondent engaging in wilful or deliberate behaviour inconsistent with the continuation of his employment and without more, an accident or innocent mistake does not rise to the level of misconduct.<sup>63</sup>

### ***Applicant's experience and role***

[69] The Applicant gave evidence that prior to and including working for the Respondent he has operated forklifts and grab forklifts for approximately 25 years.<sup>64</sup> The Applicant said the incident involving the forklift was the first time in his career that he had ever had a forklift accident.<sup>65</sup>

[70] The Applicant was initially employed by the Respondent as a machine operator from around 10 December 2020 and from 13 October 2021 commenced training to work as a corrugator floater.<sup>66</sup> A corrugator floater is required to perform various tasks including driving forklifts and working on a cardboard stacker.<sup>67</sup>



[71] During cross examination Mr Conway was asked whether, aside from the incident, the Applicant has always been a good worker to which he replied “he had been fine”.<sup>68</sup> Mr Conway also indicated that he was not aware of any incidents of the Applicant telling lies, that the Applicant had otherwise performed his work competently and that during the period between the time of the incident on 27 June 2023 and 11 October 2023, when the Applicant was suspended, he had no problems with the Applicant.<sup>69</sup>

***Evidence regarding the type of forklift involved in the incident***

[72] The Applicant gave evidence that:

- a grab forklift (the forklift involved in the incident) is different to a regular forklift in that, rather than having flat tines that can be loaded and unloaded, the grab of a grab forklift has a semi-circular shape which is typically used to pick up cylindrical reels of paper;
- the unloaded weight of the forklift is 11.33 tonnes which is significantly heavier than a standard forklift<sup>70</sup> and it is approximately 3 metres long;<sup>71</sup>
- there are three grab forklifts at the site where he worked, one of which was out of operation and had not been used for approximately four to six months prior to the time of the incident;
- the reason for one of the grab forklifts being out of service was that it stopped working while the Applicant was in the middle of driving it;
- as a result of a grab forklift being out of service the grab forklift involved in the incident had been used on the day, afternoon and night shift five days per week for the entire period the other forklift had been out of service;<sup>72</sup>

***Forklift service history***

[73] Adapt-A-Lift leases forklifts to the Respondent and also services and maintains these forklifts, including the forklift the subject of the incident.<sup>73</sup>

[74] Rod Harris is the National Operations Manager of Adapt-A-Lift Group Pty Ltd (Adapt-A-Lift), a position he held for two years at the time of filing his statement.<sup>74</sup> Mr Harris’ evidence was that:

- he is a qualified technician which is a specialised mechanics trade;
- his duties include overall responsibility for Adapt-A-Lift’s national product support teams, including services and operations and oversight of the technical activities of technicians via 12 direct reports under which approximately 120 employees sit;
- he has held similar positions with other companies in the 26 years prior to commencing with Adapt-A-Lift.<sup>75</sup>

[75] During cross examination, Mr Harris was asked when he last performed the role of a qualified technician to which he responded:

“As far as day-to-day operation, probably 10 years, but as far as identification and fault finding, on a daily basis.”<sup>76</sup>

[76] Mr Harris said he recalled receiving a call from Adapt-A-Lift’s NSW State Supervisor informing him that a request had been received from the Respondent for a copy of the 12 month service history for the forklift and that he told the NSW State Supervisor to provide the requested material.<sup>77</sup> Mr Harris said he understood that initially, Adapt-A-Lift provided the Respondent with the service history for another forklift in the Respondent’s possession but that the service history for the correct forklift was provided to the Respondent on 10 October 2023.<sup>78</sup> A copy of the records of the forklift’s service history was attached to Mr Harris’ statement.<sup>79</sup>

[77] Mr Harris said that a 4000 hour service was carried out on 9 March 2023 by an Adapt-A-Lift technician Merrik Peria.<sup>80</sup> A copy of Mr Peria’s record of this was attached to Mr Harris’ statement.<sup>81</sup>

[78] A note on the copy of the service history states:

“they don’t want to give the machine, because the (sic) have a breakdown machine, when the other one is fixed, they can give the machine.”

[79] Mr Harris said this note was recorded in Adapt-A-Lift’s system by Mr Peria on 2 February 2023 in connection with other maintenance work that was carried out on the forklift on this date and that the 4000 hour service was subsequently rebooked and carried out by Mr Peria on 9 March 2023.<sup>82</sup> Mr Harris pointed to the entry on the record of service history which states ‘4000 hour service’ and the record of Mr Peria which suggests that Mr Peria did make the note about the Respondent not wanting to provide the forklift involved in the incident on 2 February 2023 and that a 4000 hour service was carried out on 9 March 2023 with a note on that day stating:

“Carry out preventative maintenance service and safety inspection in the (sic) line with agreed (sic) of (sic) scope of work.”

[80] During cross examination it was put to Mr Harris that for a particular service (e.g. a 250 hour service, 500 hour service, 1000 hour service and 2000 service) the forklift manual has a prescribed list of things that need to be done and Mr Harris confirmed this was correct.<sup>83</sup> Mr Harris was taken to the entries in Mr Peria’s records referring to the ‘4000 hour service’ and ‘Carry out preventative maintenance service and safety inspection in the (sic) line with agreed (sic) of (sic) scope of work’. It was put to Mr Harris that it would make no sense to carry out both of those services and it would be one or the other that would have been carried out to which Mr Harris responded that:

- this was just the terminology Adapt-A-Lift uses;
- the reference to a preventative maintenance service and safety inspection in line with the agreed scope of work was a reference to the 4000 hour service.<sup>84</sup>

**[81]** It was put to Mr Harris that:

- the language suggests an agreed scope of work is narrower than a 4000 hour service because a 4000 hour service has a list of things that must be performed;
- the Respondent did not want to provide the machine for a 4000 hour service because it would have meant longer time out for the forklift;
- this resulted in preventative maintenance being carried out with an agreed scope of work which meant less time out off the floor.<sup>85</sup>

**[82]** Mr Harris responded by saying that Adapt-A-Lift did not do the service on the first visit (in February) because the Respondent had another machine out of service but when Adapt-A-Lift returned on 9 March it did undertake the service.<sup>86</sup>

**[83]** Mr Harris also gave evidence that:

- prior to the incident the Respondent did not contact Adapt-A-Lift in relation to the forklift's brakes;
- on 12 May 2023 Adapt-A-Lift replaced the handbrake lever on the forklift which was physically broken but there were no issues with the mechanics of the forklift's brakes.<sup>87</sup>

**[84]** The Applicant challenged the adequacy of the forklift's servicing and in his response dated 13 October 2023 to the allegations made against him (Second Response) stated:

“Within the 12 months recorded history, there has been no occasion in which brakes have been serviced as per the maintenance schedule”.

**[85]** The expert engaged by the Respondent's representative, Mr Brennan, was asked to address whether a 4000 hour service entails an inspection or service of the brakes. The Brennan Report states that the 4000 hour service entails service of the brakes and prior to this service (according to the Forklift Manual) technicians must “Perform the 8-hour, 250-hour, 500-hour, 1000-hour and 2000-hour checks...” all of which entail a service of the brakes.<sup>88</sup>

**[86]** Mr Brennan was also asked by the Respondent's representative to address the following question:

“Even if the brakes had not been serviced in the 12 months prior to the accident, on a scale of 1 to 10, 1 being “very unlikely” and 10 being “very likely”, how likely is it that this would cause the brake pedal to go “soft” and provide “no resistance”, causing the forklift to “keep moving”?”

**[87]** In this regard the Brennan Report states that the likelihood is rated as a 1 in Mr Brennan's opinion because, by way of summary:

- with the forklift's type of braking system, if the brakes failed he would not expect a "soft pedal";
- from the material before Mr Brennan he could see no evidence of oil being found on the floor around where the incident occurred and this is relevant because an oil trail would likely indicate failure of the brakes articulating system, hydraulics or wet brakes;
- if leakage from the system had occurred, evidence of oil escape would have been found (and it was not);
- if the brake master cylinder seals had failed they do not "unfail", evidence of this would have been found at the Adapt-A-Lif inspection later that day and the issue would have re-emerged with subsequent use;
- the Job Service Card states the brakes were working as per requirements;
- the forklift is equipped with wet type brakes which means they run in a hydraulic fluid environment and are much less susceptible to wear.<sup>89</sup>

**[88]** The Applicant's Second Response also states:

"Page 39 of the heister periodic maintenance schedule states that every 500 hours or 6 months the master brake cylinder rod and pin is lubricated, there is no records (sic) of this occurring in the service records of Adapt a Lift".

**[89]** In providing his report, Mr Brennan was asked by the Respondent's representative to address the following:

- “(a) Does page 39 (or any other page) of the Manual state that every 500 hours or 6 months, the master brake cylinder rod and pin must be lubricated?
- (b) Having regard for the Service History, when was the master brake cylinder rod and pin last lubricated?
- (c) As part of a “4000hr Service”, is the master brake cylinder rod and pin lubricated?
- (d) Even if the master brake cylinder rod and pin was not lubricated every 500 hours or at least 6 months prior to the accident, on a scale of 1 to 10, 1 being “very unlikely” and 10 being “very likely”, how likely is it that this issue would cause the brake pedal to go “soft” and provide “no resistance”, causing the forklift to “keep moving”?

**[90]** In this regard the Brennan Report states:

- Page 16 of the Manual states that the master brake cylinder rod and pin must be lubricated at every 500 hour service.<sup>90</sup>

- The Service History does not carry a sufficient breakdown (to show when the master brake cylinder rod and pin was last lubricated).<sup>91</sup>
- Lubrication of the master brake cylinder rod and pin forms part of the 500 hour service and the 500 hour service forms part of the 4000 hour service.<sup>92</sup>
- Should the lubrication not have occurred then the expected result would be eventual seizure of the movement thus causing hard pedal (not soft pedal, as the Applicant claims).
- Even if the master brake cylinder rod and pin was not lubricated every 500 hours or at least 6 months prior to the accident, the likelihood that that this issue would cause the brake pedal to go “soft” and provide “no resistance”, causing the forklift to “keep moving” was rated as “1” in Mr Brennan’s opinion.<sup>93</sup>

**[91]** The Applicant’s Second Response states:

“Brake oil change (master cylinder) is to occur every 2000 hours or annually. Once again, there are no records of this oil change being performed in the service records.”

**[92]** In providing his report, Mr Brennan was asked by the Respondent’s representative to address the following:

- “(a) Having regard for the Service History, is this statement correct?
- (b) As part of a “4000hr Service”, is the brake oil changed?
- (d) Even if the brake oil was not changed every 2000 hours or in the 12 months prior to the accident, on a scale of 1 to 10, 1 being “very unlikely” and 10 being “very likely”, how likely is it that this issue would cause the brake pedal to go “soft” and provide “no resistance”, causing the forklift to “keep moving”?”

**[93]** In this regard the Brennan Report states:

- Page 16 of the Manual provides “Brake Oil Master Cylinder. Check indicator light every 8 hour/daily, check the fluid at every 500 hour/6 monthly service and replace it at every 2000 hour/annual service”.
- The Service History states a 4000-hour service was completed on 9 March 2023, so it is assumed (by Mr Brennan) that this did occur however, it is noticed that, according to the Service History, no brake oil has been changed for and page 16 of the Manual states that 0.35 litres Dexron® III from Sealed Container is required for the brake oil change.<sup>94</sup>
- Even if the brake oil was not changed every 2000 hours or in the 12 months prior to the accident, the likelihood that this issue would cause the brake pedal to go “soft” and provide “no resistance”, causing the forklift to “keep moving” is rated as “1” in Mr Brennan’s opinion because:

- It is possible that low brake oil levels or the introduction of water to the system may cause soft pedal however if this was the case, the indicator light on the dash would be lit.<sup>95</sup>
- Low oil level is very unlikely to occur without a leakage occurring or the indicator appearing on the dash and according to page 16 of the Manual this warning light must be inspected by the operator at the daily inspection.
- Checking the indicator light on the dash is an operator responsibility and in neither of the Applicant's written responses or any of the other documents provided to Mr Brennan is it raised that the warning light was lit.
- There was also no evidence of leakage.<sup>96</sup>

**[94]** The Brennan Report states that if low brake fluid levels occur or water is introduced to the system the likelihood of soft pedal or non-existent pedal pressure is high however for the reasons outlined above, the likelihood of low brake fluid levels occurring or water introduction to the system occurring unnoticed is extremely low.<sup>97</sup>

**[95]** The Applicant's Second Response states:

“Wet brake drive axle oil change on page 81 of the Heister periodic service manual specifies this is performed every 1000 hours or 6 months. There is no record of this service being performed as per the Heister periodic service manual.”

**[96]** In providing his report, Mr Brennan was asked by the Respondent's representative to address the following:

- “(a) Does page 81 (or any other page) of the Manual say that the wet brake drive axle oil change must be performed every 1000 hours or 6 months?
- (b) Having regard for the Service History, when was wet brake drive axle oil last changed?
- (c) As part of a “4000hr Service” is the wet brake drive axle oil changed?
- (d) Even if the wet brake drive axle oil was not changed every 1000 hours or at least 6 months prior to the accident, on a scale of 1 to 10, 1 being “very unlikely” and 10 being “very likely”, how likely is it that this issue would cause the brake pedal to go “soft” and provide “no resistance”, causing the forklift to “keep moving”?”

**[97]** In this regard the Brennan Report states:

- Page 16 of the Manual states that the wet brake drive axle oil change must be performed every 1000 hours or 6 months<sup>98</sup> and as the 1000 hour service forms part of the 4000 hour service the wet brake drive axle oil is required to be changed.<sup>99</sup>

- The Manual requires the change of oils in five separate chambers of the wet brake system and in this regard:
  - 25 litres in total are required;
  - 12 litres of HP GEAR OIL 80W/90 \$L (PER LITRE) is shown in the Service History (reference 1473584, 24 February 2023). This is used on the Wet Brake Drive Axle Centre section and is a lower viscosity to the oils required in the left and right side wet brakes;
  - there is insufficient information to know when or if the wet brake oils had been changed;
  - it is generally accepted that where a service is designated then reference back to the Manual will provide the required level of detail and that detail does not need to be listed in the Job Card or Service History;<sup>100</sup>
- In the case of the oil not being changed (if that was in fact the case), it is unlikely that a sudden or unexpected change in braking performance would occur as a result and any change in braking would be gradual.<sup>101</sup>
- As the post incident inspection shows no sign of oil leakage or failure then it is unlikely that sudden brake failure would occur.<sup>102</sup>

**[98]** In circumstances where the wet brake drive axle oil was not changed every 1000 hours or at least 6 months prior to the accident, Mr Brennan rated the likelihood of soft pedal or non-existent pedal pressure as “1 or 2” in his opinion.<sup>103</sup>

**[99]** The Applicant’s Second Response states:

“Brake system accumulator checks on page 99 of Heister periodic service manual. This check is done every 2000 hours or annually. There are clear instructions in the manual outlining what pressures are required for the system. There is no record of this check being performed as per the manual in the Adat a Lift service records.”

**[100]** In providing his report, Mr Brennan was asked by the Respondent’s representative to address the following:

- “(a) Does page 99 (or any other page) of the Manual say that the brake system accumulator check must be done every 2000 hours or annually?
- (b) Having regard for the Service History, when was the brake system accumulator last checked?
- (c) As part of a “4000hr Service” is the brake system accumulator checked?
- (e) Even if the brake system accumulator was not checked every 2000 hours or at least 12 months prior to the accident, on a scale of 1 to 10, 1 being “very

unlikely” and 10 being “very likely”, how likely is it that this issue would cause the brake pedal to go “soft” and provide “no resistance”, causing the forklift to “keep moving”?”

**[101]** In this regard the Brennan report indicates:

- Page 16 of the Manual suggests that the 2000 hour or 12 month service requires that the service “check pressure only”.<sup>104</sup>
- There is insufficient information (in the service history) to know when the pressure was last checked.<sup>105</sup>
- As the 2000 hour service forms part of the 4000 hour service the brake system accumulator would need to be checked as a part of this service.<sup>106</sup>
- In the event the accumulator was not serviced (if that was in fact the case) it is unlikely that a sudden or unexpected change in braking performance would occur and as the post-incident inspection showed no sign of failure it is unlikely that sudden brake failure would occur (with Mr Brennan emphasising “sudden or unexpected change in braking”).
- For the above reasons the likelihood was rated as 1 or 2.<sup>107</sup>

**[102]** The Respondent’s representative asked Mr Brennan to provide an opinion as to whether the Service History was deficient in any way in relation to the service and maintenance of the forklift’s brakes in relation to which the Brennan Report states:

“In reviewing the Adapt-A-Lift service history provided, it is not possible to state whether it is “deficient” or “not deficient”. It is industry standard not to list the full contents of any particular periodic service, but to rely on the Manual to provide such detail. I would expect to see parts and fluids listed that would match up with that specified in the Manual. There does appear to be some anomalies in the Service History provided in this regard. i.e. certain parts or lubricants required by the schedule set out in the periodic maintenance table in the Manual are not listed in the Service History. However, that does not directly mean that this was not completed. Just that they are not listed”.<sup>108</sup>

**[103]** During cross examination it was put to Mr Brennan that if the list of items that must be done as a part of a 4000 hour service were not performed this would increase the risk of brake failure and Mr Brennan agreed.<sup>109</sup> It was then put to Mr Brennan that there were a number of things he could not identify in the forklift history as being completed because they did not appear in the history including:

- whether the master brakes cylinder and rod were lubricated, to which Mr Brennan agreed;
- whether the brake oil change had been carried out, to which Mr Brennan agreed;



- whether the wet brake axle oil change had been carried out, to which Mr Brennan indicated there was no charge for this in the service history;
- whether the brake system accumulator had been serviced, to which Mr Brennan indicated that it had not been specifically listed in the service history.<sup>110</sup>

[104] It was put to Mr Brennan that if it was the case that none of the above had been carried out, the cumulative effect would significantly increase the risk of brake failure, including a temporary failure, and he agreed.<sup>111</sup>

***Employee evidence concerning the forklift incident***

[105] An incident report was completed by the Respondent following the incident and was provided to the Applicant during the investigation. The Applicant attached a copy of this incident report to his statement<sup>112</sup> (Respondent's Incident Report).

[106] The Applicant's normal starting time was 6.50am and as a floater he could be required in different areas of the business.<sup>113</sup> The Applicant provided the following account of events concerning the incident:

- on 27 June 2023 he either looked at the whiteboard to identify his tasks for the day or was directed to operate a grab forklift at the 'wet end' of the corrugator, which is where paper is first loaded into the corrugator machine;<sup>114</sup>
- prior to operating the forklift he checked to make sure all the correct reels were set up from the night before which took approximately 20 minutes;<sup>115</sup>
- he then transported the reels on the ground next to the corrugator machine so the machine operators could run the paper through the machine to create cardboard;<sup>116</sup>
- after approximately 20 minutes of operating the grab forklift he picked up a 'butt reel' (being a reel containing what is left over from a full reel which can be used for another job) at the wet end of the corrugator<sup>117</sup> and close to the yellow trolley in the top left hand corner of page 20 of the Respondent's Incident Report;<sup>118</sup>
- at this time the forklift was facing towards the orange and blue drum pictured at page 20 of the Respondent's Incident Report;<sup>119</sup>
- he rotated the clamp, which was holding the butt reel approximately one metre in the air, from vertical to horizontal so he could place the butt reel on the ground with it facing the correct way for insertion into the corrugator by the machine operator;<sup>120</sup>
- as he rotated the clamp a red metal plate fell from the clamp itself to the ground;<sup>121</sup>
- he immediately put the butt reel back down on the ground for safety,<sup>122</sup> turned off the grab forklift and went to inspect the plate with Mr Williams;<sup>123</sup>

- the forklift was parked approximately two to three metres from the yellow trolley in the top left hand corner of page 20 of the Respondent's Incident Report;<sup>124</sup>
- he had a conversation with Mr Williams and they agreed that they should notify the supervisor that the plate had fallen off the forklift and that Adapt-A-Lift (the company contracted by the Respondent to service its forklifts) should be contacted to fix the forklift;<sup>125</sup>
- he got back in the forklift, reversed the forklift for approximately one or two metres to put the butt reel down safely and out of the way and then went to park the forklift near the boiler;<sup>126</sup>
- as he was driving he pushed down on the brakes approximately two metres before where he had intended to park the forklift and when he pressed the brake it went all the way to the floor and had no resistance;<sup>127</sup>
- the forklift continued to move forward, he was aware that the boiler was on his left and that the forklift was going to hit something, so he intentionally steered the forklift as straight as possible to ensure he went between the boiler and starch kitchen to minimise damage;<sup>128</sup>
- as he steered the forklift straight, it collided with the orange and blue cylinder causing it to bend around the yellow bollard shown at pages 20 and 21 of the Respondent's Incident Report;
- the forklift then continued straight before eventually colliding with the roller door, among other items of plant and equipment (including the gas feed line to the boiler which led to the release of gas), and stopping;<sup>129</sup>
- the time between the Applicant pressing on the brakes to when the forklift collided with the roller door was a few seconds;<sup>130</sup>
- he could not be certain as to whether the engine was still running or whether he turned the ignition off when he got out of the forklift as he was in shock;<sup>131</sup>
- he estimated the distance between where the forklift was initially parked when the plate fell off the clamp to the roller door to be 15 to 20 metres;<sup>132</sup>
- he estimated the distance between where he pressed the brakes to the roller door to be eight to 10 metres.<sup>133</sup>

[107] The Applicant said:

- he did not press the accelerator and that if he did the forklift would have sped up;
- the forklift continued but decreased in speed, particularly after colliding with plant and equipment;

- he was not driving anywhere near full speed.<sup>134</sup>

[108] The Applicant said after the crash he got out of the forklift and Mr Deo was near him and said ‘are you ok?’.<sup>135</sup> The Applicant recalled having a conversation with Mr Williams and Mr Deo generally discussing that the brakes did not work but could not recall exactly when.<sup>136</sup>

[109] The Applicant underwent a drug and alcohol test which returned a negative result.<sup>137</sup> The Applicant used a cab charge to go to hospital as he had a minor injury to his shoulder and was told he could return to work the next day.<sup>138</sup>

[110] Mr Williams is employed by the Respondent as a ‘floater’ and is also an elected Health and Safety Representative, a role he had held for approximately 19 years.<sup>139</sup> Mr Williams was working on 27 June 2023, the day of the incident. Mr Williams provided the following account of events concerning the incident:

- just before 7.30am on 27 June 2023 he was working on module facer 1 (MF1) with 10 other people including Feng Li and Rajiv Deo;<sup>140</sup>
- he saw that the Applicant was operating a grab forklift and had picked up a butt reel;
- he saw that a red plate fell from the forklift’s clamp;<sup>141</sup>
- the Applicant placed the butt reel back down on the ground and stopped the forklift and Mr Williams was standing approximately five metres away from the forklift at this point;<sup>142</sup>
- he immediately went over to the forklift with Son Thatch to see what had happened and recalled that Mr Deo was also close by;<sup>143</sup>
- he told the Applicant that they should move the red metal plate to the side and call the control room to advise them that the plate had fallen off the forklift;<sup>144</sup>
- he picked up the red metal plate and lent it against a rubbish bin at MF1;<sup>145</sup>
- at this stage the forklift was parked in the direction of the blue and orange drum and parked within a couple of metres of the yellow trolley (depicted in the second photo on page 20 of the Respondent’s Incident Report);<sup>146</sup>
- he then continued to work on the MF1;<sup>147</sup>
- a couple of minutes later he saw the Applicant get back in the grab forklift and assumed he was going to park it in the usual area near the boiler given the plate had fallen off its clamp;<sup>148</sup>
- he then watched the Applicant drive the forklift and it was not being driven fast or erratically.<sup>149</sup> During cross examination Mr Williams confirmed that when he said the forklift wasn’t being driven fast he was saying that it was not being driven at more than 10 kilometres per hour;<sup>150</sup>

- he saw the forklift collide with the orange and blue drum before continuing between the boiler and the starch kitchen and eventually hitting the roller door where it stopped;<sup>151</sup>
- the distance between where the forklift was originally when the plate dropped from the clamp up to the roller door is approximately 15 metres;<sup>152</sup>
- whilst the Applicant was still in the grab forklift he turned around with his arms out and looked stunned by what happened;<sup>153</sup>
- he went straight onto the two-way radio, said “emergency, emergency” and told the control room to stop the corrugator;<sup>154</sup>
- shortly after making this call over the radio there was a strong smell of gas and the fire alarm went off;<sup>155</sup>
- Mr Deo and Ahmad Ibrahim Elgarhy (Mr Elgarhy) later told him that Mr Deo had turned off the gas valve;<sup>156</sup>
- later on that same day the Applicant told him that the brakes on the forklift did not work.<sup>157</sup>

**[111]** During cross examination Mr Williams was asked a number of questions in the context of his role as a health and safety representative. Mr Williams was asked whether, after hearing the Applicant’s account that the brakes on the forklift did not work, he told management that the forklift should not be moved to which he indicated that when the fire alarm went off, everyone evacuated to the car park and the site of the incident was preserved.<sup>158</sup>

**[112]** Mr Williams was asked whether at that stage he told anybody that he had been told that the brakes did not work to which he responded that he told Mr Conway.<sup>159</sup>

**[113]** Mr Deo is employed by the Respondent as a ‘grab driver’ and was also working on MF1 at the time of incident.<sup>160</sup> Mr Deo’s evidence was that:

- at approximately 7.30am on 27 June 2023 he was working at MF1, heard a loud noise and was standing approximately 10 metres away from the grab forklift when this occurred;<sup>161</sup>
- he could not initially see when he looked over as there were paper rolls obstructing his view;<sup>162</sup>
- he then walked towards the grab forklift to see what happened and noticed Mr Williams and the Applicant;<sup>163</sup>
- he saw that the red guard plate from the forklift’s clamp was leaning against the nearby rubbish bin;<sup>164</sup>

- he inspected the forklift to see where it had fallen off and how it would be put back into place;<sup>165</sup>
- referring to the second photo on page 20 of the Respondent's Incident Report, the forklift was parked near the yellow trolley on the left-hand side of the picture;<sup>166</sup>
- he intended to use the two-way radio to call Mr Conway, the Day Shift Manager, to advise him that the plate had come off the forklift and needed to be repaired however before he could do so he heard a loud bang and instinctively yelled out "woah";<sup>167</sup>
- he turned around and saw that the orange and blue drum had been impacted and saw the forklift slowly rolling towards the roller door before it stopped;<sup>168</sup>
- at most, he saw the forklift rolling for a second or two after it had already hit the drum;<sup>169</sup>
- the approximate distance between where the forklift was initially parked when the plate had fallen and once the forklift had rolled to a stop was approximately 15 metres;<sup>170</sup>
- once the forklift had stopped he ran over to see if the Applicant was ok;<sup>171</sup>
- he then went through the starch kitchen and went to see the Applicant and asked if he was ok;<sup>172</sup>
- the Applicant looked at him but did not say anything and looked very shocked;<sup>173</sup>
- he immediately heard a loud whistling sound and realised gas was leaking;<sup>174</sup>
- he went outside the fire door next to the roller door looking for a valve to turn the gas off;<sup>175</sup>
- he then saw Mr Ibrahim-Elgarhy and informed him of the incident and that the gas needed to be turned off and then turned off the gas at the roadside meter.<sup>176</sup>

**[114]** Mr Li is employed by the Respondent as a Machine Operator and was also working on MF1 on the day of the incident.<sup>177</sup> Mr Li's evidence was that:

- in the morning of 27 June 2023 he was working at reel stand 10 at MF1 when he heard a bang and turned around and saw the Applicant getting out of the grab forklift;<sup>178</sup>
- he then saw Mr Deo, Mr Williams and the Applicant investigating what had happened.<sup>179</sup> Referring to the second photo on page 20 of the Respondent's Incident Report, Mr Li said the forklift was parked near the yellow trolley and that he was standing approximately 15 metres away from the forklift at the time;<sup>180</sup>
- he walked up close to the forklift, approximately three or four metres away, and noticed something on the floor and at this stage the forklift was facing slightly to the right of the blue and orange drum contained in the second picture on page 20 of the Respondent's Incident Report;<sup>181</sup>

- he assumed something had fallen off the grab forklift and as Mr Deo, Mr Williams and the Applicant were dealing with the issue he returned to working on the machine;<sup>182</sup>
- about a minute later he finished working on the reel, was picking up rubbish off the floor, turned around and saw the Applicant in the forklift for about one or two seconds before it collided with the roller door and came to a stop;<sup>183</sup>
- the distance between where the forklift was originally parked when the plate fell off to the roller door was approximately 20 metres;<sup>184</sup>
- he saw the Applicant get off the forklift, he walked over to see how the Applicant was and noticed that the Applicant was shaken by the incident and that Mr Deo and Mr Williams were standing nearby;<sup>185</sup>
- he asked the Applicant “are you okay” but cannot recall if he responded or not;<sup>186</sup>
- shortly after the incident all employees were directed to leave the site and go to the emergency point.<sup>187</sup>

**[115]** Mr Li said he was not sure how fast the forklift was going, he only saw the last one or two seconds of the Applicant on the forklift before it stopped and he did not see the forklift impact the blue and orange drum in the photo.<sup>188</sup>

**[116]** Mr Wilson was working on the morning of the incident, heard a radio call from Mr Williams at approximately 7.38am indicating an emergency and that the forklift had hit the boiler, heard the site’s alarms sound at 7.40am, called the fire brigade and started evacuating the site with the evacuation completed by approximately 7.45am.<sup>189</sup> Mr Wilson’s evidence was that after employees were able to return to the site, at approximately 8.18am he went to look at the location of the incident and upon doing so observed:

- there was a ruptured gas pipe next to the boiler, electrical equipment such as computers and monitors close by and the potential for a large explosion;
- the forklift had travelled between the boiler and the starch kitchen and this area is not much wider than the forklift itself;
- a 40 gallon drum had been crushed against a bollard;
- the bollard was partially dislodged from where it was bolstered to the floor of the factory and was also bent at its foot;
- a gas pipe attached to the boiler was ruptured;
- the fire door beyond the boiler and starch kitchen was knocked completely off its hinges and had landed a few metres from the doorway;

- the roller door immediately to the left of the fire door was partially dislodged and dented, having been pushed outwards by the grab forklift.<sup>190</sup>

[117] Mr Wilson arranged for the Applicant to undergo drug and alcohol testing and when he met him at around 9.15 am for this purpose observed that the Applicant appeared to be very shaken and in shock.<sup>191</sup> The testing identified that the Applicant did not have any drugs or alcohol in his system.<sup>192</sup>

***Evidence concerning events following the incident – the Respondent’s investigation – interviews with employee witnesses***

[118] Alastair Conway is the Respondent’s Day Shift Manager.<sup>193</sup> Mr Conway did not see the incident but conducted preliminary interviews with employees who were present during the incident, including the Applicant.<sup>194</sup>

[119] Mr Williams gave evidence that later on the day of the incident, at approximately 10.30am, he attended a meeting with Mr Conway and Mr Dixon and explained what he had heard and seen and Mr Conway made notes of that meeting.<sup>195</sup> This is consistent with the evidence of Mr Conway.<sup>196</sup> A copy of Mr Conway’s notes of that meeting were attached to his statement<sup>197</sup> and indicate that during that meeting Mr Williams said:

- he was working at MF1, observed the forklift pick up a butt reel and then a red plate fell from the clamp;
- the Applicant put the butt (reel) down and stopped the forklift;
- he and Mr Thatch approached the forklift;
- he picked up the plate and lent it against a rubbish bin at MF1;
- 2 to 5 minutes later the Applicant went to park the forklift by the reels opposite MF1;
- the forklift didn’t stop and came to rest in front of the red exit door past the boiler and starch kitchen;
- the Applicant looked back with arms outstretched as if in a very surprised state as if saying “what happened there?”
- Mr Williams went to the two-way radio and called “emergency, emergency, stop the corrugator”;
- there was a strong gas smell followed a couple of minutes later by the fire alarm going off.<sup>198</sup>

[120] The account recorded by Mr Conway does not contradict Mr Williams’ account of the incident as set out in his witness statement.

[121] Mr Li's evidence was that at approximately 9am on the day of the incident he attended a meeting with Mr Conway to provide his account of what he saw, this conversation lasted approximately 5-10 minutes and Mr Conway briefly summarised the conversation in his notes.<sup>199</sup> This is consistent with the evidence of Mr Conway.<sup>200</sup> A copy of Mr Conway's notes of that meeting were attached to his statement<sup>201</sup> and indicate that during that meeting Mr Li said:

- he was working at MF1, heard a bang, looked up and the forklift had stopped;
- the Applicant stepped off the forklift and Mr Li saw Mr Thatch and Mr Williams at the forklift;
- approximately 1 or 2 minutes later he observed the forklift driving between the boiler and starch kitchen towards the red exit door.

[122] The account recorded by Mr Conway does not contradict Mr Li's account of the incident as set out in his witness statement.

[123] Mr Deo's evidence was that at approximately 11.25am on the day of the incident he attended a meeting with Mr Conway and explained what he had heard and seen and Mr Conway took notes during this meeting.<sup>202</sup> This is consistent with the evidence of Mr Conway.<sup>203</sup> A copy of Mr Conway's notes of that meeting were attached to his statement<sup>204</sup> and indicate that during that meeting Mr Deo said:

- he was working at MF1 and heard a loud noise which was a red plate falling from the grab clamp;
- he went to take a look and saw the metal plate against a rubbish bin;
- he looked at the grab to see how/why the plate had fallen from the clamp before moving back to MF1 and at this time the forklift was parked more or less pointing towards MF1;
- he then heard a bang which was the forklift hitting a large chemical defoamer drum and he looked up to see the forklift slowly moving forward between the boiler and starch kitchen and then stopping;
- he went to check on the Applicant by walking through the starch kitchen area and asked the Applicant if he was ok;
- he realised there was a gas leak and walked through the exit doorway looking for a gas stop valve;
- Mr Ibrahim-Elgarhy was outside the exit doorway and Mr Deo informed him of the accident and that the gas had to be turned off;
- he then turned the gas off at the roadside gas meter.<sup>205</sup>



[124] The account recorded by Mr Conway does not contradict Mr Deo's account of the incident as set out in his witness statement.

***Evidence concerning events following the incident – the Respondent's investigation - Adapt-A-Lift***

[125] Mr Conway called Adapt-A-Lift on the day of the incident.<sup>206</sup> Mr Conway said in his written statement that he was aware that the Applicant was attributing the incident to the forklift's brakes and when he called Adapt-A-Lift explained that the forklift had been involved in a significant incident and needed to be inspected.<sup>207</sup> However during cross examination Mr Conway indicated he could not recall whether he explained to the person on the phone that the brakes had allegedly failed.<sup>208</sup> Mr Conway gave evidence that:

- a technician arrived on site and waited in the yard until SafeWork confirmed that the site did not need to be preserved;<sup>209</sup>
- he spoke briefly to the technician before he removed the forklift from the site to carry out his inspection and cannot recall what was discussed at that time.<sup>210</sup> During cross examination Mr Conway said he believed he said to the technician "we believe there may be a brake issue" although could not recall the exact details of the conversation;<sup>211</sup>
- after the technician finished his inspection he had a brief discussion with him and recalled the technician saying something along the lines of:

"Look, there's nothing wrong with the brakes. The brakes are fine";<sup>212</sup>

- when the assessment was complete he signed the service report on the technician's iPad but was not given a copy.<sup>213</sup>

[126] Derek Sporl said that he also met the technician, he and Mr Conway watched as the technician removed the forklift from the impact site which required use of both the brakes and accelerator and the technician then said words to the effect of:

"There's nothing wrong with the brakes".<sup>214</sup>

[127] Mr Sporl said he then instructed the technician to conduct a full inspection of the forklift in the service bay and observed the technician driving the forklift out of the building towards the service area, which is in a different location on site, while he stayed at the immediate incident site to gather evidence.<sup>215</sup> Mr Sporl said that before the technician left to conduct the full inspection he explained to Mr Sporl that even if the forklift loses power (or cuts out) deceleration will occur at the same rate as if the forklift was powered and that he understood this to mean that if there was a total brake failure or the forklift cut out it would decelerate (or slow down) at the same speed as if it were powered.<sup>216</sup>

[128] Mr Williams said:

- he was aware that the Respondent preserved the incident site and contacted SafeWork to notify it of the incident on the same day;<sup>217</sup>

- the Respondent was released from preserving the site on the morning of the incident;<sup>218</sup>
- he is aware that at around 10.30am an Adapt-A-Life technician came to site to inspect the forklift involved in the incident.<sup>219</sup> Mr Williams attached a copy of the service job cards completed by Adapt-A-Lift to his statement indicating that Adapt-A-Lift carried out an inspection and provided a diagnosis of the brake system on 27 June 2023.<sup>220</sup>

[129] Tom Paraskevopoulos is employed by Adapt-A Lift as a Service Technician and at the time of filing his statement on 18 January 2024 had held this position for one year.<sup>221</sup> Mr Paraskevopoulos' evidence was that:

- in his position as Service Technician his duties include, among other things, the repair of forklifts of various makes and models that have broken down, are not going or have some kind of defect or issue;<sup>222</sup>
- he has held similar positions with other companies for around 27 years;<sup>223</sup>
- he is a qualified auto-electrician and motor-mechanic;<sup>224</sup>
- he holds 'tickets' in electric vehicles, hydraulics, welding and air conditioning.<sup>225</sup>

[130] Mr Paraskevopoulos said that on 27 June 2023 his Service Controller allocated him a job at the Respondent's Revesby site involving an inspection of 'unit H12149 – Hyster forklift model S155FT', including its brakes.<sup>226</sup> Mr Paraskevopoulos said he did not speak to anyone who works for the Respondent prior to arriving on site.<sup>227</sup> Mr Paraskevopoulos met Mr Conway and Mr Sporl on site and said he waited a 'considerable period of time' before he was told that SafeWork NSW was not coming on that day and he could remove the forklift from the crash area and undertake the inspection.<sup>228</sup>

[131] Mr Paraskevopoulos said that Mr Conway and Mr Sporl escorted him to the forklift which was located in the factory where the paper rolls were stored and when he reached the forklift he:

- took photos of it while stationary before the inspection;
- removed the forklift from the crash area which required the use of the forklift's brakes and accelerator;
- had a brief discussion with Mr Conway and Mr Sporl, after which he drove the forklift to the service area where he completed a full assessment of it.<sup>229</sup>

[132] Mr Paraskevopoulos said his full assessment of the forklift involved:

- carrying out a visual inspection of the unit and in doing so 'nothing unusual jumped out' at him;

- removing the floor plate to ensure there were no oil leaks and in doing so found there were not;
- making sure that none of the lines were cut or broken, as this can cause the brakes to fail, with him finding they were not;
- checking the operation of the handbrake with him finding that it was operational;
- checking the operation of the throttle with him finding that 'it tested fine'; and
- inspecting the brake system and in doing so he identified that the fluid and all adjustments were correct as per the specifications.<sup>230</sup> In relation to this inspection of the brake system Mr Paraskevopoulos confirmed that this was confined to a 'visual' and 'measured' inspection.<sup>231</sup>

[133] Mr Paraskevopoulos' evidence was that:

- the forklift has a wet brake system which means that it is boosted through a transmission, hydraulically, and a clutch and metal plate, which sit in oil;
- when the brake is applied the forklift uses boosted pressure, which pushes into the clutch;
- because the braking system is a wet brake system, there is minimum wear and tear on the parts of the brake;
- his visual inspection of the brakes did not identify any wear;
- he tested the brake capacity by sitting in the forklift, bringing it up to maximum speed and applying the brakes;
- if the braking capacity is working as it should, the forklift will stop within 2 metres of the brake being applied;
- when he carried out this test the forklift stopped within approximately 2 metres of the brake being applied;<sup>232</sup>
- he performed this test in the presence of Mr Conway and did not recall if Mr Spurl was there.<sup>233</sup>

[134] Mr Paraskevopoulos said he recalls Mr Conway asking his opinion as to what caused the incident to which he responded with words to the effect of:

"I wasn't there, so I can't tell you. But the machine is operating correctly and within the specs. I haven't found any issues with the brakes."<sup>234</sup>

[135] Mr Spurl was provided with a copy of Mr Paraskevopoulos' service job card via email (Service Job Card).<sup>235</sup> This is contained within two pages attached to both Mr Paraskevopoulos' and Mr Spurl's statements, both dated 27 June 2023.<sup>236</sup> The first of these states in the notes:

“Travel to site,  
Carry out Inspection and Diagnosis of Brake System  
remove unit from crash area. carried out visual inspection of unit, strip and inspect brake system, found fluid and all adjustments correct as per manufacturers specifications. check operation of hand brake, ok. check operation of throttle, tested ok. operated unit and tested braking capability. no fault found with unit.  
Liaised with Alistair Conway from Opal on my findings, concluding with suspected operator error.”

The second states in the notes:

“Travel to site,  
Carry out Inspection and Diagnosis of Brake System  
remove unit from area strip and inspect brake system found fluid and all adjustments correct check operation of hand brake ok check operation of throttle test ok no fault found with unit.”

[136] The Respondent's representative asked Mr Brennan, in providing the Brennan Report, to provide an opinion as to whether the Job Service Card, enclosing details of Adapt-A-Lift's post-incident inspection of the forklift's brakes, was deficient in any way. In this regard, the Brennan Report indicates:

- in reviewing the Adapt-A-Lift Job Card 1544759 it is not possible to state that it is “deficient” or “not deficient” however it does appear to be in line with industry standards and expectations;<sup>237</sup>
- the quantity of hours consumed being 2.6 appears to line up with the services completed for a skilled technician;<sup>238</sup>
- considering the document is a ‘Job Card’ and not a detailed situation report, Mr Brennan had no issue in stating that the Job Card is in line with expectations with the proviso that the writer has no knowledge of the brief given.<sup>239</sup>

[137] During cross examination Mr Paraskevopoulos' evidence was that after conducting the test he did not service or make any alterations to the brakes.<sup>240</sup>

### *Evidence concerning events following the incident – Derek Spurl investigation*

[138] Mr Spurl was the Respondent's Health and Safety Business Partner at the time of the incident and led the Respondent's investigation into the incident. Mr Spurl's evidence was that he was initially notified of the incident by Mr Wilson at approximately 8am on 27 June 2023,<sup>241</sup> notified SafeWork NSW of the incident and took initial steps to preserve the site,<sup>242</sup> was informed by SafeWork NSW that the Respondent did not need to preserve the site and was

permitted to re-enter the site to commence a safety investigation.<sup>243</sup> Mr Sporl said that the following employees were also involved in the investigation:

- Mr Wilson (the Respondent's Production Manager);
- Mr Ibrahim-Elgarhy;
- Mr Sayan;
- Mr Williams.<sup>244</sup>

[139] During cross examination Mr Sporl indicated that his role was largely collating the evidence as a part of this investigation.<sup>245</sup>

[140] Mr Conway interviewed the employees involved in or within the immediate vicinity of the incident including the Applicant, Mr Williams, Mr Deo and Mr Li and provided Mr Sporl with copies of the records of those interviews.<sup>246</sup> Mr Sporl indicated that he took most of the photos and that Mr Wilson also provided him with some photos. Mr Wilson said his role was limited to contributing relevant operational knowledge of the site and that he did not make any findings or decisions based on the findings of the investigation.<sup>247</sup> Mr Wilson said he made the following operational observations that are relevant:

- the Applicant drove the forklift through a yellow and red shared pedestrian walkway at which point the forklift came to a stop after it had collided with a number of pieces of plant and equipment;
- driving a forklift through a shared pedestrian area presents a significant safety risk, there was a factory access door very close by and pedestrians walk along the marked path to get to the access door;
- the photos in the Sporl Investigation Report show the final stopping point of the forklift on the yellow and red shared pedestrian pathway.<sup>248</sup>

[141] The investigation resulted in the creation of a report (Sporl Investigation Report) which was attached to Mr Sporl's statement and which was finalised around two weeks after the incident.<sup>249</sup>

[142] Page 20 of the Sporl Investigation Report states:

“IT3 – The Grab had sufficient speed and momentum to cause significant damage in a relatively straight line over an approximate 10m distance.  
Also, the impact to the I-Beam indicates that it was not a slow progressive stop

IT4 – Post Grab inspection from Adapt-A-Lift technician, it was confirmed that the braking and acceleration systems on the Grab were in perfect working order with no faults identified. This is contradictory to the statement from Pece Calovski who explained that the brake pedal provided no resistance to his foot and felt soft and that there was no braking and the Grab kept moving forward. Although it cannot be validated

at this stage, it is plausible to assume given the technician's report that the accelerator may have been used in lieu of the brake which resulted in the incident”.

[143] Page 21 of the Sporl Investigation Report states:

“The Grab was tested post incident to determine the stopping distance at full speed and the distance was approx. 7m  
The distance between the impacted bollard and the fire safety door is 9m  
The Grab would have had to be travelling at full speed at the time it hit the bollard and the question is why given there was ample distance and time to stop before the bollard? Adapt-A-Lift have confirmed that if the Grab loses power the deceleration will occur at the same rate as if it was powered”.

[144] Mr Sporl said that to the best of his recollection he provided the Sporl Investigation Report to Mr Wilson, Mr Ibrahim-Elgarhy, Mr Wilmore and Celia Yuen (General Counsel Workplace Relations).<sup>250</sup>

[145] Mr Sporl said he reached the view that it was more likely than not that the brakes had not failed and that the accelerator may have been used by the Applicant in lieu of the brake, resulting in the incident.<sup>251</sup> Mr Sporl’s evidence was that he reached this view based on the information provided by the technician and taking into consideration the following matters:

- the forklift had sufficient speed and momentum to cause significant damage in a relatively straight line over an approximately 10 metre distance and the following damage occurred to plant and equipment:
  - the main gas feed line to the boiler was compromised and high pressure gas was released;
  - the natural gas line to the boiler was ruptured with full site evacuation and emergency services engaged;
  - a 200L defoamer drum was impacted;
  - a large dyna bolted bollard was dislodged from the floor;
  - a section of the boiler roller door was impacted;
  - the fire exit door and frame were damaged (with the door off its hinges);
  - the I-beam for the roller door was impacted; and
  - the starch kitchen filter (ultramix) was impacted;
- the forklift was tested post-incident to determine stopping distance at full speed and the distance was approximately 7 metres, the distance between the impacted bollard and fire safety door is 9 metres, and he believed the forklift would have had to be travelling at full speed at the time it hit the bollard and that the impact to the I-beam indicates that it was not a slow and progressive stop;
- even if there was a total brake failure or the forklift cut out, the forklift would decelerate (or slow down) at the same speed as if it were powered and in these circumstances he believed that if the forklift’s brakes failed it would not have travelled far enough and with enough velocity to hit the I-beam and impact it to the degree that it did.<sup>252</sup>

[146] Mr Sporl indicated during cross examination that another test had been undertaken by John Quinn, an employee of the Respondent, that involved Mr Quinn travelling at full speed in the forklift and then removing his foot and during that test the forklift's stopping distance was 7 metres.<sup>253</sup> This is consistent with the evidence of Mr Ibrahim-Elgarhy who said that:

- he instructed Gary Corbet (Supervisor) to conduct a test on the forklift for the purpose of determining the stopping distance of the forklift when travelling at full speed;<sup>254</sup>
- the forklift involved in the incident had a capped speed of 10km per hour such that it could not exceed this speed;<sup>255</sup>
- he instructed Mr Corbet to conduct the test in a clear, designated area outside the factory;<sup>256</sup>
- the test involved another employee, Mr Quinn, travelling at full speed (10km per hour) in the forklift and then removing his foot from the accelerator but not activating the brake;<sup>257</sup>
- the stopping distance was 7 metres.<sup>258</sup>

[147] Mr Ibrahim-Elgarhy was not present for the test but said there were videos of the testing.<sup>259</sup> Mr Ibrahim-Elgarhy said during cross examination that the test surface was different to the factory floor surface in that it “would have more bumps and crevices outside than it would inside, so it would be a rougher surface”.<sup>260</sup> It was put to Mr Ibrahim-Elgarhy that this would feasibly mean that the forklift would stop a lot shorter than had it been inside the factory and Mr Ibrahim-Elgarhy responded “Yes, possibly”.<sup>261</sup>

[148] Mr Ibrahim-Elgarhy considered the test results to be relevant because:

- the forklift driven by the Applicant caused significant damage over an approximate 10 metre distance;
- there is approximately 9 metres between the bolted bollard which the forklift impacted (and dislodged from the floor) and the roller door and safety door where the forklift finally stopped;
- the forklift also collided with various other items of plant and equipment between the bolted bollard and the roller door and safety door.<sup>262</sup>

[149] Mr Ibrahim-Elgarhy confirmed during cross examination that the reference to 10 metres was an approximation.<sup>263</sup>

[150] During cross examination Mr Sporl was asked a series of questions about this test and the following can be taken from his evidence:

- the tests undertaken by the technician and Mr Quinn regarding the forklift's stopping distance were performed in areas that were separate from the area where the incident occurred,<sup>264</sup>

- he was not there for those tests but believed he saw some footage of the test undertaken by Mr Quinn;
- he could not recall how the 7 metres was measured;
- he was ‘pretty sure’ the forklift was not carrying a load at the time of the test;
- he couldn’t be certain that the test was conducted under the same conditions as those present at the time of the incident.<sup>265</sup>

[151] Mr Sporl said even if the accelerator was not used by the Applicant in lieu of the brake, based on the findings of the post-inspection assessment of the forklift’s brakes he considered it very unlikely that the forklift’s brakes had failed as the Applicant had claimed.

*Evidence concerning events following the incident – what happened to the forklift?*

[152] As noted above, during cross examination Mr Paraskevopoulos’ evidence was that after conducting the test he did not service or make any alterations to the brakes.<sup>266</sup>

[153] During cross examination Mr Williams was asked whether the forklift was put back into service to which he responded that the forklift was put back into service later that night.<sup>267</sup> Mr Williams confirmed that based on the information he was given he was satisfied that the forklift was safe to go back into operation.<sup>268</sup> During cross examination Mr Deo indicated that the forklift was put back into use, he used it and it seemed to be working fine, including the brakes.<sup>269</sup>

[154] Mr Harris gave evidence that, as at the date of his statement Adapt-A-Lift has:

- not received any reports from the Respondent relating to any issues with the forklift since the incident, including in relation to the brakes;
- undertaken routine maintenance jobs on the forklift (including tyre replacements).<sup>270</sup>

*SafeWork NSW Inspection*

[155] Mr Wilson gave evidence that on 18 July 2023 Inspector Emma Afeaki and Corey Myers of SafeWork NSW attended the site for an inspection in relation to the incident and he attended that inspection.<sup>271</sup> Mr Wilson said that the inspection started at approximately 10am, lasted for two hours and consisted of:

- a meeting between the SafeWork NSW inspectors and the Respondent’s investigation team (i.e. Mr Wilson, Mr Sporl, Mr Ibrahim-Elgarhy, Mr Williams and Mr Sayan) in the board room during which the team described the incident and answered questions;
- a walk-through of the part of the factory where the incident occurred and an inspection of the forklift in which the Applicant participated. Mr Wilson said Mr Sayan did not



attend the walk-through as he had lost his voice however Mr Williams attended as the Health and Safety Representative;

- a discussion between the SafeWork NSW inspectors and the Applicant on the factory floor for which Mr Wilson was not present but observed occurring.<sup>272</sup>

[156] Mr Williams gave evidence that:

- on 18 July 2023 Ms Afeaki conducted an on-site inspection that he attended together with the Applicant, Mr Sporn and another SafeWork inspector in training;
- he explained what had happened and where he was standing during the incident.<sup>273</sup>

[157] Mr Williams attached a copy of the inspection report completed by SafeWork NSW (SafeWork Inspection Report) to his statement.<sup>274</sup>

[158] An Incident Notification Report was completed by SafeWork (SafeWork Incident Notification Report)<sup>275</sup>, a copy of which was attached to Mr Williams' statement.<sup>276</sup> The SafeWork Incident Notification Report:

- identifies that the incident was a 'Dangerous Incident' classified as response category '3 – Medium' and that the Respondent was released from preserving the site on the morning of 27 June 2023;<sup>277</sup>
- includes the following description of the incident:
  - \_\_\_\_\_ in vicinity of boiler (picks up reels of paper 7 tonne Forklift) - \_\_\_\_\_ went to break (sic) and possibly the brakes failed
  - Forklift has struck a gas main near a boiler – fire brigade been out and isolated gas
  - Forklift is obstruction pipe work – plumbers need to get int there
  - No CCTV in that area – taking photos
- identifies that SafeWork NSW had called the Respondent and confirmed that it would be conducting a site inspection and making enquiries in relation to the incident;
- identifies that SafeWork NSW representatives Mr Myers and Ms Afeaki attended site and made enquiries into the incident on 18 July 2023.

[159] On 20 July 2023 Ms Afeaki sent Adapt-A-Lift a notice to give information to SafeWork NSW including:

- the names of the employees who inspected the forklift on 27 June 2023;
- a list of all tests conducted on the forklift as a part of the service and the results of each of those tests; and
- confirmation as to whether any mechanical errors were identified during the inspection that may have contributed to the incident; and

- detailed service reports and paperwork pertaining to the Service Job Card (job. No 1544759).<sup>278</sup> This was the Service Job Card relating to the inspection undertaken by Adapt-A-Lift on 27 June 2023 following the incident.<sup>279</sup>

[160] Mr Harris responded to that notice by email dated 25 July 2023, enclosing the job service card completed by the technician who inspected the forklift at the Respondent’s site on 27 June 2023.<sup>280</sup> In his covering email to Ms Afeaki, Mr Harris said:

“The following works were conducted:

Upon conducting the inspection on the braking system, no faults identified with the performance, related components or total operation were detected.

An additional mechanical inspection was also conducted, by dismantling the brake assemblies to check internal componentry and serviceability, all components found correct as per manufacturers specifications.

Throttle operation also inspected – found ok.”<sup>281</sup>

### *Outcome of SafeWork NSW inspection*

[161] Mr Williams gave evidence that the day after the SafeWork inspection (i.e. 19 July 2023) he called Ms Afeaki to ascertain whether the Applicant’s forklift license was being suspended to which he was advised that SafeWork would take no further steps given the Respondent had made the decision that the Applicant would not operate any forklifts.<sup>282</sup>

[162] Attached to Mr Williams’ statement was an email dated 19 July 2023 from Ms Afeaki to Mr Spurl and Mr Williams<sup>283</sup> stating:

“Dear Derek

Thank you for your time yesterday to discuss the incident which occurred at the workplace on 27<sup>th</sup> June 2023

The decision has been made that as the forklift operator Mr Pece Calovski has already been suspended from using the forklift at the workplace since the incident that Safework NSW will allow the PCBU to continue to manage the incident and not use our powers under clause 110 of the WHS Act 2011

It is an expectation that the PCBU will ensure that Mr Calovski is able to operate high risk work competently and safety (sic) prior to being allowed to use forklifts in the premises...”

[163] Ms Afeaki gave evidence that at the time of the inspection the Applicant said he was operating a forklift when he attempted to press the brake but the brake didn’t work and the forklift then travelled a distance of approximately nine metres at which time it hit a gas main and a fire door.<sup>284</sup> Ms Afeaki was asked whether she believed the Applicant’s account to which she responded:

“Based on the evidence before me on the day it didn’t seem that it would be an accurate account of what had occurred.”<sup>285</sup>

**[164]** Ms Afeaki was asked what risks she anticipated existed when she inspected the incident to which she replied:

“Well, in the first instance, the gas main didn’t appear to have any bollards that was unprotected but also the forklift making uncontrolled movements towards a piece of plant, or in this case, the gas main.”<sup>286</sup>

**[165]** Ms Afeaki said on the day of the incident she was told that a bollard would be installed within the area, there were temporary barriers put in and her recommendation was to complete those actions.<sup>287</sup> The Respondent’s Incident Report had identified that there were:

“No adequately engineered barricades present to protect the Boiler or services from Grab impact. Metal bollard was completely inadequate”.<sup>288</sup>

**[166]** During cross examination Mr Ibrahim-Elgarhy confirmed that SafeWork NSW had made some recommendations around this, the Respondent intended to change the type of bollards that were in front of the area to bollards that were a bit larger and bolted into the concrete and that he believed five such bollards were ultimately installed near the boiler.<sup>289</sup>

**[167]** Ms Afeaki said she asked Mr Spurl what the business did immediately following the incident to which he said the forklift was isolated and Adapt-A-Lift was engaged immediately to conduct a mechanical test.<sup>290</sup> Ms Afeaki indicated this was the regular response she would expect.<sup>291</sup> Ms Afeaki was asked whether she asked the Respondent anything further about the inspection and maintenance of the forklift to which she responded:

“I asked what the findings of Adapt-A-Lift, the independent company was. They stated that on the day of the inspection the inspector stated that there were no mechanical errors with the plant.”<sup>292</sup>

**[168]** Ms Afeaki was asked whether her enquiries showed any checks undertaken on a regular basis to which she responded:

“So during the inspection Derek (Spurl) was also able to show me a maintenance log of the forklift that is conducted by Opal Staff.”<sup>293</sup>

**[169]** Ms Afeaki indicated that she was satisfied with those records. Ms Afeaki was asked whether she further investigated whether the brakes had failed or not to which she said that she issued a section 155 request for information to Adapt-A-Lift to get a copy of the report “from the independent company”, was provided with that report which was the same as the copy she had seen on site, and read from that report that there were no mechanical errors that could be found on the day.<sup>294</sup>

**[170]** In the course of giving her evidence Ms Afeaki was asked what she meant when she referred to Adapt-A-Lift as an “independent company” to which she responded:

“So I see them as a forklift company. I am not aware of any connection between Opal and them as a trading company together.”<sup>295</sup>

[171] Ms Afeaki was then asked whether she would have considered it appropriate for Adapt-A-Lift to conduct the inspection if she was aware that they had a pre-existing commercial relationship to which she responded “yes”.<sup>296</sup>

[172] Mr Myers was an inspector in training at the time he attended the inspection on 18 July 2023 and was assisting Ms Afeaki and observing as a part of his training.<sup>297</sup> Mr Myers observed that at the time of the inspection the forklift had been removed and the Respondent had installed water-filled barriers to mitigate the risks of another forklift hitting any pedestrians in the pedestrian area.<sup>298</sup>

[173] On 26 July 2023 Ms Afeaki emailed the investigation team attaching the SafeWork Inspection Report.<sup>299</sup> The SafeWork Inspection Report provides the following summary of the Ms Afeaki’s observations:

- “1) On 18/7/2023 at 10:00am I entered the site of Opal Packaging located at 10 Fitzpatrick St Revesby to investigate a reported incident at the workplace in the company of regulator staff member Corey Myers.
- 2) On 18/07/2023 I reviewed a copy of the Service Job Card from company Adapt-A-Lift Group Pty Ltd provided to Opal Packaging following the inspection of forklift unit H12149, Serial # G024V02064N. The report stated that no fault was found with the unit or its brake system.
- 3) This information was further verified through a S155 notice (7-450392) to Adapt-A-Lift Group Pty Ltd which verified that the service had been conducted as per the job task sheet 27/06/2023.”

[174] Mr Wilson’s evidence was that SafeWork NSW did not take any compliance action against the Respondent in relation to the incident.<sup>300</sup> Ms Afeaki indicated that SafeWork NSW’s enquiries with the business had been completed.<sup>301</sup>

#### ***Respondent’s request for information from SafeWork NSW***

[175] Mr Ibrahim-Elgarhy instructed the Respondent’s General Manager Health and Safety to prepare a Government Information Public Access (GIPA) application so the Respondent could obtain a copy of the Adapt-A-Lift materials referred to in the SafeWork Inspection Report and at this time had assumed that the Adapt-A-Lift materials referred to in the SafeWork Inspection Report included the service records for the forklift involved in the incident.<sup>302</sup> However on 25 September 2023 the Respondent received those materials which did not include service records and only included a redacted version of Adapt-A-Lift’s post-inspection report and a covering email from Mr Harris.<sup>303</sup> The Respondent already had a copy of the SafeWork Inspection Report in its possession at the time of making the GIPA application.<sup>304</sup>

#### ***Evidence concerning events following the incident – the Respondent’s investigation – engagement with the Applicant***

[176] Mr Sayan is employed by the Respondent as a Corrugator Operator and is Father of the Chapel, a role he has performed for approximately 10 years.<sup>305</sup> Mr Sayan is also an elected Health and Safety Representative and has performed this role for approximately 12 years.<sup>306</sup>

[177] Mr Sayan was not working on the day of the incident and did not witness it but attended all meetings involving the Applicant and said he represented the Applicant at those meetings in his capacity as Father of the Chapel.<sup>307</sup>

[178] Mr Sayan gave evidence that on the day of the incident the Respondent circulated an incident notification form (Respondent's Immediate Incident Notification Form) to all employees at the Revesby site.<sup>308</sup> A copy of the Respondent's Incident Notification Form was attached to Mr Sayan's statement and stated:

“A Grab Forklift was being operated at the Corrugator Wet End when a metal hydraulic cover plate for the clamp dislodged from the unit onto the floor. A decision was made to drive the forklift out of the operational area and park it adjacent to the Boiler for further inspection. As the forklift operator proceeded towards the Boiler he continued to drive between it and the Starch Kitchen impacting multiple items of plant and equipment in the process. The main gas feed line to the Boiler was compromised and high-pressure gas was released”.<sup>309</sup>

[179] The Applicant returned to work on 28 June 2023, the day following the incident, and attended a meeting with Mr Conway and Mr Sayan at approximately 10.30am and explained his version of events.<sup>310</sup> Mr Conway took notes during that meeting.<sup>311</sup> Mr Sayan also attached a copy of the notes he said he made during that meeting to his statement.<sup>312</sup>

[180] The Applicant said that during the meeting on 28 June 2023 Mr Conway asked him why the (forklift) technician would lie and put their reputation at risk to which he responded by asking Mr Conway why he would lie, noting that he had a family at home, did not take 'sickies' and was not a difficult person to work with.<sup>313</sup>

[181] The Applicant gave evidence that after the incident he was directed not to work on the grab forklift but continued to work on the cardboard stacker, including working the same shifts and regular overtime, until he was suspended from duties on 11 October 2023.<sup>314</sup>

[182] On 4 July 2023 another meeting was held between the Applicant, Mr Sayan, Mr Conway and Michael Kenny (Quality Assurance Manager). Mr Conway said that in the meeting:

- the Applicant maintained that he had tried to apply the brake but the pedal provided no resistance, felt soft and hit the floor;<sup>315</sup>
- he put to the Applicant that the breaks had been inspected and there were no issues;<sup>316</sup>
- he raised that there had been no reported issues with the brakes either before or after the incident;<sup>317</sup>

- he tried to convey his view to the Applicant that he thought there had been an accident and that he did not consider the Applicant had intentionally caused it.<sup>318</sup>

[183] Mr Sayan recalled that during that meeting on 4 July 2023 Mr Conway advised that Adapt-A-Lift had tested the brakes of the forklift and the outcome did not align with the Applicant's version of events.<sup>319</sup> Mr Sayan said:

- Mr Conway indicated he 'certainly believed' it was an accident;
- he advised Mr Conway that he did not agree with the wording on the Respondent's Incident Notification Form as it did not state there was an accident;
- he enquired about whether Adapt-A-Lift had provided copies of its service records, to which Mr Conway advised they had not received any such information;
- he requested a copy of the forklift service records and asked whether Adapt-A-Lift was independent in conducting the assessment given it was responsible for servicing the forklift.<sup>320</sup>

[184] Mr Sayan said he and Mr Kenny kept notes of this meeting and he attached these to his statement.<sup>321</sup> Mr Conway also kept notes of the meeting.<sup>322</sup>

[185] On 3 October 2023 Mr Sayan also attended a meeting with the Applicant, Mr Conway and Mat Wilmore, the Respondent's Workplace Relations Specialist, during which the Applicant was provided with a letter containing allegations of misconduct and was requested to attend a meeting on 5 October 2023.<sup>323</sup> Mr Sayan requested that the Applicant be given an extension until 10 October 2023 to respond as the Applicant did not have the service records, Mr Wilmore had indicated that the forklift's service records would be provided once they were to hand.<sup>324</sup>

[186] Later that day Mr Sayan emailed asking for any information relied on in the investigation including witness statements and service records for the grab forklift.<sup>325</sup> Mr Sayan's evidence was that:

- at approximately 7.30am on 10 October 2023 Mr Conway advised him that he had sent the service records and queried whether he still wished to have the meeting with the Applicant at 2pm, noting that not much notice had been given since the records were sent;
- he confirmed that he still wished for the meeting to proceed;
- at 2pm he attended the meeting with the Applicant, Mr Conway and Mr Wilmore and during that meeting provided the Applicant's written response dated 9 October 2023.

[187] In the meeting of 10 October 2023 between Mr Conway, the Applicant, Mr Sayan and Mr Wilmore, Mr Sayan raised that the serial number on the service records provided did not match the serial number of the forklift provided to SafeWork.<sup>326</sup> Mr Conway obtained a copy of the correct service records from either Mr Wilson or Mr Ibrahim-Elgarhy and on 11 October

2023 sent an email to Mr Sayan and Mr Wilmore enclosing these records.<sup>327</sup> Mr Conway said he believed he passed the Applicant's written response dated 9 October 2023 on to Mr Wilson and Mr Ibrahim-Elgarhy.<sup>328</sup>

[188] Mr Conway's evidence was that based on the information he had, it was his view that the Applicant had accidentally pushed down on the accelerator and not the brake.<sup>329</sup> Mr Conway was not the decision maker in relation to the decision to terminate the Applicant's employment.<sup>330</sup>

[189] On 11 October 2023 another meeting was held between the Applicant, Mr Sayan, Mr Wilmore and Mr Ibrahim-Elgarhy.<sup>331</sup> Shortly after the meeting Mr Sayan raised a dispute in relation to the enterprise agreement and Respondent's investigation guiding principles.<sup>332</sup> The following morning Mr Sayan requested a copy of the service manual for the forklift and a copy of the Respondent's Incident Report.<sup>333</sup> Mr Ibrahim-Elgargy indicated during cross examination that while he was unsure of the exact date he believed that the forklift manual was provided to the Applicant on 12 October 2023.<sup>334</sup>

[190] On 13 October 2023 another meeting took place between the Applicant, Mr Sayan, Mr Wilmore and Mr Ibrahim-Elgarhy in which the Applicant provided his response to the allegations. During that meeting Mr Sayan raised that no changes could be made to the Applicant's duties, shift, occupation or income whilst a dispute was in process.<sup>335</sup>

[191] On 18 October 2023 another meeting took place between the Applicant, Mr Sayan, Mr Ibrahim-Elgarhy and 'Sveto'.<sup>336</sup> On 19 October 2023 a meeting took place between the Applicant, Mr Sayan, Mr Wilmore and Mr Ibrahim-Elgarhy in which the Applicant was provided with a letter notifying him of the termination of his employment (Letter of Termination).<sup>337</sup>

[192] Mr Ibrahim-Elgarhy said the delay between the date of the incident (being 27 June 2023) and the date of the Applicant's termination of employment (19 October 2023) was due to the gap between the incident and SafeWork NSW's site visit and the time it took the Respondent to receive the materials it requested under the GIPA application.<sup>338</sup> During cross examination Mr Ibrahim-Elgarhy indicated that the Respondent has had Adapt-A-Lift's forklifts on site for at least seven to eight years and that the Respondent has a good relationship with Adapt-A-Lift.<sup>339</sup> It was put to Mr Ibrahim-Elgarhy that there was no reason that he could not have contacted Adapt-A-Lift directly for the forklift service records to which he replied, "No. I could have. Yes".<sup>340</sup>

### ***The decision to dismiss the Applicant***

[193] Mr Ibrahim-Elgarhy said he was involved in the Respondent's ICAM Safety Investigation into the incident in his capacity as a witness to the aftermath of the incident, as a Person Conducting a Business or Undertaking and as the Site Manager.<sup>341</sup> Mr Ibrahim-Elgarhy said he was not involved in interviewing witnesses or preparing the allegations issued to the Applicant but was the ultimate decision maker in relation to the Applicant's dismissal.<sup>342</sup>

[194] Mr Ibrahim-Elgarhy said:

- ultimately the safety investigation found that even if the brakes failed and/or the forklift cut out it was unlikely that the forklift could have travelled the distance that it did and hit the various items of plant and equipment that it did with the level of force that it did;
- it was more likely that the Applicant accidentally hit the accelerator on the forklift, rather than the brake.<sup>343</sup>

[195] Mr Ibrahim-Elgarhy said the Applicant was adamant that the brakes were defective and that this caused the incident however he considered that all of the objective evidence pointed to the Applicant being untruthful in providing this explanation.<sup>344</sup>

[196] Mr Ibrahim-Elgarhy said in his statement:

- driving an uncontrolled forklift into a controlled shared walkway presents a serious safety risk and put forward the view that this is what the Applicant did on the day of the incident;<sup>345</sup>
- if the Applicant had been truthful as to cause of the incident the Applicant's honesty would have allowed the Respondent to promptly implement suitable corrective action, inferring he believed the Applicant had not been truthful;<sup>346</sup>
- the importance of being truthful in safety investigations is vital as this allows the business to investigate the incident, identify the root cause and implement corrective actions and in terms of responding to SafeWork NSW investigations;
- SafeWork NSW has the power to coercively question officers and employees of a company and prosecute them for giving false answers.<sup>347</sup>

[197] The Letter of Termination, signed by Mr Ibrahim-Elgarhy ultimately said:

“The reason for the termination of your employment is misconduct. Specifically:

1. On 27 June 2023, you failed to operate the grab forklift in a safe manner. This caused extensive damage and created a safety incident that could have resulted in injury and loss of life.
2. Despite being informed that the reports from the forklift manufacturer, Adapt-A-Lift, found that the braking system for the grab forklift was in perfect working order, you have had not been willing to accept any responsibility for the incident despite being given the opportunity to do so.”

[198] During cross-examination Mr Ibrahim-Elgarhy indicated:

- he believed the forklift incident was an accident;
- there were a number of meetings with the Applicant who maintained his view that the forklift brakes were not working;



- he wanted the Applicant to take responsibility for the incident and this was very important in his capacity as decision maker;
- he was disappointed that the Applicant did not, in his view, accept responsibility and if the Applicant had told him what he believed to be the correct version of events there may have been an alternative option to dismissal;
- between the period of the incident and the Applicant's suspension on 11 October 2023 there were no issues with the Applicant's performance;
- aside from the events regarding the incident he did not have any issues with the Applicant during his employment and was not aware of the Applicant lying or making up stories.<sup>348</sup>

### ***The Brennan Report***

[199] In addition to the comments provided in relation to the forklift's service history, Mr Brennan dealt with additional questions that the Respondent's representative had asked him to address in providing the Brennan Report.

[200] The Applicant's Second Response states:

“Detailed incident report page 13 (sic) key learnings 4 has the following statement “Adapt A Lift have confirmed that if Grab loses power the deceleration will occur at the same rate as if powered”. This expert statement sourced from Adapt a Lift is contradicting Heister service manual as the following safety note has been added to page 39. The safety statement informs of the following “The brake system has a boosted master cylinder; braking will be more difficult if the engine is not running and can result in injuries to personal (sic)””.

[201] The Respondent's representative requested that Mr Brennan address the following questions in providing the Brennan Report:

- (a) Is the statement from Adapt a Lift, correct? Specifically, is it correct that if the Forklift loses power, deceleration will occur at the same rate as if the forklift were powered?
- (b) Explain in further detail what the following statement, extracted from page 39 of the Manual, means:

“The brake system has a boosted master cylinder, braking will be more difficult if the engine is not running and can result in injury to personnel.”
- (c) If the forklift “cut out”, on a scale of 1 to 10, 1 being “very unlikely” and 10 being “very likely”, how likely is it that this would cause the brake pedal to go “soft” and provide “no resistance” causing the forklift to “keep moving”?”

[202] In this regard the Brennan Report explains:

- deceleration will occur naturally or by assistance from the braking system;
- deceleration will vary based on other factors such as the gradient of the surface;
- Adapt-A-Lift's statement is in essence correct in that it refers to the natural deceleration that will occur if the engine is shut off without using brakes;
- deceleration may occur slightly quicker with the engine off due to friction and other forces;<sup>349</sup>
- the brake system has an assistance booster which provides a vacuum that acts to assist in reducing the pedal pressure required to achieve effective braking and without that assistance the pedal would be very "hard" and the operator would have to push the pedal with greater force to achieve the same braking effect;
- loss of assistance does not mean that the brakes will not work but will mean that the operator would need to push the pedal harder and if loss of assistance occurred Mr Brennan would expect the pedal to become "hard" rather than "soft";<sup>350</sup>
- if the engine power cut out it is usual that the brake pedal would feel "hard" and not "soft";
- the likelihood that the brake pedal would go "soft" and provide "no resistance" causing the forklift to "keep moving" if the forklift "cut out" would, in Mr Brennan's opinion, be rated as a "1" for the above reasons.<sup>351</sup>

**[203]** The Applicant's Second Response states:

"The forklift weighs approx. 13 tonnes with attachment there is no evidence showing that the forklift must have been travelling at full speed."

**[204]** The Respondent's representative requested that Mr Brennan address the following questions in providing the Brennan Report:

"Please assume that the Forklift was not loaded, as was the case when the incident occurred.

Having regard for the Report of the Respondent's ICAM (Safety) investigation including the photographs showing damage (in particular the damage to the I-beam), on a scale of 1 to 10, 1 being "very unlikely" and 10 being "very likely", how likely is it that this level of damage could be caused if the forklift was travelling at a safe speed and the brakes failed and/or the forklift lost power?"

**[205]** In this regard the Brennan Report states, by way of summary:

- after considering the supplied photos and documents, in the writers opinion there would need to be considerable velocity caused by momentum and/or acceleration of the forklift to cause the damage exemplified in the Safety Report;<sup>352</sup>
- from observation of the photos the floor level appears to be within a 2 percent gradient and Mr Brennan did not consider that the forklift could move from a standing start and roll with enough velocity to cause the indicated damage;<sup>353</sup>
- the forklift weight is shown on the data plate as 11330 kilograms which, in accordance with Australian Standard AS 2359.6-2013, must include the weight of the load handling attachment (Bolzoni Auramo Paper Roll Clamp in this case);<sup>354</sup>
- in the Spori Investigation Report and SafeWork Inspection Report nowhere has a travel speed been mentioned and the forklift is assumed to have a maximum travel speed of 20km per hour;<sup>355</sup>
- Mr Brennan considered the following facts obtained from the documents supplied:
  - the Applicant was off the forklift looking at the dislodged plate;
  - the Applicant had remounted the forklift and commenced travel;
  - it was stated “A short time later PC commenced driving the forklift with the intention of parking it out of the operational area in proximity to the Boiler and Starch Kitchen where the incident was about to occur”;
  - the Applicant would have had to place the butt reel on the ground and reverse away from it to release it from the paper roll clamp;
  - photo g31 shows forklift tyre turning marks in the direction of the incident area so the statement from the Applicant above makes sense;
  - from photo g31 a travel distance of 10 -12 metres from commencement of forward travel to the final position at the broken doors (the Safety Report states 10 metres);
  - from observation of the photo g24, the zone of damage caused by forklift impact appears to be approximately 6 metres from the bent bollard to the rear of the forklift;
  - the Spori Investigation Report states “The distance between the impacted bollard and the fire safety door is 9m” and the 6 metres to the rear of the forklift plus the approximate length of the forklift being 3 metres, supports this;
  - at the 4 metre mark (from initial movement), the Applicant has stated that braking was attempted yet travelled some 6 more metres before the forklift came to a stop;
  - the Applicant states he did not use the accelerator;
  - from the writer’s training, knowledge and experience, a forklift of this weight would not be able to accelerate to more than 4 – 5 km/h in this distance;
  - according to Monash University Accident Research Centre report ‘Forklift Stability and Other Technical Safety Issues 2003’ the actual braking distance from 10km/h is around 6 metres (with data collected on 178 forklifts with capacities from 1 – 48 tonnes) and therefore, braking distance from 4-5km/h would be expected to be 3 metres or less;

- however, there are no braking marks from the front tyres so it would appear true that braking did not occur.<sup>356</sup>

**[206]** The Brennan Report states that in considering the Applicant's assertion that the brakes did not operate at all, in Mr Brennan's opinion a forklift of its weight:

- could not accelerate in 4 metres to more than an estimated 4-5km;
- would have started decelerating at the 4 metre mark (based on the Applicant's statement that he did not have his foot on the accelerator); and
- could not travel 6 metres further without decelerating to almost a complete stop, especially after striking objects in its path;<sup>357</sup>
- the removal of doors at the final stage would indicate that the terminal travel speed of the forklift was not in line with these assertions and the likelihood that this level of damage could have been caused if the brakes failed and/or the forklift lost power is on the very lower end of the scale and at best would be ranked "1".<sup>358</sup>

**[207]** During cross examination it was put to Mr Brennan that:

- if the Applicant had travelled 10 to 12 metres (rather than the four metres referred to in the Brennan Report) that the Applicant would have been able to travel at least 10 km per hour; and
- if the brakes were not used and the Applicant was travelling at 10km per hour the forklift would be able to travel well beyond 6 metres;

and Mr Brennan agreed with these propositions.<sup>359</sup>

**[208]** The Respondent's representative asked Mr Brennan to address whether the forklift came equipped with a handbrake and whether (in the event of brake failure) activating the handbrake would have stopped the forklift. In this regard the Brennan Report indicates:

- the forklift is equipped with a mechanically hand operated brake located on the dash panel to the left of the steering column;<sup>360</sup>
- the handbrake would have stopped the forklift moving forward as it activates the same set of brakes as the foot brake by a separate mechanical activation.<sup>361</sup>

**[209]** Mr Brennan makes a number of additional observations and comments in the Brennan Report. This includes:

- Mr Brennan's statement with a "high degree of confidence" that the brakes were not activated as there was no sign of emergency or hard braking in the photos provided;<sup>362</sup>
- Mr Brennan's observation from the documents and photographs provided that he could see no evidence of oil on the floor near where the incident occurred.<sup>363</sup> Mr Brennan went

on to state that an oil trail may indicate failure of either the brakes actuating system, hydraulics or wet brakes and if leakage had occurred evidence of oil escape would have been found and was not;<sup>364</sup>

- an observation that PCBUs and workers each have a responsibility to conduct pre-operation inspections. In this regard Mr Brennan pointed to reg. 213 of the *Work Health and Safety Regulation 2017* (NSW), Australian Standard AS2359.2 – Operation, the forklift’s Manual, SafeWork NSW guidance and the unit of competence relevant to obtaining a licence to operate a forklift;<sup>365</sup>
- a comment that if there was a fault with the forklift there is a high likelihood it would have been discovered by the operator as a part of the pre-operation daily inspection.<sup>366</sup>

### *Evidence regarding contamination as a soft pedal cause*

[210] During cross examination Mr Paraskevopoulos was taken to a copy of a manual for the forklift which was attached to the statement of Mr Brennan. Mr Paraskevopoulos was taken specifically to a statement in that manual which said:

“Small amounts of water in the brake system can cause reduced braking performance. DO NOT allow water entry.”<sup>367</sup>

[211] Mr Martin asked Mr Paraskevopoulos a series of questions dealing with the causes of ‘soft pedal’, which is what the Applicant had asserted resulted in the incident, and the following can be taken from Mr Paraskevopoulos’ responses:

- the forklift runs transmission fluid through its master cylinders;
- if water is introduced to the fluid it reduces its boiling point;
- if there is a reduction in the boiling point it is more likely that when a forklift’s brakes are pressed the boiling point will be reached;
- if the boiling point is reached, gas is emitted and this may result in a compressible air bubble;
- these circumstances cause soft pedal;
- upon cooling down the gas can return to a liquid form;
- if the gas is no longer in existence this may give the appearance that things are working as normal.<sup>368</sup>

[212] Mr Paraskevopoulos confirmed during cross examination that he did not test to see if the brakes were contaminated by water, only conducted a visual inspection and did not think that taking a sample to confirm whether there was water in the fluid was required.<sup>369</sup>

[213] It was put to Mr Paraskevopoulos that:

- as the incident occurred at 7.30am in the morning the forklift could have sufficiently cooled by the time he inspected to which he replied “I presume so”;<sup>370</sup>
- any gas bubbles that were in the forklift could have returned to a liquid state such that the pedal was working again to which he responded “Yes”;<sup>371</sup>
- in conducting a test of the forklift it was possible that he didn’t sufficiently heat the brakes such that there was a gas bubble in the brakes to which he responded “Well the way the system works is a little bit different, but yes, if you want to say that.”<sup>372</sup>

[214] During re-examination Mr Paraskevopoulos clarified that in referring to the system being a ‘bit different’ he meant, by way of summary, that:

- a normal braking system works with brake fluid that pushes cylinders out to create friction and braking;
- instead the forklift pedal is not enough in itself to create braking so when the brake pedal is pushed one system talks to another using transmission oil to push a boost of pressure into the brake system creating friction and engine braking.<sup>373</sup>

[215] Mr Martin asked Mr Paraskevopoulos a series of questions dealing with the service history of the forklift and the following can be drawn from Mr Paraskevopoulos’ responses:

- he checked the service history of the forklift before conducting the inspection to the extent that he was able to do so through his tablet;
- he identified from that history that there were no other brake issues prior to the incident;
- he was not able to tell if something had not occurred (e.g. whether the brake oil had not been changed);
- if, for example, the 4000 hour service wasn’t done or the brake oil had not been changed, the accumulative effect could mean a greater risk of brake failure.<sup>374</sup>

[216] In his statement Mr Paraskevopoulos said:

“Based on my approx. 28 years of experience working on forklifts like the Unit [the forklift the subject of the incident], it is my opinion that the wet brake system either works or it does not work. If the brakes had failed, the issue would have presented itself again. When a part is failing, the issue will get progressively worse, not better.”<sup>375</sup>

[217] Mr Paraskevopoulos was taken to this statement during cross examination and was asked whether it was possible that soft pedal could have occurred and the brakes could have worked again because they hadn’t heated sufficiently to which Mr Paraskevopoulos’ responses suggested that this was not possible because the issue would get progressively worse.<sup>376</sup>

[218] Mr Paraskevopoulos further clarified this during re-examination saying:

“Well, if you’ve got an issue with – say, with your master cylinder where it gets hot and the brake pedal, say, for instance, foot goes to the floor, over a period of time, that will get worse. It will happen more and more to the point where it will just sit on the floor, plus the machine should throw up error codes.”<sup>377</sup>

[219] Mr Harris gave different evidence and said in his experience, if the brake failed to operate as alleged, this would constitute a complete failure of the brake system and it would not be possible for the brake to fail in that instance and then subsequently work.<sup>378</sup>

[220] During cross examination Mr Brennan was also taken to the Forklift Manual which includes a warning that:

“Small amounts of water in the brake system can cause reduced braking performance. DO NOT allow water entry. Ensure that the sealed reservoir lid is properly replaced.”<sup>379</sup>

[221] Mr Brennan was then taken to the Brennan Report which states:

“If low brake fluid levels or water is introduced to the system the likelihood of soft pedal or non-existent pedal pressure is high.”<sup>380</sup>

[222] A series of propositions were then put to Mr Brennan during cross examination by the Applicant’s representative which were accepted by Mr Brennan. These included:

- if water is introduced to the system it reduces the boiling point of the fluid;
- that increases the risk that when the brakes are applied and heating it then boiling point would be reached;
- if the boiling point is reached with water in there that would then turn into gas;
- where there’s a gas bubble and the brake is applied its compressible and that creates soft pedal;
- when the system then cools down it is possible that the gas could return to a liquid state;
- if returned to a liquid state when the brake is applied again it would appear to work normally;
- had the forklift technician tested for contamination he could have identified whether the oil was contaminated with water;
- if there was a time between when the crash occurred and when the technician inspected the forklift, it could have sufficiently cooled so when he went to test the forklift it was working normally again.<sup>381</sup>

[223] During re-examination Mr Brennan was asked to rate the likelihood of the scenario about water being in the brake system and then turning into gas and then back into water

occurring using a scale of 1-10, 10 being very likely and one being very unlikely.<sup>382</sup> Mr Brennan assessed the likelihood as being in the 2-3 range.<sup>383</sup>

[224] Mr Brennan was taken to the statement in the Brennan Report suggesting that if water is introduced to the system the indicator light on the forklift's dash would be on.<sup>384</sup> Mr Brennan agreed that this statement would be dependent on the make and model of the forklift and he had not seen the particular forklift the subject of the incident.<sup>385</sup> Mr Brennan was then taken to a statement in the forklift's Manual which states:

“There is an indicator light on the Display Switch Cluster for the brake oil. See Figure 24. The red light is **ON** when the key switch is in the **START** position or the Power **ON/OFF** button is pressed, and must go **OFF** when the engine is running. If the light is on when the engine is running, the brake fluid oil in the reservoir is too low”.<sup>386</sup>

[225] It was put to Mr Brennan that the particular forklift involved in the incident would show if the fluid was too low but not necessarily whether it was contaminated with water to which Mr Brennan indicated he was not able to correctly answer.<sup>387</sup>

[226] It was also put to Mr Brennan that if the contention was that the brakes did not work there would not be any brake marks on the floor and Mr Brennan agreed.<sup>388</sup>

*Consideration – was there a valid reason for the dismissal?*

[227] The Respondent submitted that there was a valid reason related to the Applicant's conduct. For there to be a valid reason related to the Applicant's conduct, I must find that the conduct occurred and justified termination.<sup>389</sup> “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 termination.”<sup>390</sup>

[228] Two allegations have been made in relation to the Applicant that have ultimately led to his dismissal being that:

1. on 27 June 2023 the Applicant failed to operate the grab forklift in a safe manner, causing extensive damage and creating a safety incident that could have resulted in injury and loss of life (Allegation 1); and
2. the Applicant has not been willing to accept any responsibility for the incident despite being given the opportunity to do so (Allegation 2).

[229] The Respondent has submitted, by way of summary, that there was a valid reason for dismissal because it has work health and safety obligations, there are serious risks associated with contraventions of these obligations, forklift driving is considered high-risk, the Applicant was driving the forklift involved in the incident, his 'actions were inherently dangerous' and in putting forward that the brakes failed the Applicant lied and this showed his untrustworthiness.<sup>391</sup> The Respondent alleges this constitutes serious misconduct. The



Respondent also submitted that either the inherent dangerousness of the Applicant's actions or the fact that he lied about the brakes not working provided a valid reason for dismissal.<sup>392</sup>

**[230]** Allegation 1 has three elements:

1. the Applicant failed to operate the grab forklift in a safe manner;
2. this caused extensive damage; and
3. created a safety incident that could have resulted in injury and loss of life.

**[231]** I am satisfied based on the evidence before the Commission that on the morning of 27 June 2023:

- the Applicant was assigned to drive the grab forklift of which the unloaded weight is 11.33 tonnes;
- the Applicant was driving the forklift and transporting a butt reel when a red metal plate from the forklift's clamp fell off;
- the Applicant put the butt reel down, turned the forklift off and went to inspect the plate with Mr Williams;
- at this stage the forklift was parked approximately two to three metres from the yellow trolley in the top left hand corner of page 20 of the Respondent's Incident Report and was facing the direction of the blue and orange drum or slightly to the right of it;
- Mr Williams went over to see what had happened;
- Mr Williams told the Applicant that they should move the red metal plate to the side and call the control room to advise them that the plate had fallen off the grab;
- Mr Williams picked up the red metal plate and lent it against a rubbish bin,<sup>393</sup>
- after the conversation with Mr Williams the Applicant got back in the forklift, reversed the forklift for approximately one or two metres and went to park the forklift near the boiler;
- the forklift travelled forwards and was not being driven at more than 10 kilometres per hour at this time;
- the forklift collided with the orange and blue drum causing the cylinder to bend around the yellow bollard shown at pages 20 and 21 of the Respondent's Incident Report;
- the forklift continued travelling straight into a pedestrian zone between the boiler and starch kitchen before colliding with other items of plant and equipment, including the gas feed line to the boiler;
- the forklift made contact with the roller door and fire safety door and stopped;

- the Applicant was not observed to be speeding or driving erratically before making contact with the blue and orange drum;
- the Applicant was not under the influence of drugs or alcohol at the time of the incident.

[232] Mr Wilson's evidence was that when he inspected the incident he observed:

- there was a ruptured gas pipe next to the boiler, electrical equipment such as computers and monitors close by and the potential for a large explosion;
- the forklift had travelled between the boiler and the starch kitchen and this area is not much wider than the forklift itself;
- a 40 gallon drum had been crushed against a bollard;
- the bollard was partially dislodged from where it was bolstered to the floor of the factory and was also bent at its foot;
- a gas pipe attached to the boiler was ruptured;
- the fire door beyond the boiler and starch kitchen was knocked off its hinges and had landed a few metres from the doorway;
- the roller door immediately to the left of the fire door was partially dislodged and dented, having been pushed outwards by the grab forklift.<sup>394</sup>

[233] This was not disputed and the photographs within the Spurl Investigation Report appear to support this.

[234] I am satisfied that the forklift incident resulted in extensive damage. Further, it is not in contention that the incident involving the forklift was of a serious nature and gave rise to a safety incident that may have resulted in injury and loss of life. The remaining element of Allegation 1 is whether the Applicant failed to operate the grab forklift in a safe manner.

[235] The Respondent has not suggested that the incident itself was a deliberate act and Mr Ibrahim-Elgarhy, the person who made the decision to dismiss the Applicant, indicated he believed the incident was an accident. I accept that the Applicant did not *deliberately* drive a forklift in a manner that was unsafe.

[236] The Applicant submitted that if the incident was an accident on the part of the Applicant it would not constitute a valid reason. However the Respondent submitted that the Applicant's submission proceeds on the basis that misconduct involves something more than mere negligence, error of judgement or innocent mistake and does not take into account:

- the many cases which show that gross negligence may be grounds for a finding of misconduct justifying summary dismissal;<sup>395</sup>

- the statutory definition of serious misconduct set out in Regulation 1.07 of the *Fair Work Regulations 2009* (Cth) which states that serious misconduct includes conduct that ‘causes serious and imminent risk to the health and safety of a person’.<sup>396</sup>

[237] I accept the Respondent’s submissions that conduct that constitutes ‘gross negligence’ amounts to serious misconduct, particularly if it causes serious and imminent risk to the health and safety of a person. However the Respondent did not allege ‘gross negligence’, rather it simply alleged that the Applicant failed to operate the grab forklift in a safe manner and inferred that the Applicant was at fault and alleged he had ‘not been willing to accept any responsibility for the incident despite being given the opportunity to do so’. Mr Sporl, who was the investigator, reached the view that it was more likely than not that the brakes had not failed and that the accelerator may have been used by the Applicant in lieu of the brake.<sup>397</sup> I do not accept that accidental acceleration or any fault on the part of the Applicant would automatically be considered to amount to ‘gross negligence’. I do however accept that conduct that causes serious and imminent risk to the health and safety of a person may constitute a valid reason for dismissal even if not wilful or deliberate.

[238] If it were to be substantiated that the incident was the Applicant’s fault and he lied about it, I would be satisfied that constitutes serious misconduct on the part of the Applicant. Where the alleged conduct involves serious misconduct, the principles established in *Briginshaw v Briginshaw*<sup>398</sup> will be relevant. In these circumstances the standard of proof remains the balance of probabilities but ‘the nature of the issue necessarily affects the process by which reasonable satisfaction is attained’<sup>399</sup> and such satisfaction ‘should not be produced by inexact proofs, indefinite testimony, or indirect inferences’ or ‘by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion.’<sup>400</sup> The strength of the evidence needed to establish a fact on the balance of probabilities ‘may vary according to the nature of what it is sought to prove’<sup>401</sup> and more serious allegations may require stronger evidence.

***Did the Applicant fail to operate the grab forklift in a safe manner?***

[239] Allegation 1 proceeds on the basis that the Applicant is at fault for the incident. The fact that a forklift has been involved in an incident does not automatically mean that the driver is at fault. There may be a range of reasons for an incident and in this case, the Applicant and Respondent have advanced competing arguments regarding the cause of the incident. The Respondent points to fault on the part of the Applicant. While it is unclear precisely what actions the Respondent believes the Applicant took to cause the incident the Sporl Investigation Report was finalised around two weeks after the incident<sup>402</sup> and stated ‘Although it cannot be validated at this stage, it is plausible to assume given the technician’s report that the accelerator may have been used in lieu of the brake which resulted in the incident’’. Mr Sporl, who was the Respondent’s investigator but not the decision maker, ultimately reached the view that it was more likely than not that the brakes had not failed and that the accelerator may have been used by the Applicant in lieu of the brake, resulting in the incident.<sup>403</sup>

[240] The Applicant points to a failure of the forklift’s brakes, indicating that the brake pedal went soft when he went to apply it.

*How far did the forklift travel?*

[241] Mr Li's evidence was that the distance from where the forklift was parked (when the plate fell off) to the bollard to was more than 10 metres.<sup>404</sup> During cross examination Mr Deo's evidence was that the distance between where the forklift was parked when the plate fell off to the bollard was approximately 15 metres.<sup>405</sup>

[242] Mr Ibrahim-Elgarhy said there is approximately 9 metres between the bollard that the forklift impacted and the roller door and safety door where the forklift finally stopped and that the forklift driven by the Applicant caused significant damage over an approximate 10 metre distance.<sup>406</sup> Mr Ibrahim-Elgarhy confirmed during cross examination that the reference to 10 metres was an approximation.<sup>407</sup>

[243] The Applicant said that as he was driving he pushed down on the brakes approximately two meters before where he had intended to park the forklift (i.e. near the boiler).<sup>408</sup> The Applicant estimated the distance between where he pressed the brakes to the roller door to be eight to 10 metres.<sup>409</sup> Mr Li's evidence was that:

- the distance from the bollard to where the forklift was parked was more than 10 metres;<sup>410</sup>
- the distance between the back of the forklift (where it finally stopped) to the bollard was only three to four metres;<sup>411</sup>

[244] Mr Sporl (who was responsible for the Respondent's investigation) said that the distance between the impacted bollard and roller door is 9 metres.<sup>412</sup> Mr Sporl confirmed this was an approximation.<sup>413</sup>

[245] Mr Li said the distance from where the forklift was originally parked and where the plate fell off to the roller door was approximately 20 metres.<sup>414</sup> Mr Deo said the approximate distance between where the forklift was initially parked when the plate had fallen and once the forklift had rolled to a stop was approximately 15 metres.<sup>415</sup> This is inconsistent with his evidence during cross examination that the distance between where the forklift was parked when the plate fell off to the bollard alone was approximately 15 metres.<sup>416</sup>

[246] It is apparent that the evidence regarding the distances between objects are estimations only and it is unfortunate that during the course of the investigation into such a serious safety incident no specific measurements were taken at the scene of the incident when it occurred.

[247] Having considered the evidence and given that all of these measurements are approximations, it seems likely that:

- the forklift was driven by the Applicant from its parked position toward the boiler and this would have required the Applicant to apply the accelerator;
- the forklift had been travelling for at least 10 metres before it made contact with the orange and blue drum (which wrapped around the bollard) near the boiler;

- after making contact with the boiler, the forklift continued before coming to a stop when it hit the roller door;
- the distance between the bollard and the roller door was a distance of up to 9 metres;
- the total distance travelled by the forklift from its parked position to where it hit the roller door was at least 19 metres.

*How fast was the forklift travelling?*

[248] Mr Williams was the only employee (other than the Applicant) to see the whole incident. Mr Williams said he saw the forklift collide with the orange and blue drum before continuing between the boiler and the starch kitchen and eventually hitting the roller door where it stopped<sup>417</sup> however other than to say the forklift wasn't being driven fast his evidence was not specific around the speed that the forklift was moving when it hit the roller door. During cross examination Mr Williams confirmed that when he said the forklift wasn't being driven fast he was saying that it was not being driven at more than 10 kilometres per hour.<sup>418</sup>

[249] Mr Deo said he saw the forklift (after it had hit the orange and blue drum) slowly rolling towards the roller door before it stopped.<sup>419</sup> Mr Li said he was not sure how fast the forklift was going, that he only saw the last one or two seconds of the Applicant on the forklift before it stopped and he did not see the forklift impact the blue and orange drum in the photo.<sup>420</sup>

[250] While there were employees who were witnesses to the incident, it is unclear as to how fast the forklift was going when it hit the roller door and fire safety door.

[251] During cross examination it was put to Mr Brennan that if the Applicant had travelled 10 to 12 metres that the Applicant would have been able to travel at least 10 km per hour and Mr Brennan agreed with this proposition.<sup>421</sup>

[252] While it is not possible to determine the precise speed at which the forklift was travelling I accept that it would have been possible for the forklift to reach its maximum speed of 10km before it made contact with the first object, being the blue and orange drum that wrapped around the bollard.

*Was there evidence of braking?*

[253] Mr Paraskevopoulos' evidence was that:

- if the braking capacity is working as it should, the forklift will stop within 2 metres of the brake being applied;
- he tested the brake capacity by sitting in the forklift, bringing it up to maximum speed and applying the brakes;
- when he carried out this test the forklift stopped within approximately 2 metres of the brake being applied;<sup>422</sup>

[254] The forklift hit multiple objects before ultimately stopping when it hit the roller door. The Brennan Report suggests that the lack of braking marks in the photographs taken of the incident mean that actual braking did not occur.

[255] I am satisfied there is no evidence of the forklift actually braking and the Applicant said the brakes went soft. This raises the question of whether the brake was either not applied or whether braking failed.

*Could brake failure cause so much damage or was the Applicant accelerating?*

[256] Mr Ibrahim-Elgarhy said the forklift driven by the Applicant caused significant damage over an approximate 10 metre distance<sup>423</sup> and I have earlier found that the damage was extensive.

[257] The Respondent submitted that the evidence establishes that had the Applicant taken his foot off the accelerator, the forklift would have slowed and stopped before travelling nine metres from the bollard and before hitting the fire door so hard that it knocked the fire door off its hinges.<sup>424</sup> The Respondent said that the forklift would have slowed further by hitting the bollard and gas main.<sup>425</sup>

[258] Mr Sporn said that before the technician left to conduct the full inspection he explained to Mr Sporn that even if the forklift loses power (or cuts out) deceleration will occur at the same rate as if the forklift was powered and he understood this to mean that if there was a total brake failure or the forklift cut out it would decelerate (or slow down) at the same speed as if it were powered.<sup>426</sup> The Respondent's representative requested that Mr Brennan address whether this statement is correct. In this regard the Brennan Report explains:

- deceleration will occur naturally or by assistance from the braking system;
- deceleration will vary based on other factors such as the gradient of the surface;
- Adapt-A-Lift's statement is in essence correct in that it refers to the natural deceleration that will occur if the engine is shut off without using brakes;
- deceleration may occur slightly quicker with the engine off due to friction and other forces.<sup>427</sup>

[259] The Brennan Report goes on to state by way of summary:

- after considering the supplied photos and documents, in the writers opinion there would need to be considerable velocity caused by momentum and/or acceleration of the forklift to cause the damage exemplified in the Safety Report;<sup>428</sup>
- from observation of the photos the floor level appears to be within a 2 percent gradient and Mr Brennan did not consider that the forklift could move from a standing start and roll with enough velocity to cause the indicated damage.<sup>429</sup>

**[260]** The Brennan Report states that in considering the Applicant's assertion that the brakes did not operate at all, in Mr Brennan's opinion a forklift of its weight:

- could not accelerate in 4 metres to more than an estimated 4-5km;
- would have started decelerating at the 4 metre mark (based on the Applicant's statement that he did not have his foot on the accelerator); and
- could not travel 6 metres further without decelerating to almost a complete stop, especially after striking objects in its path;<sup>430</sup>
- the removal of doors at the final stage would indicate that the terminal travel speed of the forklift was not in line with these assertions and the likelihood that this level of damage could have been caused if the brakes failed and/or the forklift lost power is on the very lower end of the scale and at best would be ranked "1".<sup>431</sup>

**[261]** The Brennan Report goes on to state by way of summary:

- after considering the supplied photos and documents, in the writers opinion there would need to be considerable velocity caused by momentum and/or acceleration of the forklift to cause the damage exemplified in the Safety Report;<sup>432</sup>
- from observation of the photos the floor level appears to be within a 2 percent gradient and Mr Brennan did not consider that the forklift could move from a standing start and roll with enough velocity to cause the indicated damage.<sup>433</sup>

**[262]** However, during cross examination it was put to Mr Brennan that:

- if the Applicant had travelled 10 to 12 metres (rather than the 4 metres referred to in the Brennan Report) that the Applicant would have been able to travel at least 10 km per hour; and
- if the brakes were not used and the Applicant was travelling at 10km per hour the forklift would be able to travel "well beyond 6 metres"

and Mr Brennan agreed with these propositions.<sup>434</sup>

**[263]** As pointed out by the Applicant, Mr Brennan relied on the following assumptions in arriving at these findings:

- the forklift had sufficient speed and momentum to cause significant damage in a relatively straight line over an approximate 10m distance (Assumption 1);
- the forklift was tested post incident to determine the stopping distance at full speed and the distance was approx. 7m (Assumption 2);
- the distance between the impacted bollard and the fire safety door is 9m (Assumption 3).<sup>435</sup>

[264] The Applicant submitted that Mr Brennan has wrongly construed Assumption 1 as meaning the total distance the forklift travelled from start to finish and that this is demonstrated at paragraph 9.41(g) of his report that there is a ‘travel distance of 10-12 metres from the commencement of forward travel to the final position of the broken door’<sup>436</sup> and it is apparent that this is the case. At paragraph 5.3 of his report Mr Brennan states ‘[s]hould these assumptions be materially different, this may in turn affect the content of the Report, and conclusions therein’.

[265] I have earlier found that the total distance traveled by the forklift was at least 19 metres. I consider that assumption made by Mr Brennan regarding the total distance travelled is materially different, especially considering that I have earlier found that the forklift could have been travelling at its maximum speed of 10km per hours when it hit the orange and blue drum. As a result, I do not consider that Mr Brennan’s evidence turning to whether the damage could have been caused in the event of brake failure can be relied on.

[266] Mr Sporl’s evidence was that:

- he instructed Gary Corbet (Supervisor) to conduct a test on the forklift for the purpose of determining the stopping distance of the forklift when travelling at full speed,<sup>437</sup> the forklift had a capped speed of 10km per hour such that it could not exceed this speed;<sup>438</sup>
- he instructed Mr Corbet to conduct the test in a clear, designated area outside the factory;<sup>439</sup>
- the test involved another employee, Mr Quinn, travelling at full speed (10km per hour) in the forklift and then removing his foot from the accelerator but not activating the brake;<sup>440</sup>
- the stopping distance was 7 metres;<sup>441</sup>
- he estimated the distance between the impacted bollard and fire safety door is 9 metres and believed the forklift would have had to be travelling at full speed at the time it hit the bollard and that the impact to the I-beam indicates that it was not a slow and progressive stop;
- even if there was a total brake failure or the forklift cut out, the forklift would decelerate (or slow down) at the same speed as if it were powered;
- he believed that if the forklift’s brakes failed it would not have travelled far enough and with enough velocity to hit the I-beam and impact it to the degree that it did.<sup>442</sup>

[267] Mr Corbet and Mr Quinn were not called as witnesses to give evidence about the test. Neither Mr Sporl nor Mr Ibrahim-Elgarhy were there for those tests but both understood that video footage had been taken. That footage was not tendered as evidence. Mr Sporl indicated he couldn’t be certain that the test was conducted under the same conditions as those present at the time of the incident.<sup>443</sup> While he was unspecific about the distance, Mr Brennan agreed during cross examination that if the brakes were not used and the Applicant was travelling at



10km per hour the forklift would be able to travel well beyond 6 metres.<sup>444</sup> In these circumstances, I am not persuaded that the evidence establishes that 7 metres is the precise distance within which the forklift should have stopped before hitting the roller door.

[268] I do accept that hitting various objects should have slowed the trajectory of the forklift down to some degree. If the forklift did cause the fire safety door to ‘fly off its hinges/frame’ and land a few metres away this does suggest a significant impact would have been needed. However the final position of the fire door as shown in the photograph on page 23 of the Sporn Investigation Report is peculiar. If it did land in that position, it has landed on an angle in front of the roller door and mostly to the side of the walkway leading into the fire door. The building was evacuated immediately following the incident due to the gas leak and it is apparent that the fire door was used as a means of egress from the building. For example, Mr Deo’s evidence was that he went outside the fire door next to the roller door as he was looking for a valve to turn gas off.<sup>445</sup> Given the building was evacuated due to the gas leak it seems more likely that the fire door had been knocked off its hinges but was moved to the side by someone evacuating the building to enable a safe and clear means of egress.

[269] Based on the evidence before the Commission I cannot be satisfied that the moving forklift weighing in excess of 11 tonnes should have slowed enough between the bollard and roller door to stop or cause lesser damage in the event of brake failure.

*Can the brakes of a forklift work again if soft pedal is encountered?*

[270] That the forklift was returned to operation the same night of the incident and the absence of any issues with the forklift since the incident, at face value, weighs in favour of the Respondent’s theory that the cause of the incident was operator error.

[271] Mr Paraskevopoulos was asked whether it was possible that soft pedal could have occurred and the brakes could have worked again because they hadn’t heated sufficiently. Mr Paraskevopoulos’ responses suggested that this was not possible because the issue would get progressively worse.<sup>446</sup> Mr Paraskevopoulos further clarified this during re-examination saying:

“Well, if you’ve got an issue with – say, with your master cylinder where it gets hot and the brake pedal, say, for instance, foot goes to the floor, over a period of time, that will get worse. It will happen more and more to the point where it will just sit on the floor, plus the machine should throw up error codes.”<sup>447</sup>

[272] However Mr Harris gave different evidence and said in his experience, if the brake failed to operate as alleged, this would constitute a complete failure of the brake system and it would not be possible for the brake to fail in that instance and then subsequently work.<sup>448</sup>

[273] It not apparent that the evidence of Mr Paraskevopoulos and Mr Harris squarely addresses the question of contamination.

[274] During cross examination Mr Brennan accepted that:

- if water is introduced to the system it reduces the boiling point of the fluid;

- this increases the risk that when the brakes are applied and heating it then boiling point would be reached;
- if the boiling point is reached with water in there that would then turn into gas;
- where there's a gas bubble and the brake is applied its compressible and that creates soft pedal;
- when the system then cools down it is possible that the gas could return to a liquid state;
- if returned to a liquid state when the brake is applied again it would appear to work normally;
- had the forklift technician tested for contamination he could have identified whether the oil was contaminated with water;
- if there was a time between when the crash occurred and when the technician inspected the forklift, it could have sufficiently cooled so when he went to test the forklift it was working normally again.<sup>449</sup>

[275] Mr Paraskevopoulos said he waited a 'considerable period of time' before he was told that SafeWork NSW was not coming on that day and he could remove the forklift from the crash area and undertake the inspection.<sup>450</sup> The forklift would have cooled down during this time. During re-examination Mr Brennan was asked to rate the likelihood of the scenario about water being in the brake system and then turning into gas and then back into water occurring using a scale of 1-10, 10 being very likely and 1 being very unlikely.<sup>451</sup> Mr Brennan assessed the likelihood as being in the 2 to 3 range.<sup>452</sup> While a 2 or 3 out of 10 does not indicate a high degree of likelihood, it does lead me to the view that the scenario is more than a remote possibility and it should not be considered in isolation of other relevant factors when identifying the likely cause of the incident on the balance of probabilities. Mr Brennan accepted that when the system then cools down it is possible that the gas could return to a liquid state and if returned to a liquid state when the brake is applied again it would appear to work normally.<sup>453</sup>

[276] Having regard to the evidence of Mr Brennan it seems that a forklift impacted by soft pedal may work again normally when it cools down.

*What did Adapt-A-Lift test for and did this include water contamination?*

[277] Mr Harris's covering email to Ms Afeaki states:

"The following works were conducted:

Upon conducting the inspection on the braking system, no faults identified with the performance, related components or total operation were detected.

An additional mechanical inspection was also conducted, by dismantling the brake assemblies to check internal componentry and serviceability, all components found correct as per manufacturers specifications.

Throttle operation also inspected – found ok."<sup>454</sup>

[278] The first page of the Job Service Card states:

“Travel to site,  
Carry out Inspection and Diagnosis of Brake System  
remove unit from crash area. carried out visual inspection of unit, strip and inspect brake system, found fluid and all adjustments correct as per manufacturers specifications. check operation of hand brake, ok. check operation of throttle, tested ok. operated unit and tested braking capability. no fault found with unit.  
Liaised with Alistair Conway from Opal on my findings, concluding with suspected operator error.”

The second page states in the notes:

“Travel to site,  
Carry out Inspection and Diagnosis of Brake System  
remove unit from area strip and inspect brake system found fluid and all adjustments correct check operation of hand brake ok check operation of throttle test ok no fault found with unit.”

[279] The Brennan Report states:

“If low brake fluid levels or water is introduced to the system the likelihood of soft pedal or non-existent pedal pressure is high.”<sup>455</sup>

[280] Further, the Forklift Manual states:

“Small amounts of water in the brake system can cause reduced braking performance. DO NOT allow water entry. Ensure that the sealed reservoir lid is properly replaced.”<sup>456</sup>

[281] Mr Paraskevopoulos confirmed during cross examination that he did not test to see if the brakes were contaminated by water and only conducted a visual inspection.<sup>457</sup>

[282] I accept that a visual inspection may be able to detect if brake fluid levels were low. Mr Brennan indicated that it is possible that low brake oil levels or the introduction of water to the system may cause soft pedal however among the reasons for his rating suggesting low likelihood were:

- low oil level is very unlikely to occur without a leakage occurring or the indicator appearing on the dash and according to page 16 of the Forklift Manual this warning light must be inspected by the operator at the daily inspection;
- there was no evidence of leakage.<sup>458</sup>

[283] I accept that it seems unlikely that the brake fluids were low. However I am satisfied that water contamination is also a cause of soft pedal and no testing of the brake fluids was undertaken to rule contamination out. I do not suggest that Adapt-A-Lift was trying to cover anything up but it seems that Mr Paraskevopoulos did not know about the soft pedal explanation that the Applicant had provided and did not think such testing was necessary.

*Should the indicator light have shown if there was water contamination?*

[284] Mr Brennan rated the likelihood of the brake pedal going “soft”, providing “no resistance” and causing the forklift to “keep moving in circumstances where the brake oil was not changed every 2000 hours or in the 12 months prior to the accident” as “1” on a scale of 1 to 10, with 1 being “very unlikely” and 10 being “very likely”. Among the reasons for his rating suggesting low likelihood were that:

- low oil level is very unlikely to occur without a leakage occurring or the indicator appearing on the dash and according to page 16 of the Forklift Manual this warning light must be inspected by the operator at the daily inspection;
- checking the indicator light on the dash is an operator responsibility and in neither of the Applicant’s written responses or any of the other documents provided to Mr Brennan is it raised that the warning light was lit.

[285] During cross examination Mr Brennan was taken to his statement in the Brennan Report suggesting that if water is introduced to the system the indicator light on the forklift’s dash would be on<sup>459</sup> and he agreed that this statement would be dependent on the make and model of the forklift and that he had not seen the particular forklift the subject of the incident.<sup>460</sup> It was put to Mr Brennan that the particular forklift involved in the incident would show if the fluid was too low but not necessarily whether it was contaminated with water to which Mr Brennan indicated he was not able to correctly answer.<sup>461</sup> Further, while I am satisfied that prior to operating the forklift the Applicant checked to make sure all the correct reels were set up from the night before,<sup>462</sup> there is insufficient evidence before the Commission to establish that he carried out a daily inspection of the forklift. While the Brennan Report suggests that such an inspection should have been conducted by the Applicant, there is no evidence that the Respondent required this of him. Indeed, Key Learning 3 of the Spurl Investigation Report states “Pre-operational checks are not conducted/recorded and the system is currently reliant on operator discretion”.

[286] In these circumstances I am unable to draw a conclusion that if contamination occurred the indicator light would have been on or that the Applicant would have seen it.

*Anomalies in the service history*

[287] The Applicant gave uncontested evidence that as a result of a grab forklift being out of service the grab forklift involved in the incident had been used on the day, afternoon and night shift five days per week for the entire period the other forklift had been out of service.<sup>463</sup> It is apparent that the Respondent had increased reliance on the forklift in these circumstances, as evidenced by its initial reluctance to provide the forklift to Adapt-A-Lift in February 2023 and the resultant rebooking of the 4000 hour service in March 2023.

[288] I am however satisfied that a 4000 hour service, albeit delayed, did ultimately occur in March 2023 and *should* have involved the service elements for a 4000 hour service as set out in the Forklift Manual. I also accept that a service history record may not exhaustively list all of the elements of a particular service, given that these are prescribed in the manual.

[289] However the Brennan Report has identified some anomalies in the service history records that bring into question whether all elements prescribed by the manual were carried out in the servicing of the forklift. In particular, the Brennan Report indicates:

- in reviewing the Adapt-A-Lift service history it was not possible for Mr Brennan to state whether it was "deficient" or "not deficient";
- while it is industry standard not to list the full contents of any particular periodic service, but to rely on the Forklift Manual to provide such detail, he would expect to see parts and fluids listed that would match up with that specified in the Forklift Manual;
- in this regard there did appear to be some anomalies in the Service History provided i.e. certain parts or lubricants required by the schedule set out in the periodic maintenance table in the Manual are not listed in the Service History.<sup>464</sup>

[290] In his Second Response the Applicant specifically raised that there were no records of a brake oil change being performed in the service records and that this is required to occur every 2000 hours or annually. The Brennan Report indicates that a brake oil change is required as a part of the 4000 hour service and as the Service History stated that a 4000 hour service was completed on 9 March 2023 Mr Brennan assumed this occurred.<sup>465</sup> However the Brennan Report goes on to state that according to the Service History:

- no brake oil has been charged for, with the Manual requiring use of a certain product for the brake oil change;<sup>466</sup> and
- while wet brake drive axle oil is required to be changed<sup>467</sup> in five separate chambers of the wet brake system, requiring 25 litres in total, only 12 litres of HP GEAR OIL 80W/90 \$L (PER LITRE) is shown in the forklift's service history<sup>468</sup> and this is a lower viscosity to the oils required in the left and right side wet brakes.

[291] When Mr Paraskevopoulos inspected the forklift he was not able to tell from accessing the service history on his tablet if something had not occurred (including whether the brake oil had not been changed) and there was no evidence of any close examination of the service history.<sup>469</sup> Further, the technician who is said to have carried out the 4000 hour service, Mr Peria, was not called as a witness to the proceedings.

[292] Mr Brennan's opinion was that even if the brakes had not been serviced in the 12 months prior to this the likelihood that this would cause the brake pedal to go "soft" and provide "no resistance", causing the forklift to "keep moving" was rated as "1" a scale of 1 to 10 with 1 being "very unlikely" and 10 being "very likely". The Brennan Report suggests this rating was provided for a range of reasons, including:

- because the forklift has "wet type" brakes which means they run in a hydraulic fluid environment and are much less susceptible to wear and tear;
- if there was a failure of the brakes' articulating system, hydraulics or wet brakes, there would be an oil trail and there was no evidence of this;

- if the brake master cylinder seals had failed they would not “unfail”, there would have been evidence of this found during Adapt-A-Lift’s inspection later on the day of the incident and the issue would have re-emerged with subsequent use;
- the Job Service Card in respect of Adapt-A-Lift’s inspection stated that the brakes were working.

[293] However it is not clear that the above relates to soft pedal caused by water contamination and while Mr Brennan relied on Adapt-A-Lift’s Job Service Card, I have already found that Adapt-A-Lift did not test for this.

[294] Further, during cross examination it was put to Mr Brennan that if the list of items that must be done as a part of a 4000 hour service were not performed this would increase the risk of brake failure and Mr Brennan agreed.<sup>470</sup> It was then put to Mr Brennan that there were a number of things he could not identify in the forklift history as being completed because they did not appear in the history including:

- whether the master brakes cylinder and rod were lubricated, to which Mr Brennan agreed;
- whether the brake oil change had been carried out, to which Mr Brennan agreed;
- whether the wet brake axle oil change had been carried out, to which Mr Brennan indicated there was no charge for this in the service history;
- whether brake system accumulator had been serviced, to which Mr Brennan indicated it had not been specifically listed in the service history.<sup>471</sup>

[295] It was put to Mr Brennan that if it was the case that none of the above had been carried out, the cumulative effect would significantly increase the risk of brake failure, including a temporary failure, and he agreed.<sup>472</sup>

[296] I cannot be satisfied as to whether Adapt-A-Lift, in servicing the forklift carried out all of the elements of a service as prescribed by the Forklift Manual. Rather, there is evidence of anomalies, including evidence suggesting that the brake fluids may not have been changed in accordance with the Forklift Manual and this would likely increase the likelihood of brake failure.

[297] I also note that there were three grab forklifts provided by Adapt-A-Lift to the Respondent and at the time of the incident one of these was out of service as it had stopped working while the Applicant was in the middle of driving it. The Applicant gave uncontested evidence that it had not been used for approximately four to six months prior to the time of the incident. While this forklift was not the forklift involved in the incident it does indicate that the grab forklifts, despite being serviced by Adapt-A-Lift, are not infallible to unexpected breakdown and the fact that the forklift involved in the incident did not have any reported brake issues prior to the incident does not mean issues could not have arisen.

*SafeWork NSW outcome*

[298] It is apparent from its correspondence to the Applicant dated 16 October 2023 that the Respondent did not believe the Applicant's explanation for the incident because:

- it considered the explanation was inconsistent with the outcome SafeWork NSW communicated via email 19 July 2023 to Mr Sporn and Mr Williams<sup>473</sup> stating:

‘The decision has been made that as the forklift operator Mr Pece Calovski has already been suspended from using the forklift at the workplace since the incident that Safework NSW will allow the PCBU to continue to manage the incident and not use our powers under clause 110 of the WHS Act 2011

It is an expectation that the PCBU will ensure that Mr Calovski is able to operate high risk work competently and safety (sic) prior to being allowed to use forklifts in the premises;’ and

- it considered the report provided to SafeWork NSW by Adapt-A-Lift on 25 July 2023 in response to a Notice to Give Information to SafeWork NSW issued to Adapt-A-Lift pursuant to section 155(2) of the *Work Health and Safety Act NSW* (2011) on 20 July 2023 confirmed the forklift brakes were in working order.

[299] In this regard, on 20 July 2023 Ms Afeaki sent Adapt-A-Lift a notice to give information to SafeWork NSW including:

- the names of the employees who inspected the forklift on 27 June 2023;
- a list of all tests conducted on the forklift as a part of the service and the results of each of those tests; and
- confirmation as to whether any mechanical errors were identified during the inspection that may have contributed to the incident; and
- detailed service reports and paperwork pertaining to Service Job Card (job. No 1544759).<sup>474</sup> This was the Service Job Card relating to the inspection undertaken by Adapt-A-Lift on 27 June 2023 following the incident.<sup>475</sup>

[300] Mr Harris responded to that notice by email dated 25 July 2023, enclosing the job service card completed by the technician who inspected the forklift at the Respondent's site on 27 June 2023.<sup>476</sup> In his covering email to Ms Afeaki, Mr Harris said:

“The following works were conducted:

Upon conducting the inspection on the braking system, no faults identified with the performance, related components or total operation were detected.

An additional mechanical inspection was also conducted, by dismantling the brake assemblies to check internal componentry and serviceability, all components found correct as per manufacturers specifications.

Throttle operation also inspected – found ok.”<sup>477</sup>

[301] Ms Afeaki was asked whether she believed the Applicant's account to which she responded:

“Based on the evidence before me on the day it didn't seem that it would be an accurate account of what had occurred.”<sup>478</sup>

[302] It is apparent that SafeWork NSW relied on the representations of Adapt-A-Lift who I have found did not test for water contamination which creates a high risk of soft pedal.

*What can be said about the Applicant's actions if the braking did fail due to soft pedal?*

[303] Mr Wilson made the following observations:

- the Applicant drove the forklift through a yellow and red shared pedestrian walkway at which point the forklift came to a stop after it had collided with a number of pieces of plant and equipment;
- driving a forklift through a shared pedestrian area presents a significant safety risk, there was a factory access door very close by and pedestrians walk along the marked path to get to the access door;
- the photos in the Sporn Investigation Report show the final stopping point of the forklift on the yellow and red shared pedestrian pathway.<sup>479</sup>

[304] There is no doubt that a moving forklift weighing in excess of 11 tonnes in a pedestrian area gives rise to a serious risk to safety. The Applicant said that as he was driving he pushed down on the brakes approximately two metres before where he had intended to park the forklift and when he pressed the brake it went all the way to the floor and had no resistance,<sup>480</sup> the forklift continued to move forward and he was aware that the boiler was on his left and that the forklift was going to hit something therefore he intentionally steered the forklift as straight as possible to ensure he went between the boiler and starch kitchen to minimise damage.<sup>481</sup>

[305] Given the Applicant's lengthy experience driving forklifts there is also a question around why the handbrake was not applied by the Applicant if the foot brake did not work for him. The Brennan Report indicates that the handbrake would have stopped the forklift moving forward as it activates the same set of brakes as the foot brake by a separate mechanical activation.<sup>482</sup> The reason why the Applicant did not apply the handbrake is unclear. However the measures that should have been taken in the event of brake failure in the circumstances described by the Applicant were not the subject of focus during the Respondent's investigation or the proceedings. If the brakes did fail as the Applicant claims, I am not able to conclude that the Applicant's failure to apply the handbrake in reacting to the foot brake failure would justify his dismissal.

*Was the incident the Applicant's fault or was it caused by soft pedal?*

[306] The Respondent has established that:

- the incident happened while the Applicant was driving the forklift;



- there is no evidence of effective braking;
- the brakes worked when Adapt-A-Lift tested them post incident;
- Adapt-A-Lift did not find any faults with the forklift's brakes (although it did not test for water contamination);
- the forklift was returned to service the night of the incident and no issues arose with the forklift's brakes once this happened.

[307] These factors weigh in favour of a finding on the balance of probabilities that the accident was the Applicant's fault.

[308] The Respondent has not established that:

- the forklift should have stopped or slowed so as to cause lesser damage if the brakes failed;
- the failure of the Applicant to engage the handbrake or actions otherwise taken were a valid reason for dismissal if the brakes did in fact fail.

[309] The evidence does however establish that:

- the Applicant had 25 years' experience driving forklifts;
- the Applicant was not under the influence of drugs or alcohol or otherwise observed to be impaired or driving erratically prior to the incident;
- there had been increased reliance on the forklift the subject of the incident in circumstances where one of the three grab forklifts was out of service;
- the servicing of the forklift had been delayed from February to March as a result of the increased reliance on the forklift;
- the forklift travelled approximately 10 metres between where it was parked and where it hit the first object and would have been able to reach its full speed of 10 kilometres per hour across that distance;
- upon hitting the first object there was no evidence of braking but rather, the forklift travelled a further 9 metres, hitting multiple other objects along the way, into a pedestrian zone and roller door without stopping in circumstances where the forklift should brake within 2 metres if the operator applies a working brake;
- the forklift weighs in excess of 11 tonnes and Mr Brennan's evidence is that if the brakes were not used and the Applicant was travelling at 10km per hour the forklift would be able to travel well beyond 6 metres;
- no precise measurements were taken of any of the distances that the forklift travelled during the course of the investigation and I am not satisfied that a forklift, weighing in excess of 11 tonnes, would have slowed to a stop before hitting the roller door in circumstances of brake failure, despite hitting objects along the way;
- the Respondent called Adapt-A-Lift, the entity that leases and services the forklift, to inspect the forklift post accident and it was that entity that reported that it had found no issues with the forklift;
- the Respondent interviewed the Applicant to get his full account of events after Adapt-A-Lift has inspected the forklift;

- the Adapt-A-Lift representative was not told that the Applicant had alleged soft pedal and did not test for water contamination, which creates a high risk of soft pedal if it occurs;
- the Applicant has been consistent in his account that the brake went soft (soft pedal);
- while the service history states a 4000-hour service was completed on 9 March 2023, there are anomalies in the forklift's service history including evidence suggesting that:
  - no brake oil has been changed for, with the Manual requiring use of a certain product for the brake oil change;<sup>483</sup> and
  - while wet brake drive axle oil is required to be changed<sup>484</sup> in five separate chambers of the wet brake system, requiring 25 litres in total, only 12 litres of HP GEAR OIL 80W/90 \$L (PER LITRE) is shown in the forklift's service history<sup>485</sup> and this is a lower viscosity to the oils required in the left and right side wet brakes;
- Mr Brennan acknowledged that there were a number of things he could not identify in the forklift history as being completed because they did not appear in the history and that if these had not been carried out, the cumulative effect would significantly increase the risk of brake failure, including a temporary failure;
- the forklift's history was only obtained on 10 October 2023 (after the wrong service history was provided by Adapt-A-Lift to the Respondent)<sup>486</sup> and it does not appear that the anomalies identified by Mr Brennan in the service history were identified at that time or investigated;
- it is possible that in the time between when the incident occurred and when the technician inspected the forklift, the system could have cooled down, the gas could have returned to a liquid state and if so the forklift would appear to work normally.<sup>487</sup>

**[310]** I accept that the Adpat-A-Lift inspection would have ruled out some causes of brake failure. However the Applicant has not just simply said that the brakes failed but has consistently alleged the brake pedal went soft when he went to apply it. There are specific factors that cause soft pedal and as identified by Mr Brennan, water contamination results in a high likelihood of soft pedal.

**[311]** The seriousness of the incident, in my view, warranted a more thorough investigation. The Respondent should have obtained the Applicant's account before the forklift was returned to service and, upon learning that soft pedal was alleged, it should have arranged for testing to conclusively rule out water contamination and given more careful consideration to the forklift's service history.

**[312]** The Applicant has operated forklifts and grab forklifts for approximately 25 years.<sup>488</sup> The Applicant says the incident involving the forklift was the first time in his career that he had ever had a forklift accident.<sup>489</sup> There were no concerns regarding the Applicant's performance in his role before the incident.<sup>490</sup> While this does not in itself mean that the Applicant is immune from having an accident whilst driving a forklift, it does reduce the likelihood of the Applicant making such a serious error, whether it be applying the accelerator instead of the brake or otherwise.

**[313]** I note that Mr Brennan and SafeWork NSW placed reliance on Adapt-A-Lift's findings as reflected in the Job Service Card in arriving at their findings. Adapt-A-Lift was the service provider that the Respondent called to inspect the forklift following the incident. The decision

to do so may have been an intuitive one given Adapt-A-Lift leases and services the forklifts and would have a close working knowledge of the forklift and its condition. However in circumstances where a very serious and potentially life threatening safety incident occurred, the Applicant had indicated that the incident was caused by braking failure and Adapt-A-Lift provided and serviced the forklift involved, it would have been prudent to engage an expert independent of Adapt-A-Lift to inspect the forklift.

**[314]** Having considered the evidence, two possible explanations for the incident are that:

1. the Applicant, in travelling from where he was stopped to the area where he intended to park near the boiler, failed to brake in time before hitting the first object (the blue and orange drum and bollard) and he panicked or went into a state of shock such that he did not brake at all or continued to accelerate such that the forklift kept travelling for a distance of 9 metres into the pedestrian zone and the roller door, hitting multiple objects along the way; or
2. the Applicant tried to apply the brake of a forklift that had been heavily used since its last service in March and had anomalies in its service history, the pedal went soft when he went to apply it and he was unable to brake effectively. In circumstances where he had the boiler to his left and starch room to his right, he steered the forklift down a pathway that would result in the forklift causing what he considered to be the least amount of damage.

**[315]** While it is a combination of factors that make the explanation about soft pedal plausible and it appears that the incident happened within a matter of seconds<sup>491</sup>, I consider it is no more likely that a forklift driver with 25 years' experience and who was not under the influence of drugs, alcohol or otherwise observed to be impaired, could make a combination of errors that would see him:

- apply the accelerator to move a forklift from its parked position toward the boiler for around 8 metres and then either brake late or accidentally accelerate into the first object, being the blue and orange drum; and
- then fail to brake, continue to accelerate or accidentally accelerate such that the forklift travelled a further nine metres into a pedestrian zone, hitting multiple other objects along the way, in circumstances where the forklift should have stopped within 2 metres had a working brake been applied.

**[316]** The Applicant has been consistent in his account that when he went to apply the brakes the pedal went soft and the forklift failed to brake. This consistency has persevered through the Applicant's communications with his colleagues following the incident, the Respondent's entire investigation and disciplinary process and during these proceedings. The Applicant's consistency in his explanation persevered even after he became aware that SafeWork NSW were not going to suspend or cancel his licence and he was at risk of losing his job. Prior to the incident the Applicant did not have a history of being untruthful during his employment.

**[317]** In all the circumstances and taking into account the flaws in the investigation, and the failure to undertake testing to rule out contamination, which creates a high risk of soft pedal, I

am unable to be satisfied, on the balance of probabilities, about which of these two theories caused the incident, i.e. whether it was Applicant error or whether the brake pedal went soft as consistently claimed by the Applicant.

***Did the Applicant lie***

[318] As noted above the Applicant has been consistent in his account that when he went to apply the brakes the pedal went soft and the forklift failed to brake and the Applicant did not have a history of being untruthful during his employment prior to the incident.

[319] The allegations made by the Respondent about the Applicant's conduct are serious and it bears the onus of proving that the conduct on which it relies took place. In my view there needs to be sound evidence upon which a firm finding may be made, on the balance of probabilities, that the Applicant failed to operate the grab forklift in a safe manner, causing extensive damage and creating a safety incident that could have resulted in injury and loss of life; and that he lied or was dishonest about this. For the reasons set out above I am unable to determine the cause of the incident and I cannot be satisfied that the Applicant was dishonest or untruthful. Even if some accident did occur involving error on the part of the Applicant (which I am not satisfied is the case as I do not know what caused the incident) I cannot be satisfied, based on the evidence before the Commission and on the balance of probabilities, that the Applicant was dishonest or lied during the investigation and disciplinary process.

[320] In all the circumstances, I find that there was no valid reason related to the Applicant's conduct.

***Was the Applicant notified of the valid reason?***

[321] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).<sup>492</sup>

[322] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.<sup>493</sup>

***Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?***

[323] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.<sup>494</sup>

***Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?***

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

[325] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”<sup>495</sup>

[326] It was not in contention that the Applicant was afforded the opportunity to bring a support person to discussions regarding his dismissal.<sup>496</sup>

[327] In all the circumstances, I find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal.

***Was the Applicant warned about unsatisfactory performance before the dismissal?***

[328] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

***To what degree would the size of the Respondent’s enterprise and absence of dedicated human resource management specialists or expertise in the Respondent’s enterprise be likely to impact on the procedures followed in effecting the dismissal?***

[329] In relation to s.387(f) the Applicant submitted:

- The Respondent is a large company with dedicated, experienced human resources and legal representatives and it can, and should be held to a high standard in terms of the procedures it can be expected to follow when dismissing an employee.<sup>497</sup>
- Large employers are expected to have appropriate standards of conduct when dealing with an employee’s dismissal and to follow policies and procedures.<sup>498</sup>
- Where an employer is substantial and has dedicated human resources personnel and access to legal advice, there will likely be no reason for it not to follow fair procedures.<sup>499</sup>
- To this end, the Respondent employs internal legal counsel as well as a dedicated Workplace Relations Specialist who conduct investigations into allegations of workplace misconduct.<sup>500</sup>
- The Respondent simply inferred that the Applicant was guilty of misconduct without having regard to the incident considered in its complete context.<sup>501</sup>
- The Respondent contravened its own policies by failing to provide the Applicant with all the materials and conferring him with five working days to respond to the allegations as required by the Investigation Guiding Principles.<sup>502</sup>

- The deficiencies in the procedures followed in effecting the dismissal weigh in favour of a finding that the dismissal was unfair.<sup>503</sup>

[330] The Applicant submitted that as the Respondent has dedicated human resources specialists nothing arises for consideration under s.397(g).<sup>504</sup>

[331] The Respondent is substantial, employing approximately 3,500 employees across the group,<sup>505</sup> and has dedicated human resources personnel and access to legal advice and as such there is no reason for it not to follow fair procedures.<sup>506</sup> Further, I find that the size of the Respondent's enterprise was not likely to impact on the procedures followed in effecting the dismissal.

*What other matters are relevant?*

[332] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

*Submissions*

[333] The Applicant submitted that the following matters point to the dismissal being unfair.<sup>507</sup>

- the forklift incident was an accident, whether it be due to faulty brakes, or otherwise;
- there were no pre-operational checks in place for forklifts and issues were only reported on an ad-hoc basis as they occur,<sup>508</sup> despite pre-operational checks being a requirement of SafeWork NSW and the operation of forklifts constituting high risk work;
- the Respondent failed to implement adequate barricades to protect the boiler and other equipment from being damaged;
- the forklift was almost four months' overdue for a major service (at Opal's own election) which likely contributed to the incident;
- the lack of any prior disciplinary action taken against the Applicant;
- the financial impact of the dismissal on the Applicant in the current economic climate;
- the Applicant's age and difficulty he had in obtaining alternative employment, noting he made 59 unsuccessful applications.

[334] The Applicant also submitted that:

- the Respondent had already decided just a few hours after the incident that the Applicant had engaged in the alleged conduct and did not afford the Applicant a genuine opportunity to persuade the Respondent that there were reasons not to terminate his employment,<sup>509</sup>

- a proper investigation was not carried out;<sup>510</sup>
- the Respondent did not follow the investigation guiding principles in its enterprise agreement which require five business days to respond.<sup>511</sup> In this regard the Applicant submitted that:
  - he was required to show cause as to why his employment should not be terminated by 13 October 2023;
  - he had all the materials by 12 October 2023 including the forklift servicing history (which was just under 20 pages and the forklift service manual) which is over 100 pages;
  - he was supposed to have these materials by no later than 6 October 2023;
  - he only had a day to review the materials and then provide a response and this was a clear breach of the investigation guiding principles and was procedurally unfair;<sup>512</sup>
- even if the Commission was to find the Investigation Guiding Principles don't apply, the Respondent was nonetheless required to provide full disclosure in accordance with the principles of justice, which would entail having sufficient time to review those materials and respond.<sup>513</sup>

[335] The Respondent submitted that:

- the Applicant's submissions in relation to procedural fairness are without merit;
- the requirements of procedural fairness are that a person who may be adversely affected by a decision be informed of the case against them and be given a reasonable opportunity to answer it;
- the Applicant was on notice for three months of the allegations and was given repeated opportunities to respond;<sup>514</sup>
- in any event any issue or issues of procedural fairness may not be of such significance as to outweigh the substantive reason/s for an employee's dismissal, particularly in cases of misconduct where the proven misconduct is of such a gravity as to outweigh any other considerations such as age, length of service, contrition and issues of procedural unfairness generally.

[336] In closing oral submissions, the Applicant submitted that:

- it was unfair and cruel that the Applicant was employed between 27 June 2023 and 3 October 2023 before receiving the show cause letter to respond to;<sup>515</sup>
- Mr Ibrahim-Elgarhy's explanation of the reason for the delay (being that he was waiting on the GIPA application outcome) was a farce because given the Respondent had a

seven or eight year commercial relationship with Adapt-A-Lift, he could have sought the records directly from Adapt-A-Lift;<sup>516</sup>

- if Mr Ibrahim-Elgarhy genuinely considered that the incident needed to be dealt with swiftly and warranted termination, he wouldn't have allowed Mr Calovski to work for three and a half months, and he expressly conceded that if Mr Calovski simply accepted his version of events, he could have had his job back.<sup>517</sup>

[337] The Respondent noted in closing submissions that the evidence of Mr Ibrahim-Elgarhy was that if there had been a request to extend time he would have done so, he had done so in the past, and there was no such request.<sup>518</sup>

[338] Procedural fairness is one factor that the Commission may take into consideration when deciding if a dismissal has been harsh, unjust or unreasonable. It concerns the decision-making process followed or steps taken by a decision maker, rather than the actual decision itself.

[339] In the context of administrative decision-making, the rules of natural justice are flexible and require fairness in all the circumstances, including the nature of the power exercised and the statutory provisions governing its exercise.<sup>519</sup> Ordinarily, procedural fairness requires that an allegation be put to a person and they be given an opportunity to answer it before a decision is made.<sup>520</sup>

[340] I consider that the matters below are relevant to my consideration of whether the dismissal was harsh, unjust or unreasonable.

[341] While it is apparent that some of the employees of the Respondent including Mr Conway appeared to have formed the early belief that the Applicant had applied the accelerator instead of the brake, I am not satisfied that the decision maker Mr Ibrahim-Elgarhy rushed to any conclusions because the Applicant's employment did in fact continue for over three months post-incident and Mr Ibrahim-Elgarhy took the additional step of seeking to access the service history records for the forklift. While he could have requested the service history records from Adapt-A-Lift at an earlier stage he did not do so and instead directed that the GIPA application be made before he arrived at his decision. It seems likely that he considered that the forklift's service history may have also been a relevant factor in making the decision about the Applicant's employment and had sought to understand whether SafeWork NSW had relied on service history in deciding upon its outcome. Mr Ibrahim-Elgarhy's evidence was that he assumed SafeWork NSW had a copy at the time of the GIPA application but this assumption was incorrect.

[342] Mr Sayan's evidence was that at the meeting on 4 July 2023 between the Applicant, Mr Sayan, Mr Conway and Michael Kenny (Quality Assurance Manager) he requested a copy of the forklift service history records and asked whether Adapt-A-Life was independent in conducting the assessment given it was responsible for servicing the forklift.<sup>521</sup> On 3 October 2023 Mr Sayan also attended a meeting with the Applicant, Mr Conway and Mat Wilmore, during which the Applicant was provided with a letter containing allegations of misconduct and was requested to attend a meeting on 5 October 2023.<sup>522</sup> Mr Sayan requested that the Applicant be given an extension until 10 October 2023 to respond as the Applicant did not have the service records.<sup>523</sup> At approximately 7.30am on 10 October 2023 Mr Conway advised Mr Sayan that



he had sent the service records and queried whether he still wished to have the meeting with the Applicant at 2pm, noting that not much notice had been given since the records were sent and Mr Sayan confirmed that he still wished for the meeting to proceed.

[343] In that meeting of 10 October 2023 Mr Sayan raised that the serial number on the service history records provided did not match the serial number of the forklift provided to SafeWork NSW.<sup>524</sup> Service history records for the wrong forklift had been provided, Mr Conway obtained a copy of the correct service records and on 11 October 2023 sent an email to Mr Sayan and Mr Wilmore enclosing these records.<sup>525</sup>

[344] On 11 October 2023 another meeting was held between the Applicant, Mr Sayan, Mr Wilmore and Mr Ibrahim-Elgarhy.<sup>526</sup> The following morning Mr Sayan requested a copy of the service manual for the forklift and a copy of the Respondent's Incident Report.<sup>527</sup> Mr Ibrahim-Elgarhy indicated during cross examination that while he was unsure of the exact date he believed that the forklift manual was provided on 12 October 2023.<sup>528</sup>

[345] On 13 October 2023 another meeting took place between the Applicant, Mr Sayan, Mr Wilmore and Mr Ibrahim-Elgarhy in which the Applicant provided his response to the allegations. On 18 October 2023 another meeting took place between the Applicant, Mr Sayan, Mr Ibrahim-Elgarhy and 'Sveto'.<sup>529</sup> On 19 October 2023 a meeting took place between the Applicant, Mr Sayan, Mr Wilmore and Mr Ibrahim-Elgarhy in which the Applicant was provided with a letter notifying him of the termination of his employment.<sup>530</sup>

[346] It is apparent that the meeting of 13 October 2023 was the primary meeting in which the Applicant was provided with an opportunity to respond to the allegations made against him. I accept that a request to move this meeting could have been made by the Applicant and was not however he had no guarantee such a request would have again been granted and it is apparent that within the very limited time between receiving the correct service history records on 11 October 2023 and the forklift manual on 12 October 2023 the Applicant made a very serious attempt to respond to the allegations in his letter of 13 October 2023 in a way that explored whether the new material he had been given supported his account of what had occurred. However in my view, the delay between when Mr Sayan first asked for the service history records (being 4 July 2023) and when they were ultimately provided, being 11 October 2023 is unreasonable. This information was, in my view, of importance in understanding whether the Applicant's account of what had occurred was a plausible explanation for the incident. The Applicant is not a forklift technician and had he received that information earlier, he may have been able to give it closer consideration in putting his case to the Respondent that his employment should not be terminated. Once the service history was in the hands of the Applicant and the Applicant raised concerns about it, there is no evidence that the Respondent looked into these concerns in any meaningful way before making the decision to dismiss him and the Brennan Report authored post the Applicant's dismissal did in fact identify anomalies in the service history records.

[347] More fundamentally, the Applicant had explained to the Respondent what he believed to be the cause of the incident, i.e. that the pedal went soft. There are known causes of soft pedal. It was within the Respondent's means and control to undertake an investigation into what was accepted by both parties to be a very serious safety incident and rule out the known causes of soft pedal and I have earlier found that the Respondent's investigation was deficient in this

regard. The entity that provides and services the Respondent's forklifts was called out, it assessed its own forklift that it had serviced as being free from faults and it did not test for a cause of soft pedal. The accident site was cleared and the forklift was returned to service that night. The Respondent's approach in response to the incident means that it has lost the opportunity to know the probable cause of the incident and has meant that the Applicant's account was not fully explored before being dismissed as a lie.

[348] The above factors are regrettable and weigh in favour of a finding that the dismissal was harsh.

*Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?*

[349] I have made findings in relation to each matter specified in s.387 as relevant.

[350] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>531</sup>

[351] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of the Applicant was harsh and unreasonable because the Respondent has not established that it has a valid reason for the dismissal, the forklift's service history records sought by Mr Sayan on behalf of the Applicant should have been provided sooner and the Applicant's account of the cause of the incident (being soft pedal) should have been properly investigated and there were deficiencies in this regard.

## **Conclusion**

[352] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the FW Act.

## **Remedy**

[353] Being satisfied that the Applicant:

- made an application for an order granting a remedy under s.394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[354] Under s.390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

- (a) I am satisfied that reinstatement of the Applicant is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

***Is reinstatement of the Applicant inappropriate?***

[355] While the Applicant's application indicates that he seeks reinstatement and/or compensation,<sup>532</sup> I understand that reinstatement is the Applicant's preferred remedy. In particular, the Applicant submitted, by way of summary that he seeks reinstatement with orders for continuity of service and restoration of lost pay<sup>533</sup> and that the following factors make reinstatement appropriate:

- the Applicant was a hard-working, loyal and diligent employee;
- the Applicant has no history of any prior disciplinary or safety issues at the Respondent or otherwise throughout his employment history;
- the Respondent is well able to accommodate the Applicant's reinstatement;
- there can be no sensible suggestion that the relationship of trust and confidence between the Applicant and Respondent has broken down such that the employment relationship cannot be re-established, particularly noting the Applicant continued to work for three and a half months between the date of the incident on 27 June 2023 and his suspension on 11 October 2023;
- reinstatement is the primary remedy.<sup>534</sup>

[356] The Respondent submitted during closing submissions that while employees have a duty to be truthful generally, in relation to safety breaches they have a particular duty to be truthful. The Respondent says it does not believe the Applicant, it continues not to believe him upon hearing the evidence, there is a breach of trust and reinstatement is impracticable.<sup>535</sup> The Respondent submits that in these circumstances it cannot be argued that it is safe for the Respondent to have the Applicant back in the workplace.<sup>536</sup> The Respondent referred to the findings of the Full Bench in *Parlamat* that:

“Employers have important statutory obligations to maintain a safe place of work. Those obligations have a high profile in NSW. Establishing and enforcing safety rules are an important obligation, a breach of which can lead to serious consequences...Clearly disciplinary action was necessary and appropriate because a failure to do so sends a message to the workforce that safety breaches can occur with impunity.”<sup>537</sup>

[357] The Applicant's evidence was that Mr Thornton was his direct supervisor and that Mr Thornton left the business shortly after the incident and was not replaced.<sup>538</sup> While Mr Thornton reported to Mr Conway, the Applicant said that he only occasionally received instructions from Mr Conway and neither Mr Ibrahim-Elgarhy, Mr Sporl nor Mr Wilson ever directed him to perform duties.<sup>539</sup> The Applicant also submitted that it was not clear that Mr Conway's evidence (that he did not believe the Applicant) was relevant to the issue of trust and confidence in that he was not his immediate supervisor. In this respect the Applicant referred to the statement of Gray J in *AMIEU v G&K O'Connor Pty Ltd* that:

“The law relating to the need for trust and confidence in an employment relationship was developed at a time when employment invariably involved a close personal relationship between employer and employee. The advent of corporate employers has diminished the importance of this element of the employment relationship. A corporation has no sensitivity. The crucial question must be what effect, if any, loss of trust by a manager in an employee is likely to have on the operation of the workplace concerned. It might be more significant, for instance, to know the name of Mr Voss’s immediate supervisor and to know the attitude of that person towards him. If the immediate supervisor had no trust in Mr Voss, it might also be relevant to know whether it would be possible to place Mr Voss in another part of the workplace, under another supervisor, who did have such trust. It would also be relevant to know what effect any lack of trust by any manager or supervisor in a particular employee might have on the conduct of operations in the workplace. There is no evidence as to any of these matters”.<sup>540</sup>

[358] The Applicant submitted that:

- the Respondent’s reluctance to shift from its view (that the Applicant caused the incident and lied about it) or the fact that it may be difficult or embarrassing for the Respondent to be required to re-employ the Applicant does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed;
- the employment relationship can plainly be restored and made viable and productive;
- the Respondent has not discharged its evidential onus of showing there has been a breakdown of trust and confidence.

[359] Part 3-2 of the FW Act deals with unfair dismissal. Section 381(1)(c) of the FW Act provides that one of the objects of Part 3-2 is to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement. Section 381(2) provides that the procedures and remedies referred to in paragraphs 1(b) and (c) of the FW Act and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.

[360] In *Nguyen v Vietnamese Community in Australia T/A Vietnamese Community Ethnic School South Australia Chapter*<sup>541</sup> a Full Bench of the Commission summarised the propositions arising from the decided cases concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.<sup>542</sup>
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.<sup>543</sup>

- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.<sup>544</sup>
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.<sup>545</sup>
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate<sup>546</sup>

**[361]** The Full Bench went on to say:

“Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party.”<sup>547</sup>

**[362]** A difficulty arises in this matter in that two competing accounts have been put forward in relation to the incident's causation and I am unable to be satisfied as to which cause is the most likely account on the balance of probabilities. No valid reason was found in this matter because the Respondent bears the onus in establishing there was a valid reason due to the Applicant's conduct. There was another explanation (soft pedal) that, in all the circumstances, was no less plausible than the Respondent's belief that the incident was the Applicant's fault and the Applicant's explanation about what had happened was not properly investigated.

**[363]** While I could not be satisfied on the balance of probabilities that the incident was the Applicant's fault, there is a potential that an error has been made involving a serious safety incident. It is trite to say that sometimes people make errors in the course of their employment and it does not necessarily mean that they should not continue in their role in all circumstances. However the Applicant is involved in high risk work and if the cause of the incident was operator error, which is unknown, the error was significant and could have had significant consequences. Had it been found that the cause of the incident was attributable to the Applicant and that he had lied, it is likely that the outcome of this matter would have been very different.

**[364]** The inability to be satisfied about the cause of the incident is attributable to the deficiencies in the Respondent's investigation post-incident. The forklift was not tested for contamination (a known cause of soft pedal) and the deficiencies in the investigation cannot now be corrected.

**[365]** In circumstances where the Respondent believes that the incident was the Applicant's fault some tension will likely arise because health and safety considerations must be taken seriously and as per the expectations communicated by SafeWork NSW, the Respondent will need to have confidence that the Applicant is able to competently and safely operate a forklift

if it is to allow him to operate them in the future.<sup>548</sup> The Applicant said that he only occasionally received instructions from Mr Conway and neither Mr Ibrahim-Elgarhy, Mr Sporn nor Mr Wilson ever directed him to perform duties<sup>549</sup> and challenged the relevance of evidence of those who were not his immediate supervisor to the issue of trust and confidence. However in circumstances where work health and safety considerations arise and where the Respondent's management employees have an interest in how the Respondent meets its obligations, I consider the perspectives of the Respondent's management employees to be relevant in an assessment of whether there is a loss of trust and confidence in an employment relationship, notwithstanding that these individuals may not be the Applicant's direct supervisor.

**[366]** There are however a number of factors that suggest reinstatement is not inappropriate. Firstly, the Applicant continued to work for a period of three and a half months post incident without issue, albeit in a capacity that did not involve forklift operation. The Respondent has never suggested that the incident in itself was a deliberate act however Mr Ibrahim-Elgarhy's evidence was that he wanted the Applicant to take responsibility for the incident, that this was very important in his capacity as decision maker, that he was disappointed that the Applicant did not, in his view, accept responsibility and if the Applicant had told him what he believed to be the correct version of events there may have been an alternative option to dismissal.<sup>550</sup> It seems likely that the reason that the Applicant was ultimately dismissed was not because of the incident itself but because the Respondent believed that he had lied about the cause of it. In closing submissions the Respondent confirmed that the basis upon which it says reinstatement would be inappropriate was because the Applicant lied.<sup>551</sup> The difficulty with the belief held by the Respondent is that it didn't undertake testing to rule out a known cause of what the Applicant said had caused the incident. Without properly investigating to rule out the factors that cause soft pedal, I do not consider that the Respondent's belief that the Applicant lied was soundly based. Prior to the incident, there were no disciplinary or performance issues arising during the Applicant's employment. The Applicant's evidence is that he has 25 years of experience in driving forklifts and he says this is the only incident he has been involved in and if the incident was an accident, it seems unlikely that an accident of such a gravity could happen again.

**[367]** Further, SafeWork NSW communicated the following outcome via email dated 19 July 2023 to Mr Sporn and Mr Williams<sup>552</sup> stating:

“... The decision has been made that as the forklift operator Mr Pece Calovski has already been suspended from using the forklift at the workplace since the incident that Safework NSW will allow the PCBU to continue to manage the incident and not use our powers under clause 110 of the WHS Act 2011

It is an expectation that the PCBU will ensure that Mr Calovski is able to operate high risk work competently and safety (sic) prior to being allowed to use forklifts in the premises...”

**[368]** SafeWork NSW did not however consider it necessary to suspend or cancel the Applicant's forklift licence and the statement above contemplates that the Applicant may return to driving forklifts. In circumstances where the Applicant continues to hold a licence, if he is not driving forklifts for the Respondent, he will be doing so somewhere else as he is in the casual position secured after his dismissal.

[369] The Applicant’s role immediately before his dismissal was the role of a corrugator floater that involved performing various tasks including driving forklifts and working on a cardboard stacker.<sup>553</sup> While the Respondent will need to take steps to meet the expectation of SafeWork NSW to “ensure that Mr Calovski is able to operate high risk work competently and safety (sic) prior to being allowed to use forklifts in the premises...”, it seems likely the Respondent will be able to meet this expectation in circumstances where the Applicant is an experienced forklift driver who did not have a history of safety or performance issues prior to the incident. The Applicant accepted that the incident was serious<sup>554</sup> and indicated that even though he believed the brakes did not work he has always accepted that it was his responsibility for the incident as the driver, that he has tried to think about what he could have done to avoid the incident and has felt terrible about it ever since.<sup>555</sup> While he said the brake of the forklift went soft, it appears he is nevertheless open to drawing learnings from the incident. The Applicant also gave evidence that he loved his job, was keen to return to it and I do not consider that the viability of the employment relationship has been destroyed.

[370] The Applicant’s evidence is that he applied for 58 jobs and was unsuccessful in those applications.<sup>556</sup> On 18 December 2023 the Applicant did however commence employment as a casual forklift driver<sup>557</sup> and while it appears that his employment in this role is fairly regular<sup>558</sup> it is not guaranteed work<sup>559</sup> and he has submitted this results in some variation in his earnings.

[371] Having regard to the matters referred to above, I consider that reinstatement is not inappropriate.

***Reinstatement – to what position should the Applicant be appointed?***

[372] Section 391(1) of the FW Act provides that an order for the Applicant’s reinstatement must be an order that the Applicant’s employer at the time of the dismissal reinstate the Applicant by:

- (a) reappointing the Applicant to the position in which the Applicant was employed immediately before the dismissal; or
- (b) appointing the Applicant to another position on terms and conditions no less favourable than those on which the Applicant was employed immediately before the dismissal.

[373] Section 391(2) of the FW Act provides that, if:

- (a) the position in which the Applicant was employed immediately before the dismissal is no longer a position with the Applicant’s employer (as at the time of dismissal); and
- (b) that position, or an equivalent position, is a position with an associated entity of the employer,

the order for reinstatement may be an order to the associated entity to:

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

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

**[374]** As noted above, while the Respondent will need to take steps to meet the expectation of SafeWork NSW to “ensure that Mr Calovski is able to operate high risk work competently and safety (sic) prior to being allowed to use forklifts in the premises...” the Applicant has 25 years’ experience in driving forklifts and there is no evidence to suggest that it will not be able to do so or that the Applicant will not work cooperatively with it in meeting this expectation. I am satisfied that it is open to me to make an order reappointing the Applicant within 21 days of the date of this decision to the position in which he was employed immediately before the dismissal.

***Reinstatement - is it appropriate to make an order to maintain continuity?***

**[375]** Section 391(2) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to maintain the following:

- (a) the continuity of the Applicant’s employment;
- (b) the period of the Applicant’s continuous service with the employer or, if applicable, the associated entity.

**[376]** In all the circumstances, including that I am not satisfied that the forklift incident was the Applicant’s fault or that the Applicant engaged in misconduct, I consider it appropriate to make an order to maintain the Applicant’s continuity of employment and period of continuous service with the employer.

***Reinstatement - is it appropriate to make an order to restore lost pay?***

**[377]** Section 391(3) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to cause the employer to pay to the Applicant an amount for the remuneration lost, or likely to have been lost, by the Applicant because of the dismissal.

**[378]** Section 391(4) of the FW Act provides that, in determining an amount for the purposes of such an order, the Commission must take into account:

- (a) the amount of any remuneration earned by the Applicant 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 Applicant during the period between the making of the order for reinstatement and the actual reinstatement.

**[379]** An order to restore lost pay does not necessarily follow an order for reinstatement. The Commission may only make an order if it considers it appropriate to do so and may only make



an order that the Commission considers appropriate.<sup>560</sup> Where an employee has engaged in misconduct, the Commission may refuse to make any order to restore lost pay.<sup>561</sup>

[380] The Applicant submits that lost pay should be restored and the only amounts that should be deducted are the payment to the Applicant in lieu of notice and any income earned by the Applicant between the date of termination and the date of the orders.

[381] I have earlier found that I am not satisfied that the forklift incident was the Applicant's fault or that the Applicant engaged in misconduct. The Applicant's evidence is that he had applied for 58 jobs and was unsuccessful in those applications.<sup>562</sup> Notwithstanding this the Applicant has been able secure casual employment at the rate of \$31.73 per hour.<sup>563</sup> This compares to a base weekly wage of \$1,528.55 paid by the Respondent (being \$43.67 over a 35 hour week) resulting in a gap of \$11.94 per hour between the Applicant's former and current rates of pay.<sup>564</sup> Notwithstanding the different in rates and mode of employment I am satisfied that the Applicant has taken steps to mitigate his loss. Having regard to these matters I consider it appropriate to make an order that the Respondent pay to the Applicant the amount that the Applicant would have earned in the period between his dismissal and the date of his reinstatement less the notice paid on termination and income earned since the time of his dismissal.

[382] The Applicant proposed that the Commission make orders requiring that:

1. the parties confer in relation to quantum and advise the Commission's chambers whether the amount payable is agreed within two weeks from the date of the orders (noting that there is inherent uncertainty as to the Applicant's future earnings given his current casual role, and the amounts he may earn will likely vary as they have done over his period of employment);
2. if the calculation of the amount payable is agreed, the Respondent must pay the amount to the Applicant within three weeks from the date of the order; and
3. if the calculation of the amount payable is not agreed, the matter will be listed for directions to program the matter for determination of the quantum.

[383] I consider that it is appropriate to make orders of the nature proposed by the Applicant. If the parties are unable to reach agreement on the quantum to be paid I will list the matter for determination of the amount to be paid.



COMMISSIONER

*Appearances:*

Mr *J Martin* of the AMWU on behalf of the Applicant.  
Mr *I Latham* instructed by Ai Group on behalf of the Respondent.

*Hearing details:*

2024.  
Sydney.  
January 29 and 30.

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<sup>1</sup> Application filed 26 October 2023 at question 2.1.

<sup>2</sup> Application filed 26 October 2023, Attachment A.

<sup>3</sup> Application filed 26 October 2023, Attachment A.

<sup>4</sup> Application filed 26 October 2023, Attachment B.

<sup>5</sup> Application filed 26 October 2023, Attachment C.

<sup>6</sup> Application filed 26 October 2023, Attachment D.

<sup>7</sup> Application filed 26 October 2023, Attachment D.

<sup>8</sup> *Warrell v Fair Work Australia* [2013] FCA 291.

<sup>9</sup> *Ibid.*

<sup>10</sup> Statement of Todd John Brennan dated 10 January 202 at [8].

<sup>11</sup> Statement of Todd John Brennan dated 10 January 202 at [8].

<sup>12</sup> Statement of Todd John Brennan dated 10 January 2024, TJB1.

<sup>13</sup> Statement of Todd John Brennan dated 10 January 202 at [4].

<sup>14</sup> Brennan Report, part 2.

<sup>15</sup> Brennan Report, part 5.

<sup>16</sup> *Sayer v Melsteel Pty Ltd* [\[2011\] FWAFB 7498](#), [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

<sup>17</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

<sup>20</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7].

<sup>21</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

<sup>22</sup> Applicant's Outline of Submissions filed 22 December 2023 at [24].

<sup>23</sup> Applicant's Outline of Submissions filed 22 December 2023 at [22].

<sup>24</sup> Applicant's Outline of Submissions filed 22 December 2023 at [25].

<sup>25</sup> Transcript of proceedings, 30 January 2024 at PN 1909.

<sup>26</sup> Transcript of proceedings, 30 January 2024 at PN 1910.

<sup>27</sup> Transcript of proceedings, 30 January 2024 at PN 1926.

<sup>28</sup> Transcript of proceedings, 30 January 2024 at PN 1912.

<sup>29</sup> Transcript of proceedings, 30 January 2024 at PN 1909.

<sup>30</sup> Transcript of proceedings, 30 January 2024 at PN 1941.

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- <sup>31</sup> Transcript of proceedings, 30 January 2024 at PN 1914.
- <sup>32</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [26].
- <sup>33</sup> Transcript of proceedings, 30 January 2024 at PN 1938.
- <sup>34</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [26].
- <sup>35</sup> Transcript of proceedings, 30 January 2024 at PN 1910.
- <sup>36</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [29].
- <sup>37</sup> Transcript of proceedings, 30 January 2024 at PN 1935.
- <sup>38</sup> Respondent’s Outline of Argument filed 15 January 2024 at [3].
- <sup>39</sup> Respondent’s Outline of Argument filed 15 January 2024 at [4].
- <sup>40</sup> Respondent’s Outline of Argument filed 15 January 2024 at [6].
- <sup>41</sup> Respondent’s Outline of Argument filed 15 January 2024 at [7].
- <sup>42</sup> Respondent’s Outline of Argument filed 15 January 2024 at [6].
- <sup>43</sup> Respondent’s Outline of Argument filed 15 January 2024 at [11].
- <sup>44</sup> Transcript of proceedings, 30 January 2024 at PN 1979.
- <sup>45</sup> Transcript of proceedings, 30 January 2024 at PN 1980.
- <sup>46</sup> Transcript of proceedings, 30 January 2024 at PN 1981.
- <sup>47</sup> Transcript of proceedings, 30 January 2024 at PN 1981.
- <sup>48</sup> Respondent’s Outline of Argument filed 15 January 2024 at [23].
- <sup>49</sup> Transcript of proceedings, 30 January 2024 at PN 1984.
- <sup>50</sup> Respondent’s Outline of Argument filed 15 January 2024 at [24].
- <sup>51</sup> Transcript of proceedings, 30 January 2024 at PN 1993.
- <sup>52</sup> Transcript of proceedings, 30 January 2024 at PN 1995.
- <sup>53</sup> Transcript of proceedings, 30 January 2024 at PN 1986.
- <sup>54</sup> Transcript of proceedings, 30 January 2024 at PN 1954.
- <sup>55</sup> Transcript of proceedings, 30 January 2024 at PN 1954.
- <sup>56</sup> Respondent’s Outline of Argument filed 15 January 2024 at [25] with reference to *Rankin v Marine Power International Pty Ltd* 107 IR 117 at [330] – [340].
- <sup>57</sup> Respondent’s Outline of Argument filed 15 January 2024 at [26].
- <sup>58</sup> Respondent’s Outline of Argument filed 15 January 2024 at [26].
- <sup>59</sup> Respondent’s Outline of Argument filed 15 January 2024 at [27].
- <sup>60</sup> Respondent’s Outline of Argument filed 15 January 2024 at [28].
- <sup>61</sup> Respondent’s Outline of Argument filed 15 January 2024 at [29].
- <sup>62</sup> Applicant’s Outline of Submissions in Reply at [23].
- <sup>63</sup> Applicant’s Outline of Submissions in Reply at [24].
- <sup>64</sup> Statement of Applicant dated 22 December 2023 at [4].
- <sup>65</sup> Statement of Applicant dated 22 December 2023 at [26].
- <sup>66</sup> Statement of Applicant dated 22 December 2023 at [2] – [4].
- <sup>67</sup> Statement of Applicant dated 22 December 2023 at [5].
- <sup>68</sup> Transcript of proceedings, 30 January 2023, PN 1636.
- <sup>69</sup> Transcript of proceedings, 30 January 2023, PN 1637 - 1640.
- <sup>70</sup> Statement of Applicant dated 22 December 2023 at [19].
- <sup>71</sup> Brennan Report, part 9.41(h).
- <sup>72</sup> Statement of Applicant dated 22 December 2023 at [6].
- <sup>73</sup> Statement of Rod Harris dated 11 January 2024 at [7] – [8].

- <sup>74</sup> Statement of Rod Harris dated 11 January 2024 at [3].
- <sup>75</sup> Statement of Rod Harris dated 11 January 2024 at [3].
- <sup>76</sup> Transcript of Proceedings, 30 January 2024, PN 1321.
- <sup>77</sup> Statement of Rod Harris dated 11 January 2024 at [11].
- <sup>78</sup> Statement of Rod Harris dated 11 January 2024 at [12] – [13].
- <sup>79</sup> Statement of Rod Harris dated 11 January 2024, RH1.
- <sup>80</sup> Statement of Rod Harris dated 11 January 2024 at [15].
- <sup>81</sup> Statement of Rod Harris dated 11 January 2024, RH2.
- <sup>82</sup> Statement of Rod Harris dated 11 January 2024 at [17] – [18].
- <sup>83</sup> Transcript of Proceedings 30 January 2024 at PN1335.
- <sup>84</sup> Transcript of Proceedings 30 January 2024 at PNs1337 – 1350.
- <sup>85</sup> Transcript of Proceedings 30 January 2024 at PN1355.
- <sup>86</sup> Transcript of Proceedings 30 January 2024 at PN1357-1358.
- <sup>87</sup> Statement of Rod Harris dated 11 January 2024 at [30].
- <sup>88</sup> Brennan Report, part 9.3.
- <sup>89</sup> Brennan Report, part 9.4.
- <sup>90</sup> Brennan Report, part 9.5.
- <sup>91</sup> Brennan Report, part 9.6.
- <sup>92</sup> Brennan Report, part 9.7.
- <sup>93</sup> Brennan Report, part 9.9.
- <sup>94</sup> Brennan Report, part 9.10.
- <sup>95</sup> Brennan Report, part 9.14.
- <sup>96</sup> Brennan Report, part 9.14.
- <sup>97</sup> Brennan Report, part 9.14.
- <sup>98</sup> Brennan Report, part 9.15.
- <sup>99</sup> Brennan Report, part 9.17.
- <sup>100</sup> Brennan Report, part 9.16.
- <sup>101</sup> Brennan Report, part 9.19.
- <sup>102</sup> Brennan Report, part 9.19.
- <sup>103</sup> Brennan Report, part 9.19.
- <sup>104</sup> Brennan Report, part 9.20.
- <sup>105</sup> Brennan Report, part 9.21.
- <sup>106</sup> Brennan Report, part 9.22.
- <sup>107</sup> Brennan Report, part 9.25.
- <sup>108</sup> Brennan Report, part 9.29.
- <sup>109</sup> Transcript of Proceedings, 30 January 2024, PNs 1497 – 1500.
- <sup>110</sup> Transcript of Proceedings, 30 January 2024, PNs 1501 - 1505.
- <sup>111</sup> Transcript of Proceedings, 30 January 2024, PNs 1507 - 1508.
- <sup>112</sup> Statement of Applicant dated 22 December 2023, PC-4.
- <sup>113</sup> Statement of Applicant dated 22 December 2023 at [7].
- <sup>114</sup> Statement of Applicant dated 22 December 2023 at [8].
- <sup>115</sup> Statement of Applicant dated 22 December 2023 at [10].
- <sup>116</sup> Statement of Applicant dated 22 December 2023 at [10].
- <sup>117</sup> Statement of Applicant dated 22 December 2023 at [11].

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- <sup>118</sup> Statement of Applicant dated 22 December 2023 at [11].
- <sup>119</sup> Statement of Applicant dated 22 December 2023 at [11].
- <sup>120</sup> Statement of Applicant dated 22 December 2023 at [12].
- <sup>121</sup> Statement of Applicant dated 22 December 2023 at [12].
- <sup>122</sup> Statement of Applicant dated 22 December 2023 at [13].
- <sup>123</sup> Statement of Applicant dated 22 December 2023 at [14].
- <sup>124</sup> Statement of Applicant dated 22 December 2023 at [14].
- <sup>125</sup> Statement of Applicant dated 22 December 2023 at [14].
- <sup>126</sup> Statement of Applicant dated 22 December 2023 at [16].
- <sup>127</sup> Statement of Applicant dated 22 December 2023 at [16].
- <sup>128</sup> Statement of Applicant dated 22 December 2023 at [17].
- <sup>129</sup> Statement of Applicant dated 22 December 2023 at [17].
- <sup>130</sup> Statement of Applicant dated 22 December 2023 at [18].
- <sup>131</sup> Statement of Applicant dated 22 December 2023 at [20].
- <sup>132</sup> Statement of Applicant dated 22 December 2023 at [22].
- <sup>133</sup> Statement of Applicant dated 22 December 2023 at [22].
- <sup>134</sup> Statement of Applicant dated 22 December 2023 at [19].
- <sup>135</sup> Statement of Applicant dated 22 December 2023 at [21].
- <sup>136</sup> Statement of Applicant dated 22 December 2023 at [21].
- <sup>137</sup> Statement of Applicant dated 22 December 2023 at [24].
- <sup>138</sup> Statement of Applicant dated 22 December 2023 at [25].
- <sup>139</sup> Statement of Adam Williams dated 22 December 2023 at [1] – [2].
- <sup>140</sup> Statement of Adam Williams dated 22 December 2023 at [4].
- <sup>141</sup> Statement of Adam Williams dated 22 December 2023 at [5].
- <sup>142</sup> Statement of Adam Williams dated 22 December 2023 at [5].
- <sup>143</sup> Statement of Adam Williams dated 22 December 2023 at [6].
- <sup>144</sup> Statement of Adam Williams dated 22 December 2023 at [6].
- <sup>145</sup> Statement of Adam Williams dated 22 December 2023 at [6].
- <sup>146</sup> Statement of Adam Williams dated 22 December 2023 at [6].
- <sup>147</sup> Statement of Adam Williams dated 22 December 2023 at [6].
- <sup>148</sup> Statement of Adam Williams dated 22 December 2023 at [7].
- <sup>149</sup> Statement of Adam Williams dated 22 December 2023 at [7].
- <sup>150</sup> Transcript of Proceedings 29 January 2024 at PN395.
- <sup>151</sup> Statement of Adam Williams dated 22 December 2023 at [8].
- <sup>152</sup> Statement of Adam Williams dated 22 December 2023 at [8].
- <sup>153</sup> Statement of Adam Williams dated 22 December 2023 at [9].
- <sup>154</sup> Statement of Adam Williams dated 22 December 2023 at [9].
- <sup>155</sup> Statement of Adam Williams dated 22 December 2023 at [10].
- <sup>156</sup> Statement of Adam Williams dated 22 December 2023 at [10].
- <sup>157</sup> Statement of Adam Williams dated 22 December 2023 at [11].
- <sup>158</sup> Transcript of Proceedings 29 January 2024 at PNs 398 - 404.
- <sup>159</sup> Transcript of Proceedings 29 January 2024 at PN 405.
- <sup>160</sup> Statement of Rajic Deo dated 22 December 2023.
- <sup>161</sup> Statement of Rajic Deo dated 22 December 2023 at [3] – [4].

- <sup>162</sup> Statement of Rajic Deo dated 22 December 2023 at [4].
- <sup>163</sup> Statement of Rajic Deo dated 22 December 2023 at [4].
- <sup>164</sup> Statement of Rajic Deo dated 22 December 2023 at [4].
- <sup>165</sup> Statement of Rajic Deo dated 22 December 2023 at [4].
- <sup>166</sup> Statement of Rajic Deo dated 22 December 2023 at [5].
- <sup>167</sup> Statement of Rajic Deo dated 22 December 2023 at [6].
- <sup>168</sup> Statement of Rajic Deo dated 22 December 2023 at [7].
- <sup>169</sup> Statement of Rajic Deo dated 22 December 2023 at [7].
- <sup>170</sup> Statement of Rajic Deo dated 22 December 2023 at [10].
- <sup>171</sup> Statement of Rajic Deo dated 22 December 2023 at [8].
- <sup>172</sup> Statement of Rajic Deo dated 22 December 2023 at [8].
- <sup>173</sup> Statement of Rajic Deo dated 22 December 2023 at [8].
- <sup>174</sup> Statement of Rajic Deo dated 22 December 2023 at [9].
- <sup>175</sup> Statement of Rajic Deo dated 22 December 2023 at [9].
- <sup>176</sup> Statement of Rajic Deo dated 22 December 2023 at [9].
- <sup>177</sup> Statement of Feng Li dated 22 December 2023 at [1] – [3].
- <sup>178</sup> Statement of Feng Li dated 22 December 2023 at [3].
- <sup>179</sup> Statement of Feng Li dated 22 December 2023 at [3].
- <sup>180</sup> Statement of Feng Li dated 22 December 2023 at [3].
- <sup>181</sup> Statement of Feng Li dated 22 December 2023 at [4].
- <sup>182</sup> Statement of Feng Li dated 22 December 2023 at [4].
- <sup>183</sup> Statement of Feng Li dated 22 December 2023 at [5].
- <sup>184</sup> Statement of Feng Li dated 22 December 2023 at [6].
- <sup>185</sup> Statement of Feng Li dated 22 December 2023 at [7].
- <sup>186</sup> Statement of Feng Li dated 22 December 2023 at [7].
- <sup>187</sup> Statement of Feng Li dated 22 December 2023 at [7].
- <sup>188</sup> Statement of Feng Li dated 22 December 2023 at [6].
- <sup>189</sup> Statement of Glenn Wilson dated 15 January 2024 at [8] – [15].
- <sup>190</sup> Statement of Glenn Wilson dated 15 January 2024 at [24].
- <sup>191</sup> Statement of Glenn Wilson dated 15 January 2024 at [28].
- <sup>192</sup> Statement of Glenn Wilson dated 15 January 2024 at [31].
- <sup>193</sup> Statement of Alastair Conway dated 15 January 2024 at [1].
- <sup>194</sup> Statement of Alastair Conway dated 15 January 2024 at [7].
- <sup>195</sup> Statement of Adam Williams dated 22 December 2023 at [13].
- <sup>196</sup> Statement of Alastair Conway dated 15 January 2024 at [21].
- <sup>197</sup> Statement of Alastair Conway dated 15 January 2024, AC3.
- <sup>198</sup> Statement of Alastair Conway dated 15 January 2024, AC3.
- <sup>199</sup> Statement of Feng Li dated 22 December 2023 at [8].
- <sup>200</sup> Statement of Alastair Conway dated 15 January 2024 at [20].
- <sup>201</sup> Statement of Alastair Conway dated 15 January 2024, AC2.
- <sup>202</sup> Statement of Rajic Deo dated 22 December 2023 at [11].
- <sup>203</sup> Statement of Alastair Conway dated 15 January 2024 at [19].
- <sup>204</sup> Statement of Alastair Conway dated 15 January 2024, AC1.
- <sup>205</sup> Statement of Alastair Conway dated 15 January 2024, AC1.

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- <sup>206</sup> Statement of Alastair Conway dated 15 January 2024 at [7].
- <sup>207</sup> Statement of Alastair Conway dated 15 January 2024 at [10] – [12].
- <sup>208</sup> Transcript of proceedings, 30 January 2023, PN 1627.
- <sup>209</sup> Statement of Alastair Conway dated 15 January 2024 at [13].
- <sup>210</sup> Statement of Alastair Conway dated 15 January 2024 at [15].
- <sup>211</sup> Transcript of proceedings, 30 January 2023, PNs 1628, 1629.
- <sup>212</sup> Statement of Alastair Conway dated 15 January 2024 at [17].
- <sup>213</sup> Statement of Alastair Conway dated 15 January 2024 at [18].
- <sup>214</sup> Statement of Derek Spori dated 12 January 2024 at [24] - [25].
- <sup>215</sup> Statement of Derek Spori dated 12 January 2024 at [26].
- <sup>216</sup> Statement of Derek Spori dated 12 January 2024 at [27] – [28].
- <sup>217</sup> Statement of Adam Williams dated 22 December 2023 at [7].
- <sup>218</sup> Statement of Adam Williams dated 22 December 2023 at [12].
- <sup>219</sup> Statement of Adam Williams dated 22 December 2023 at [13].
- <sup>220</sup> Statement of Adam Williams dated 22 December 2023 at AW-3.
- <sup>221</sup> Statement of Tom Paraskevopoulos at [3].
- <sup>222</sup> Statement of Tom Paraskevopoulos at [4].
- <sup>223</sup> Statement of Tom Paraskevopoulos at [3].
- <sup>224</sup> Statement of Tom Paraskevopoulos at [5].
- <sup>225</sup> Statement of Tom Paraskevopoulos at [5].
- <sup>226</sup> Statement of Tom Paraskevopoulos at [6].
- <sup>227</sup> Statement of Tom Paraskevopoulos at [7].
- <sup>228</sup> Statement of Tom Paraskevopoulos at [8].
- <sup>229</sup> Statement of Tom Paraskevopoulos at [10] – [11].
- <sup>230</sup> Statement of Tom Paraskevopoulos at [12].
- <sup>231</sup> Transcript of proceedings, 30 January 2024 at PN1226.
- <sup>232</sup> Statement of Tom Paraskevopoulos at [12].
- <sup>233</sup> Statement of Tom Paraskevopoulos at [13].
- <sup>234</sup> Statement of Tom Paraskevopoulos at [16] – [17].
- <sup>235</sup> Statement of Derek Spori dated 12 January 2024, DS2.
- <sup>236</sup> Statement of Derek Spori dated 12 January 2024, DS2, Statement of Tom Paraskevopoulos, TP1.
- <sup>237</sup> Brennan Report, part 9.30.
- <sup>238</sup> Brennan Report, part 9.35.
- <sup>239</sup> Brennan Report, part 9.36.
- <sup>240</sup> Transcript of proceedings, 30 January 2024 at PN1227.
- <sup>241</sup> Statement of Derek Spori dated 12 January 2024 at [13].
- <sup>242</sup> Statement of Derek Spori dated 12 January 2024 at [16].
- <sup>243</sup> Statement of Derek Spori dated 12 January 2024 at [17].
- <sup>244</sup> Statement of Derek Spori dated 12 January 2024 at [18].
- <sup>245</sup> Transcript of proceedings, 29 January 2023 at PN949.
- <sup>246</sup> Statement of Derek Spori dated 12 January 2024 at [19] – [20].
- <sup>247</sup> Statement of Glenn Wilson dated 15 January 2024 at [38].
- <sup>248</sup> Statement of Glenn Wilson dated 15 January 2024 at [40].
- <sup>249</sup> Statement of Derek Spori dated 12 January 2024 at [8], DS1.

- <sup>250</sup> Statement of Derek Spori dated 12 January 2024 at [10].
- <sup>251</sup> Statement of Derek Spori dated 12 January 2024 at [32].
- <sup>252</sup> Statement of Derek Spori dated 12 January 2024 at [33].
- <sup>253</sup> Transcript of Proceedings, 29 January 2024 at PNs 973 - 985.
- <sup>254</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [50].
- <sup>255</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [51].
- <sup>256</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [52].
- <sup>257</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [53].
- <sup>258</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [53].
- <sup>259</sup> Transcript of proceedings, 30 January 2024 at PN1818.
- <sup>260</sup> Transcript of proceedings, 30 January 2024 at PN1821.
- <sup>261</sup> Transcript of proceedings, 30 January 2024 at PN1822.
- <sup>262</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [54] – [55].
- <sup>263</sup> Transcript of Proceedings, 30 January 2024 at PN 1832 - 1836.
- <sup>264</sup> Transcript of Proceedings 29 January 2024 at PN 988.
- <sup>265</sup> Transcript of Proceedings 29 January 2024 at PNs 983 -995.
- <sup>266</sup> Transcript of proceedings, 30 January 2024 at PN1227.
- <sup>267</sup> Transcript of Proceedings 29 January 2024 at PN 432.
- <sup>268</sup> Transcript of Proceedings 29 January 2024 at PN 433.
- <sup>269</sup> Transcript of Proceedings 29 January 2024 at PNs 882 - 886.
- <sup>270</sup> Statement of Rob Harris dated 11 January 2024 at [31].
- <sup>271</sup> Statement of Glenn Wilson dated 15 January 2024 at [42].
- <sup>272</sup> Statement of Glenn Wilson dated 15 January 2024 at [43].
- <sup>273</sup> Statement of Adam Williams dated 22 December 2023 at [15].
- <sup>274</sup> Statement of Adam Williams dated 22 December 2023 at AW-4.
- <sup>275</sup> Statement of Adam Williams dated 22 December 2023 at [12].
- <sup>276</sup> Statement of Adam Williams dated 22 December 2023 at AW-1.
- <sup>277</sup> Statement of Adam Williams dated 22 December 2023 at [12].
- <sup>278</sup> Statement of Adam Williams dated 22 December 2023 at AW-6.
- <sup>279</sup> Statement of Adam Williams dated 22 December 2023 at AW-3.
- <sup>280</sup> Statement of Rob Harris dated 11 January 2024 at [24], Statement of Adam Williams dated 22 December 2023 at AW-6.
- <sup>281</sup> Statement of Rob Harris dated 11 January 2024 at [25], RH3.
- <sup>282</sup> Statement of Adam Williams dated 22 December 2023 at [16].
- <sup>283</sup> Statement of Adam Williams dated 22 December 2023 at AW-5.
- <sup>284</sup> Transcript of Proceedings, 29 January 2024 at PNs 1029 – 1031, 1034
- <sup>285</sup> Transcript of Proceedings, 29 January 2024 at PN 1040.
- <sup>286</sup> Transcript of Proceedings, 29 January 2024 at PN 1033.
- <sup>287</sup> Transcript of Proceedings, 29 January 2024 at PN 1066.
- <sup>288</sup> Witness Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2023, AIE1.
- <sup>289</sup> Transcript of Proceedings, 30 January 2024 at PNs 1744 - 1752.
- <sup>290</sup> Transcript of Proceedings, 29 January 2024 at PN 1035.
- <sup>291</sup> Transcript of Proceedings, 29 January 2024 at PN 1036.
- <sup>292</sup> Transcript of Proceedings, 29 January 2024 at PN 1037.
- <sup>293</sup> Transcript of Proceedings, 29 January 2024 at PN 1038.



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- <sup>294</sup> Transcript of Proceedings, 29 January 2024 at PNs 1041 – 1047.
- <sup>295</sup> Transcript of Proceedings, 29 January 2024 at PN 1068.
- <sup>296</sup> Transcript of Proceedings, 29 January 2024 at PNs 1069 - 1070.
- <sup>297</sup> Transcript of Proceedings, 29 January 2024 at PNs 1084 - 1086
- <sup>298</sup> Transcript of Proceedings, 29 January 2024 at PN 1088.
- <sup>299</sup> Statement of Glenn Wilson dated 15 January 2024 at [45], GW5.
- <sup>300</sup> Statement of Glenn Wilson dated 15 January 2024 at [46].
- <sup>301</sup> Transcript of Proceedings, 29 January 2024 at PNs 1048 - 1049.
- <sup>302</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [34] – [35].
- <sup>303</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [36], AIE6.
- <sup>304</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [38].
- <sup>305</sup> Statement of Ahmet Sayan dated 22 December 2023 at [1].
- <sup>306</sup> Statement of Ahmet Sayan dated 22 December 2023 at [1].
- <sup>307</sup> Statement of Ahmet Sayan dated 22 December 2023 at [3].
- <sup>308</sup> Statement of Ahmet Sayan dated 22 December 2023 at [4].
- <sup>309</sup> Statement of Ahmet Sayan dated 22 December 2023, AS-1.
- <sup>310</sup> Statement of Applicant dated 22 December 2023 at [27], Statement of Alastair Conway dated 15 January 2024 at [22].
- <sup>311</sup> Statement of Applicant dated 22 December 2023 at [27], Statement of Alastair Conway dated 15 January 2024 at AC4.
- <sup>312</sup> Statement of Ahmet Sayan dated 22 December 2023, AS-3.
- <sup>313</sup> Statement of Applicant dated 22 December 2023 at [28].
- <sup>314</sup> Statement of Applicant dated 22 December 2023 at [29].
- <sup>315</sup> Statement of Alastair Conway dated 15 January 2024 at [24].
- <sup>316</sup> Statement of Alastair Conway dated 15 January 2024 at [25].
- <sup>317</sup> Statement of Alastair Conway dated 15 January 2024 at [25].
- <sup>318</sup> Statement of Alastair Conway dated 15 January 2024 at [28] – [29].
- <sup>319</sup> Statement of Ahmet Sayan dated 22 December 2023 at [7].
- <sup>320</sup> Statement of Ahmet Sayan dated 22 December 2023 at [7].
- <sup>321</sup> Statement of Ahmet Sayan dated 22 December 2023 at 10, AS-7.
- <sup>322</sup> Statement of Alastair Conway dated 15 January 2024, AC5.
- <sup>323</sup> Statement of Ahmet Sayan dated 22 December 2023 at [10].
- <sup>324</sup> Statement of Ahmet Sayan dated 22 December 2023 at [10].
- <sup>325</sup> Statement of Ahmet Sayan dated 22 December 2023 at [11].
- <sup>326</sup> Statement of Ahmet Sayan dated 22 December 2023 at [12], Statement of Alastair Conway dated 15 January 2024 at [33].
- <sup>327</sup> Statement of Alastair Conway dated 15 January 2024 at [34] – [35].
- <sup>328</sup> Statement of Alastair Conway dated 15 January 2024 at [36].
- <sup>329</sup> Statement of Alastair Conway dated 15 January 2024 at [28].
- <sup>330</sup> Statement of Alastair Conway dated 15 January 2024 at [28].
- <sup>331</sup> Statement of Ahmet Sayan dated 22 December 2023 at [13].
- <sup>332</sup> Statement of Ahmet Sayan dated 22 December 2023 at [14].
- <sup>333</sup> Statement of Ahmet Sayan dated 22 December 2023 at [16].
- <sup>334</sup> Transcript of proceedings, 30 January 2024, PN 1842.
- <sup>335</sup> Statement of Ahmet Sayan dated 22 December 2023 at [17].
- <sup>336</sup> Statement of Ahmet Sayan dated 22 December 2023 at [19].
- <sup>337</sup> Statement of Ahmet Sayan dated 22 December 2023 at [20].

- <sup>338</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [41].
- <sup>339</sup> Transcript of proceedings, 30 January 2023, PNs 1799-1800.
- <sup>340</sup> Transcript of proceedings, 30 January 2023, PNs 1799-1801.
- <sup>341</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [6], [19].
- <sup>342</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [6] – [7].
- <sup>343</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [49].
- <sup>344</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [69].
- <sup>345</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [23].
- <sup>346</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [69].
- <sup>347</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [70] – [71].
- <sup>348</sup> Transcript of proceedings 30 January 2024, PNs 1848 – 1858.
- <sup>349</sup> Brennan Report, Part 9.26.
- <sup>350</sup> Brennan Report, Part 9.27.
- <sup>351</sup> Brennan Report, Part 9.28.
- <sup>352</sup> Brennan Report, Part 9.37.
- <sup>353</sup> Brennan Report, Part 9.38.
- <sup>354</sup> Brennan Report, Part 9.39.
- <sup>355</sup> Brennan Report, Part 9.40.
- <sup>356</sup> Brennan Report, Part 9.41.
- <sup>357</sup> Brennan Report, Part 9.42.
- <sup>358</sup> Brennan Report, Part 9.43.
- <sup>359</sup> Transcript of Proceedings, 30 January 2024, PNs1541 - 1544.
- <sup>360</sup> Brennan Report, Part 9.44.
- <sup>361</sup> Brennan Report, Part 9.45.
- <sup>362</sup> Brennan Report, Parts 10.2 – 10.3.
- <sup>363</sup> Brennan Report, Part 10.19.
- <sup>364</sup> Brennan Report, Part 10.19.
- <sup>365</sup> Brennan Report, Parts 10.8 – 10.18.
- <sup>366</sup> Brennan Report, Part 10.17.
- <sup>367</sup> Transcript of proceedings, 30 January 2024 at PNs 1232 - 1236.
- <sup>368</sup> Transcript of proceedings, 30 January 2024 at PNs 1244 - 1250.
- <sup>369</sup> Transcript of proceedings, 30 January 2024 at PNs 1251 - 1252.
- <sup>370</sup> Transcript of proceedings, 30 January 2024 at PN 1255.
- <sup>371</sup> Transcript of proceedings, 30 January 2024 at PNs1256.
- <sup>372</sup> Transcript of proceedings, 30 January 2024 at PNs1259.
- <sup>373</sup> Transcript of proceedings, 30 January 2024 at PNs1285 - 1288.
- <sup>374</sup> Transcript of proceedings, 30 January 2024 at PNs 1260 - 1265.
- <sup>375</sup> Statement of Tom Paraskevopoulos at [15].
- <sup>376</sup> Transcript of proceedings, 30 January 2024 at PNs 1270 - 1278.
- <sup>377</sup> Transcript of proceedings, 30 January 2024 at PN 1289
- <sup>378</sup> Statement of Rod Harris dated 11 January 204 at [33].
- <sup>379</sup> Transcript of Proceedings, 30 January 2024 at PNs1451 – 1452.
- <sup>380</sup> Transcript of Proceedings, 30 January 2024 at 1462, Brennan Report, Part 9.14.
- <sup>381</sup> Transcript of Proceedings, 30 January 2024 at PNs1466 – 1473.

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- <sup>382</sup> Transcript of Proceedings, 30 January 2024 at PNs1583 – 1584.
- <sup>383</sup> Transcript of Proceedings, 30 January 2024 at PN1584.
- <sup>384</sup> Transcript of Proceedings, 30 January 2024 at PN1477, Brennan Report, part 9.14(a).
- <sup>385</sup> Transcript of Proceedings, 30 January 2024 at PNs1478 -1479.
- <sup>386</sup> Transcript of Proceedings, 30 January 2024 at PNs 1484 - 1486.
- <sup>387</sup> Transcript of Proceedings, 30 January 2024 at PN 1488.
- <sup>388</sup> Transcript of Proceedings, 30 January 2024 at PN 1496.
- <sup>389</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7].
- <sup>390</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- <sup>391</sup> Respondent’s Outline of Argument filed 15 January 2024 at [3] – [7], [11].
- <sup>392</sup> Respondent’s Outline of Argument filed 15 January 2024 at [13].
- <sup>393</sup> Statement of Adam Williams dated 22 December 2023 at [6].
- <sup>394</sup> Statement of Glenn Wilson dated 15 January 2024 at [24].
- <sup>395</sup> Respondent’s Outline of Argument filed 15 January 2024 at [25] with reference to *Rankin v Marine Power International Pty Ltd* 107 IR 117 at [330] – [340].
- <sup>396</sup> Respondent’s Outline of Argument filed 15 January 2024 at [26].
- <sup>397</sup> Statement of Derek Spurl dated 12 January 2024 at [32].
- <sup>398</sup> [1938] HCA 34, (1938) 60 CLR 336.
- <sup>399</sup> *Briginshaw v Briginshaw* [1938] HCA 34, (1938) 60 CLR 336.
- <sup>400</sup> *Briginshaw v Briginshaw* [1938] HCA 34, (1938) 60 CLR 336 at pp 362-3.
- <sup>401</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66, (1992) 67 ALJR 170; cited in *Guneyi v Melbourne Health T/A Royal Melbourne Hospital* [2012] FWA 10270 at [14]. See also *Budd v Dampier Salt Limited* [2007] AIRCFB 797 at [15].
- <sup>402</sup> Statement of Derek Spurl dated 12 January 2024 at [8], DS1.
- <sup>403</sup> Statement of Derek Spurl dated 12 January 2024 at [32].
- <sup>404</sup> Transcript of Proceedings, 29 January 2024, PN 771.
- <sup>405</sup> Transcript of Proceedings, 29 January 2024, PN 857.
- <sup>406</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [54] – [55].
- <sup>407</sup> Transcript of Proceedings, 30 January 2024 at PN 1832 - 1836.
- <sup>408</sup> Statement of Applicant dated 22 December 2023 at [16].
- <sup>409</sup> Statement of Applicant dated 22 December 2023 at [22].
- <sup>410</sup> Transcript of Proceedings, 29 January 2024, PN 771.
- <sup>411</sup> Transcript of Proceedings, 30 January 2024, PN 770.
- <sup>412</sup> Statement of Derek Spurl dated 12 January 2024 at [33].
- <sup>413</sup> Transcript of Proceedings, 30 January 2024 at PN 952 - 956.
- <sup>414</sup> Transcript of Proceedings, 30 January 2024, PNs755 - 756.
- <sup>415</sup> Statement of Rajic Deo dated 22 December 2023 at [10].
- <sup>416</sup> Transcript of Proceedings, 29 January 2024, PN 857.
- <sup>417</sup> Statement of Adam Williams dated 22 December 2023 at [8].
- <sup>418</sup> Transcript of Proceedings 29 January 2024 at PN395.
- <sup>419</sup> Statement of Rajic Deo dated 22 December 2023 at [7].
- <sup>420</sup> Statement of Feng Li dated 22 December 2023 at [6].
- <sup>421</sup> Transcript of Proceedings, 30 January 2024, PNs1541 - 1544.
- <sup>422</sup> Statement of Tom Paraskevopoulos at [12].
- <sup>423</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [54] – [55].

- <sup>424</sup> Transcript of proceedings, 30 January 2024 at PN 1993.
- <sup>425</sup> Transcript of proceedings, 30 January 2024 at PN 1995.
- <sup>426</sup> Statement of Derek Spori dated 12 January 2024 at [27] – [28].
- <sup>427</sup> Brennan Report, Part 9.26.
- <sup>428</sup> Brennan Report, Part 9.37.
- <sup>429</sup> Brennan Report, Part 9.38.
- <sup>430</sup> Brennan Report, Part 9.42.
- <sup>431</sup> Brennan Report, Part 9.43.
- <sup>432</sup> Brennan Report, Part 9.37.
- <sup>433</sup> Brennan Report, Part 9.38.
- <sup>434</sup> Transcript of Proceedings, 30 January 2024, PNs1541 - 1544.
- <sup>435</sup> Brennan Report, part 5.
- <sup>436</sup> Applicant’s Outline of Submissions in Reply at [31].
- <sup>437</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [50].
- <sup>438</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [51].
- <sup>439</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [52].
- <sup>440</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [53].
- <sup>441</sup> Statement of Ahmad Ibrahim-Elgarhy dated 12 January 2024 at [53].
- <sup>442</sup> Statement of Derek Spori dated 12 January 2024 at [33].
- <sup>443</sup> Transcript of Proceedings 29 January 2024 at PNs 983 -995.
- <sup>444</sup> Transcript of Proceedings, 30 January 2024, PNs1541 - 1544.
- <sup>445</sup> Statement of Rajic Deo dated 22 December 2023 at [9].
- <sup>446</sup> Transcript of proceedings, 30 January 2024 at PNs 1270 - 1278.
- <sup>447</sup> Transcript of proceedings, 30 January 2024 at PN 1289
- <sup>448</sup> Statement of Rod Harris dated 11 January 204 at [33].
- <sup>449</sup> Transcript of Proceedings, 30 January 2024 at PNs1466 – 1473.
- <sup>450</sup> Statement of Tom Paraskevopoulos at [8].
- <sup>451</sup> Transcript of Proceedings, 30 January 2024 at PNs1583 – 1584.
- <sup>452</sup> Transcript of Proceedings, 30 January 2024 at PN1584.
- <sup>453</sup> Transcript of Proceedings, 30 January 2024 at PNs1466 – 1473.
- <sup>454</sup> Statement of Rob Harris dated 11 January 2024 at [25], RH3.
- <sup>455</sup> Transcript of Proceedings, 30 January 2024 at 1462, Brennan Report, Part 9.14.
- <sup>456</sup> Transcript of Proceedings, 30 January 2024 at PNs1451 – 1452.
- <sup>457</sup> Transcript of proceedings, 30 January 2024 at PNs 1251 - 1252.
- <sup>458</sup> Brennan Report, part 9.14.
- <sup>459</sup> Transcript of Proceedings, 30 January 2024 at PN1477, Brennan Report, part 9.14(a).
- <sup>460</sup> Transcript of Proceedings, 30 January 2024 at PNs1478 -1479.
- <sup>461</sup> Transcript of Proceedings, 30 January 2024 at PN 1488.
- <sup>462</sup> Statement of Applicant dated 22 December 2023 at [10].
- <sup>463</sup> Statement of Applicant dated 22 December 2023 at [6].
- <sup>464</sup> Brennan Report, part 9.29.
- <sup>465</sup> Brennan Report, part 9.10.
- <sup>466</sup> Brennan Report, part 9.10.
- <sup>467</sup> Brennan Report, part 9.17.

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- <sup>468</sup> Brennan Report, part 9.15.
- <sup>469</sup> Transcript of proceedings, 30 January 2024 at PNs 1260 - 1265.
- <sup>470</sup> Transcript of Proceedings, 30 January 2024, PNs 1497 – 1500.
- <sup>471</sup> Transcript of Proceedings, 30 January 2024, PNs 1501 - 1505.
- <sup>472</sup> Transcript of Proceedings, 30 January 2024, PNs 1507 - 1508.
- <sup>473</sup> Statement of Adam Williams dated 22 December 2023 at AW-5.
- <sup>474</sup> Statement of Adam Williams dated 22 December 2023 at AW-6.
- <sup>475</sup> Statement of Adam Williams dated 22 December 2023 at AW-3.
- <sup>476</sup> Statement of Rob Harris dated 11 January 2024 at [24], Statement of Adam Williams dated 22 December 2023 at AW-6.
- <sup>477</sup> Statement of Rob Harris dated 11 January 2024 at [25], RH3.
- <sup>478</sup> Transcript of Proceedings, 29 January 2024 at PN 1040.
- <sup>479</sup> Statement of Glenn Wilson dated 15 January 2024 at [].
- <sup>480</sup> Statement of Applicant dated 22 December 2023 at [16].
- <sup>481</sup> Statement of Applicant dated 22 December 2023 at [17].
- <sup>482</sup> Brennan Report, Part 9.46.
- <sup>483</sup> Brennan Report, part 9.10.
- <sup>484</sup> Brennan Report, part 9.17.
- <sup>485</sup> Brennan Report, part 9.15.
- <sup>486</sup> Statement of Rod Harris dated 11 January 2024 at [12] – [13].
- <sup>487</sup> Transcript of Proceedings, 30 January 2024 at PNs 1466 – 1473.
- <sup>488</sup> Statement of Applicant dated 22 December 2023 at [4].
- <sup>489</sup> Statement of Applicant dated 22 December 2023 at [26].
- <sup>490</sup> Transcript of proceedings, 30 January 2023, PN 1636.
- <sup>491</sup> Statement of Applicant dated 22 December 2023 at [18].
- <sup>492</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].
- <sup>493</sup> *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].
- <sup>494</sup> *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].
- <sup>495</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].
- <sup>496</sup> Applicant’s Outline of Submissions at [43].
- <sup>497</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [45].
- <sup>498</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [46] with reference to *Curtis v Transit Australia Pty Ltd* [2014] FWC 8679, [20]; *Emery v City of Stirling* [2018] FWC 6853, [249]-[252] (this decision was overturned on appeal but not on this point, see *Emery v City of Stirling* [2019] FWCFB 4015).
- <sup>499</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [46] with reference to *Jetstar v Meetson-Lemkes* [2013] FWCFB 9075, [68].
- <sup>500</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [46].
- <sup>501</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [47].
- <sup>502</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [47].
- <sup>503</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [47].
- <sup>504</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [48].
- <sup>505</sup> Form F3 – Employer response to unfair dismissal application, q. 1.7.
- <sup>506</sup> *Jetstar v Meetson-Lemkes* [2013] FWCFB 9075, [68].
- <sup>507</sup> Applicant’s Outline of Submissions filed 22 December 2023 at [48].
- <sup>508</sup> Statement of Applicant at [10] and Annexures PC-4.

- <sup>509</sup> Applicant's Outline of Submissions filed 22 December 2023 at [34] – [42].
- <sup>510</sup> Transcript of proceedings, 30 January 2024 at PN 1914.
- <sup>511</sup> Transcript of proceedings, 30 January 2024 at PN 1918.
- <sup>512</sup> Transcript of proceedings, 30 January 2024 at PN 1918.
- <sup>513</sup> Transcript of proceedings, 30 January 2024 at PN 1191.
- <sup>514</sup> Respondent's Outline of Argument filed 15 January 2024 at [34] – [38].
- <sup>515</sup> Transcript of proceedings, 30 January 2024 at PN 1188.
- <sup>516</sup> Transcript of proceedings, 30 January 2024 at PN 1190.
- <sup>517</sup> Transcript of proceedings, 30 January 2024 at PN 1191.
- <sup>518</sup> Transcript of proceedings, 30 January 2024 at PN 1991.
- <sup>519</sup> *Kioa v West* [1985] HCA 81, [11] (per Gibbs CJ).
- <sup>520</sup> *Kioa v West* [1985] HCA 81, [22] (per Wilson J).
- <sup>521</sup> Statement of Ahmet Sayan dated 22 December 2023 at [7].
- <sup>522</sup> Statement of Ahmet Sayan dated 22 December 2023 at [10].
- <sup>523</sup> Statement of Ahmet Sayan dated 22 December 2023 at [10].
- <sup>524</sup> Statement of Ahmet Sayan dated 22 December 2023 at [12], Statement of Alastair Conway dated 15 January 2024 at [33].
- <sup>525</sup> Statement of Alastair Conway dated 15 January 2024 at [34] – [35].
- <sup>526</sup> Statement of Ahmet Sayan dated 22 December 2023 at [13].
- <sup>527</sup> Statement of Ahmet Sayan dated 22 December 2023 at [16].
- <sup>528</sup> Transcript of proceedings, 30 January 2024, PN 1842.
- <sup>529</sup> Statement of Ahmet Sayan dated 22 December 2023 at [19].
- <sup>530</sup> Statement of Ahmet Sayan dated 22 December 2023 at [20].
- <sup>531</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].
- <sup>532</sup> Application filed 26 October 2023 at question 2.1.
- <sup>533</sup> Applicant's Outline of Submissions filed 22 December 2023 at [52].
- <sup>534</sup> Applicant's Outline of Submissions filed 22 December 2023 at [53] – [54].
- <sup>535</sup> Transcript of Proceedings 30 January 2024, PN
- <sup>536</sup> Respondent's Outline of Argument filed 15 January 2024 at [45].
- <sup>537</sup> Respondent's Outline of Argument filed 15 January 2024 at [46] with reference to *Parlamat Food Products Pty Ltd v Wililo* [\[2011\] FWAFB 1166](#) at [18] – [19].
- <sup>538</sup> Applicant's Reply Statement at [9].
- <sup>539</sup> Applicant's Reply Statement at [9].
- <sup>540</sup> Applicant's Outline of Submissions in Reply filed 25 January 2024 at [52], [2000] FCA 627 at [42].
- <sup>541</sup> [\[2014\] FWCFB 7198](#) at [27].
- <sup>542</sup> *Tenix Defence Pty Ltd v Galea* [2003] AIRC (11 March 2003) at [7]–[8].
- <sup>543</sup> *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191.
- <sup>544</sup> *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191.
- <sup>545</sup> *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191.
- <sup>546</sup> *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191.
- <sup>547</sup> [\[2014\] FWCFB 7198](#) at [27].
- <sup>548</sup> Applicant's Reply Statement at [9].
- <sup>549</sup> Applicant's Reply Statement at [9].
- <sup>550</sup> Transcript of proceedings 30 January 2024, PNs 1848 – 1858.

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<sup>551</sup> Transcript of proceedings 30 January 2024, PN 2001.

<sup>552</sup> Statement of Adam Williams dated 22 December 2023 at AW-5.

<sup>553</sup> Statement of Applicant dated 22 December 2023 at [5].

<sup>554</sup> Transcript of Proceedings, 29 January 2024 at PN295.

<sup>555</sup> Statement of Applicant dated 22 December 2023 at [23].

<sup>556</sup> Statement of Applicant dated 22 December 2023 at [44] – [45]

<sup>557</sup> Statement of Applicant dated 22 December 2023 at [46].

<sup>558</sup> Transcript of Proceedings, 29 January 2024 at PN 322.

<sup>559</sup> Transcript of Proceedings, 29 January 2024 at PN 321.

<sup>560</sup> *Aurora Energy Pty Ltd v Davison* [PR902108](#) (AIRC FB, Watson SDP, Williams SDP, Holmes C, 8 March 2001), [25].

<sup>561</sup> See, for example, *Regional Express Holdings Ltd v Richards* [\[2010\] FWAFB 8753](#), [29].

<sup>562</sup> Statement of Applicant dated 22 December 2023 at [45], PC-13.

<sup>563</sup> Statement of Applicant dated 22 December 2023 at [46].

<sup>564</sup> Respondent's Outline of Argument filed 15 January 2024 at [49] – [50].